U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9020387

Date: AUG. 4, 2020

Appeal of California Service Center Decision

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

The Petitioner, a Canadian company engaged in interior design services and furniture sales, seeks to continue the Beneficiary's temporary employment as chief executive officer (CEO) of its U.S. affiliate[1] under the L-1A nonimmigrant classification for intracompany transferees.[2] Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary would be employed in the United States in a managerial or executive capacity under an extended petition. 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, the Petitioner has not met this burden and 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 managerial or executive capacity, or in a position requiring specialized knowledge for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(1). The prospective U.S. employer must also be a qualifying organization that seeks to employ a beneficiary in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(i).

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[1] The U.S. affiliate is [redacted], a California corporation established in 2018. The Petitioner indicates that the Beneficiary intends to enter the United States intermittently and allocate approximately half of his time to the U.S. operations, while continue to serve as CEO of the Petitioner's Canadian operations.

[2] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period July 6, 2018, until July 5, 2019. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 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" operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in the United States in an executive capacity.[3]

"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

The Petitioner's initial supporting letter did not include the required statement of the beneficiary's duties during the previous year and detailed description of duties to be performed under the extended petition. In response to a request for evidence (RFE), the Petitioner provided a description of the

[3] The Director determined that the Beneficiary would not be employed in a managerial or executive capacity. On appeal, the Petitioner does not argue that the Beneficiary would be employed in a managerial capacity. Rather, it argues that "USCIS erred in finding that the Beneficiary did not perform primarily executive functions."

Beneficiary's duties during the first year, noting that his primary focus was an assessment of the market and strategic planning "as the discovery aspect of the first year of operations required a re-assessment and re-direction of focus." The Petitioner explained that although the original business plan for the U.S.-based furniture and interior design business focused on targeting home/retail buyers, sales had been lower than expected. The Petitioner noted that the Beneficiary made the decision to instead focus on institutional buyers in the hospitality sector and stated that initial planned hiring had been delayed but is still proceeding.

The Petitioner described the Beneficiary's expected U.S. duties under the extended petition as follows:

- **10%** - Assessing business and market conditions for the new business by continuing to interact with past and present customers, obtaining pricing and product intelligence from suppliers and by attending trade shows, regular meetings with Sales and Marketing Staff to assess data and performance of various sales and marketing initiatives . . .
- **10%** - Strategic Planning, including setting direction, policies and goals of the business.
- **5%** - Reporting to the Board of Directors . . .
- **30%** - Human Resources planning, recruitment, training and management of employees . . .
- **30%** - Sales and Marketing Management. The Beneficiary will attend 5 key trade shows per year, and . . . recruit and oversee the management by the Sales Manager of commissioned Sales Representatives. . . . [H]e will manage efforts to recruit and negotiate terms with up to an additional 10-15 retail partnerships. He will also continue to initiate and evaluate social media marketing initiatives via his existing Social Media Coordinator and Client Acquisition Manager . . . . Finally, he will oversee the continued refinement and production of marketing materials.
- **10%** - Negotiate and conclude major contracts. This includes hiring contracts, partnership agreements, major sales orders, securing favorable credit terms and ordering from suppliers, negotiation of leases for warehouse/showroom space, etc.
- **5%** - Financial Control. The Beneficiary will continue to regularly review bank reconciliations and interim financial statements and cashflow forecast, budget and expenditure figures. He also liaises frequently with Canadian operations . . . .

We agree with the Director's determination that the job description includes several duties that would fall outside the statutory definition of executive capacity. For example, most of the tasks included under "assessing business and market conditions" are sales and market research tasks. While we do not doubt that the Petitioner would rely on such research to inform his business decisions, we cannot conclude that the listed tasks are executive job functions. Similarly, the Beneficiary's contract-related duties includes non-qualifying sales and inventory purchasing responsibilities that, as of the date of filing, had not been delegated to any subordinate staff, and it appears that the Beneficiary is likely responsible for both qualifying and non-qualifying financial tasks, as the Petitioner does not employ any administrative or bookkeeping staff.

Finally, we note that the Beneficiary's proposed "sales and marketing management" duties include a mix of operational duties (attending trade shows, securing retail partnerships, reviewing marketing

materials), recruiting duties that overlap with his assigned human resources responsibilities, and prospective duties that include oversight of a sales manager position that, as discussed further below, had not been filled as of the date of filing. The Petitioner's statement indicates that, until a sales manager is hired the Beneficiary would continue to be responsible for following up sales leads generated by the two current part-time staff. Other duties that would be delegated to the future sales manager include managing the showroom, handling "walk-in sales /orders," planning and organizing the trade show visits, and planning projects for clients. However, it appears that, at the time of filing, the Beneficiary was the only employee available to perform these tasks. Overall, to the extent that the position description refers to the Beneficiary's supervision and oversight of staff who had not yet been hired, we cannot determine that it accurately reflects his actual duties at the end of new office's one-year validity period.

On appeal, the Petitioner does not directly address the Director's determination regarding the non-qualifying duties included in the Beneficiary's job description. Rather the Petitioner emphasizes that the Beneficiary's performance of executive duties is evidenced by his responsibility for "managing the start up of the new business operations" and his efforts to restructure the U.S. business plan during the prior year to ensure the business will succeed.

We do not question that the Beneficiary, as the U.S. entity's CEO, is responsible for directing the company and establishing its goals and policies. However, 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 or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary exercises discretion over the U.S. entity's day-to-day operations and possesses decision-making authority, the position description does not establish that his day-to-day duties would be primarily executive in nature.

B. Staffing and Organizational Structure

Next, we will address the U.S. company'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. As noted, the Petitioner's U.S. affiliate was established as a new office and its prior petition was approved for one year, with a validity period that ended on July 5, 2019. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year from the date of approval of the petition to support an executive or managerial position.

The Petitioner provided evidence that its U.S. affiliate hired its first two employees in June 2019. These employees include a part-time social media coordinator who was hired to work for seven hours per week. His duties include making regular social media posts across company platforms, building a social media strategy, and "engag[ing] in conversation with potential industry clients (designers, architects, firms etc)." The other employee is a "Client Acquisition Manager"[4] who was hired to work

[4] The Petitioner submitted two copies of this employee's employment contract, both dated May 29, 2019. The version

for five hours per week. According to the employment agreement, she is responsible for building a client database, making initial contact with potential clients, and "when ready and if desired," working with clients on projects and meetings on the East Coast.

The Petitioner submitted a brief "business overview" from the U.S. company's initial 2018 business plan, which summarizes the growth projections the company had anticipated for its first year. The business overview indicates that the company had planned to hire a full-time permanent employee in July 2018 as well as 10-15 West Coast sales representatives during the first year. The business overview listed other first-year goals, such as establishing partnerships with 15 to 20 retailers and 10 to 15 designers.

The Petitioner explained that its U.S. affiliate made some modifications to its business plan that delayed its hiring plans, but emphasized in its initial letter that "in addition to the two new hires we are making, we anticipate hiring an additional up to 7-10 full-time employees over the next 3-5 years." The Petitioner also indicated that its U.S. affiliate is "working towards" establishing contractual relationships with "independent Sales Representatives and Interior Designers as well as establishing retail partnerships."

In the RFE, the Director observed that the new office had not hired the staff anticipated in its business plan and advised the Petitioner that it had not demonstrated how the two staff hired as of the date of filing, who work very limited hours, are able to support an executive position.

In response to the Director's RFE, the Petitioner stated that the Beneficiary had posted an opening for a full-time sales manager position in July 2018 as planned but was unable to find a suitable candidate. As of the date of the RFE response (September 2019), the Petitioner indicated that there were "current efforts to hire a full time Sales Manager within the next 1-2 months."

The Petitioner submitted an updated organizational chart which identifies the Beneficiary as CEO of the U.S. company. He is depicted as supervising the two part-time staff mentioned above (social media coordinator and "client acquisition"). The chart also depicts the "Sales Manager" position with an "Oct/Nov 2019" start date and indicates that this position would supervise an assistant sales manager and a warehouse manager, to be hired in the first quarter of 2020. Finally, the chart includes future positions for east and west coast sales representatives (also projected for the first quarter of 2020) and part-time warehouse employees (to be hired in the second quarter of 2020).

In denying the petition, the Director emphasized that the Beneficiary's only subordinate staff work minimal hours and the Petitioner did not establish how they relieve him from performing the day-to-day activities of the U.S. company or otherwise support a position in which his actual duties would be primarily executive in nature.

On appeal, the Petitioner asserts that "[w]hile the original business plan in support of the initial grant of L-1A status projected more significant growth in sales and employees, subsequent developments have borne out the Petitioner's contention that after the Beneficiary's efforts with respect to

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provided with the petition listed her title as "Social Media Coordinator" and the copy submitted in response to the RFE indicated "Client Acquisition Manager." Both versions of the contract list the same job duties.

restructuring of the business plan and efforts in the first year of operation, the business will clearly support an executive position."

The Petitioner provides evidence that its U.S. affiliate hired a full-time operations and sales manager with a December 9, 2019, start date and copies of recent purchase orders in support of its claim that the Beneficiary's "revised strategy" has "ensured the business will support an executive position and continue to be viable." The Petitioner acknowledges that these developments took place after the filing of the petition but states that they should have been considered by the Director because they "were reasonably and demonstrably foreseen prior to the filing of the petition."

The Petitioner does not contest the Director's finding that the U.S. company's staffing at the end of the one-year new office period, which consisted of two employees who worked a total of 12 hours per week, was not sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of the business. While future hiring plans are taken into consideration in the adjudication of an initial "new office petition," the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension.

Accordingly, the Petitioner's assertion that the Director should have approved the extension petition based on a projected organizational chart because the hiring of additional staff was "reasonably and demonstrably foreseen" is not persuasive. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

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. *See* section 101(a)(44)(C) of the Act. In addition, the regulations require USCIS to examine the organizational structure and staffing levels of the U.S. employer at the end of the new office period. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). Even though the U.S. enterprise here remained in a preliminary stage of organizational development, the Petitioner is not relieved from meeting the statutory requirements. The reasonable needs of the company will not supersede the requirement that the Beneficiary must be "primarily" employed in a managerial or executive capacity, rather than spending a significant portion of his time on non-qualifying duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will "direct the management" of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than on its day-to-day operations. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the organization as the owner or sole managerial or executive employee.

Here, while the record reflects that the Beneficiary is the owner and CEO of the Petitioner and its U.S. affiliate, the record does not establish that he had staff to relieve him from having to primarily focus on the day-to-day operations of the U.S. company at the time of filing, nor does the submitted position description establish that his duties are primarily executive in nature. Accordingly, the Petitioner has not established that he would be employed in the United States in an executive capacity as defined at section 101(a)(44)(B) of the Act.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established that the Beneficiary would be employed in the United States in an executive capacity. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.