U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7863578

Date: AUG. 4, 2020

Appeal of Texas Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a distributor of nutritious foods and supplements, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that (1) the Beneficiary's proposed U.S. position would be in a managerial or executive capacity, and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering their services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. *Id*. The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The primary issue to be addressed in this discussion is whether the Petitioner established that the Beneficiary's proposed U.S. position would be in an executive capacity.[1]

[1] The Petitioner has not claimed that the Beneficiary would be employed in a managerial capacity as defined at section 101(a)(44)(A) of the Act.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

To be eligible for L-1A nonimmigrant visa classification as an executive, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying executive position.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given beneficiary's duties will be primarily executive, we consider the petitioner's description of the job duties, the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Job Duties

In a supporting cover letter, the Petitioner stated that it has been engaged in the production and sales of nutritious food and supplements for the last five years. The Petitioner explained that the Beneficiary's Chinese foreign employer, described as a mid-sized construction company, recently purchased a majority of the Petitioner's shares based on an increasing demand for healthy American food and nutritional supplements in China. The Petitioner further notes that the Beneficiary was selected for transfer to the United States to be "the leader and chief executive for our company."

The Petitioner provided an overview of the Beneficiary's proposed duties as "CEO/President" noting that she would: (1) set general goals and objectives for the company; (2) approve company rules and regulations; (3) review and approve expense budget and review financial statements; (4) formulate company structure and approve hiring of higher level staff; (5) coordinate with executives of other companies and/or participate at important trade conferences; and (6) assume full profit and loss responsibilities for the U.S. company and report to its overseas parent.

The Petitioner also provided the following breakdown of her duties:

- Direct and manage the company in keeping with the vision and goals outlined for the company (8 hours/week)

- Develop high quality business plan and strategies, ensuring their alignment with short-term and long-term objectives (4 hours/week)
- Overall successful development of the company's business . . . build up public relationship and enhance company's publicity and image (6 hours/week)
- Identify and develop our clientele among local American firms who are selling or plan to sell nutritious foods/products to China. Based on her personal experience and with the existing strong connection and business practice in China, the president will also lead a professional team to sell American nutrition food to China (6 hours/week)
- [F]ully utilize our strength of China connection established by our firm who has been in business for years and connected thousands of customers in China. Our firm will provide American merchants and manufacturers with opportunities to sell their products to China (6 hours/week)
- Lead and motivate subordinates to advance employee engagement for a high performing team. (2 hours/week)
- Establish and maintain a transparent and accountable financial system, as well as fair and rewarding personnel policy/guideline (4 hours/week)
- Others (4 hours/week)

In a request for evidence (RFE) issued on May 7, 2019,[2] the Director advised the Petitioner that it had not clearly described the duties to be performed by the Beneficiary. The Director requested a more detailed position description outlining her proposed day-to-day job duties and instructed the Petitioner to address how she will primarily perform duties that fall within the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act.

In response, the Petitioner submitted the Beneficiary's U.S. job description with a few slight revisions; however, the overall areas of responsibility and time allocated to each area remained essentially the same. For example, the Petitioner stated that she would allocate eight hours per week to "direct the management of US entity . . . to achieve our goal of a successful business operation" and four hours per week to "develop high quality plans and policies." The Petitioner did not further specify the actual day-to-day duties she would perform to carry out these responsibilities, which merely paraphrase the statutory definition of executive capacity. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Several other responsibilities are similarly lacking in detail and do not sufficiently explain what the Beneficiary will be doing on a day-to-day basis within the context of the Petitioner's business. For instance, the Petitioner's claim that she will be responsible for "overall successful development of the company's business" provides little insight into the actual duties she will perform, and the few tasks outlined within the area of responsibility, such as establishing commercial relationships and conferring with consultants, are not clearly executive duties. Similarly, the Petitioner did not explain how the

[2] The Director also issued an RFE on March 18, 2019 but did not specifically address the Beneficiary's U.S. position in that notice. We have considered the evidence the Petitioner submitted in response to both RFEs.

Beneficiary "will fully utilize our strength of China connection established by our corporate parent" to provide American companies with overseas sales opportunities, or what types of duties this will entail. Given that the foreign entity operates a mid-size construction company and the Petitioner states that it manufactures and sells health food and nutritional supplements, the Beneficiary's "strong connection/network" in China and her ability to use her overseas connections to expand the business is not evident as it applies to the Petitioner's industry, and therefore requires additional explanation. The Petitioner has not, for example, provided a business plan or other overview of how it intends to expand to the Chinese market or identified these claimed business connections.

Rather than providing the requested detailed breakdown of the Beneficiary's duties, the Petitioner sought to provide examples of some tasks it claims the Beneficiary has already performed while awaiting adjudication of this petition and authorization to work in the United States. However, these examples relate to personnel matters, such as instructing the operations manager to revise the company's existing employee performance evaluation forms and approving his proposed hiring of additional employees. Given that the Petitioner has indicated that the Beneficiary will spend only two hours per week on personnel matters, these examples do not assist in illustrating how she will primarily spend her time.

Overall, because the descriptions of the Beneficiary's responsibilities are overly broad, we cannot determine that she would be engaged in primarily executive duties. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Here, the Petitioner offered a deficient job description that focuses on the Beneficiary's discretionary authority over policies, business strategies, and the overall development of the company, yet conveys little insight about the actual daily or weekly tasks that will comprise the Beneficiary's role as she leads the growth of the Petitioner's three- or four-person health food and supplement business.

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. *Id.* Here, due to the deficiencies addressed above, we cannot conclude that the Beneficiary's time would be primarily allocated to tasks of an executive nature.

B. Staffing

Next, we will address the Petitioner's staffing at the time of filing. If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, the reasonable needs of the organization must be considered in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The Petitioner claimed to have four employees when it filed the petition in March 2019. In its initial supporting letter, the Petitioner identified and provided duty descriptions for nine positions, including president/CEO, operation manager, senior assistant, bookkeeper, business consultant, marketing

specialist, marketing assistant, office assistant and commissioned sales staff. It also submitted an organizational chart which showed similar staffing but did not include the marketing specialist position. The chart showed the Beneficiary would directly supervise the operation manager and independent business and financial consultants, while the operation manager would supervise all lower-level staff. Neither the letter nor the chart identified any employees by name, and the Petitioner did not provide evidence to support its claim that it had four employees at the time of filing.

When the Petitioner responded to the Director's first RFE in April 2019, the Petitioner indicated that its current staff included only an operations manager [redacted] and a marketing specialist [redacted] and provided copies of their IRS Forms W-2, Wage and Tax Statements for 2018. The Petitioner also submitted a "personnel proposal" indicating that the company intended to hire an office assistant and at least one "marketing specialist (assistant)."

Finally, in response to the second RFE, the Petitioner provided an updated organizational chart indicating that the company had hired a senior assistant [redacted] and an office assistant [redacted]. Accompanying payroll evidence confirmed the ongoing employment of the operation manager and marketing specialist and showed that the new staff were hired in May 2019, two months after the petition was filed. The Petitioner indicated that the company expected "to form a team of 8 professionals by the end of 2019," and emphasized that the Beneficiary "will be functioning primarily in executive nature."

The Director determined that the Petitioner did not establish that it has sufficient personnel in place to relieve the Beneficiary from primarily performing non-qualifying duties or that the company otherwise has the organizational structure needed to support an executive position.

On appeal, the Petitioner contends that the evidence demonstrates that it will have enough staff to support an executive position "within one-year after the approval of the said petition." The Petitioner appears to be referencing a provision that applies to L-1A petitions for "new offices" that have been doing business in the United States for less than one year, as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" one year within the date of approval of the petition to support an executive or managerial position. The record reflects that the Petitioner here was established in 2013 and it claims that it has been doing business since that time. It is not a new office and therefore cannot be granted one year to develop to the point where it can support an executive position.

The Petitioner also emphasizes that it currently has a subordinate manager who supervises three employees, but as noted above, it has documented its employment of only two staff at the time of filing – the operation manager and a marketing specialist. Under 8 C.F.R. § 103.2(b)(1), the Petitioner must establish eligibility for the requested benefit at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). Therefore, the Petitioner cannot establish eligibility based on staff hired two months subsequent to the filing of the petition, or staff that it expects to hire in the future.

Section 101(a)(44)(C) of the Act requires that USCIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive

capacity. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner indicates that its operation manager implements company policies, drafts the budget, develops business and marketing strategies, supervises day-to-day operations, evaluates staff, is involved in staff hiring and firing, and will assist the president, while the marketing specialist is responsible for market research and analysis and development of marketing campaigns. The Petitioner did not claim that these two staff would support an executive position, but rather indicates that it would be able to support such position within one year, once the company is fully staffed. Therefore, the Petitioner did not show that its staffing composition at the time of filing was sufficient to support the Beneficiary in a position that would require her to devote her time primarily to the performance of executive-level tasks.

Finally, we acknowledge the Petitioner's claim that it plans to undergo an expansion of its activities to include the Chinese health food and supplement market and intends to rely on the increased investment from its new foreign parent and additional staffing to carry out these plans. However, neither the Petitioner's current business activities nor its plans for this expansion have been adequately documented in the record. In fact, the only evidence submitted regarding the petitioning company is its 2017 federal income tax return, in which the Petitioner identifies itself as a "service" company engaged in "transportation." Although the tax return indicates that the company achieved gross revenue of $508,107 for the 2017 tax year, the evidence indicates that the company remained in a preliminary stage of organizational development with only two employees. Despite its claim that it plans to quadruple the number of staff in 2019, the Petitioner is not relieved from meeting the statutory requirements as of the date of filing.

In light of the evidentiary deficiencies discussed with respect to the Petitioner's staffing and the Beneficiary's job duties, the Petitioner has not demonstrated that it would be able to relieve the Beneficiary from having to spend a significant portion of her time performing non-executive tasks at the time this petition was filed. Accordingly, the Petitioner has not established that it would employ the Beneficiary in an executive capacity, and the appeal will be dismissed.

III. RESERVED ISSUE

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its appellate arguments regarding whether the Beneficiary has been employed abroad in an executive capacity. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.