U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10994441

Appeal of California Service Center Decision

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

The Petitioner, a floor cleaning service, seeks to seeks to continue the Beneficiary's temporary employment as its managing director under the L-1A nonimmigrant classification for intracompany transferees.[1] 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: (1) the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) the Beneficiary will be employed in the United States in a managerial or executive capacity. The Director then granted the Petitioner's motion to reopen and reconsider, and issued a new decision, citing only the second ground for denial.

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. LAW

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity 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)(3)(v)(B). In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial or executive capacity. Id.

[1] 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. The Petitioner initially filed a "new office" petition in January 2016. The approval of that petition granted the Beneficiary L-1A status from April 14, 2016, until April 13, 2017. The Petitioner filed a petition on April 11, 2017, seeking a second year as a new office, but that petition was denied. While an appeal was pending, the Petitioner filed the present petition.

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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director determined that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner refers to the Beneficiary's position as both a managerial and an executive capacity, but states: "Given the newness and size of [the petitioning entity], the Managing Director functions both as its general manager and as its chief executive. . . . [The executive] duties, however, are few and sporadic." Because the Petitioner has essentially acknowledged that the Beneficiary's duties are not primarily executive, we will focus on the requirements of a managerial capacity.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

To be eligible for L-1A nonimmigrant visa classification as a manager, a petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition, the petitioner must then prove that the beneficiary will be primarily engaged in managerial 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 the beneficiary's duties will be primarily managerial, we consider the description of the job duties, the company's organizational structure, the duties of the 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 the beneficiary's actual duties and role in the business.

The Petitioner has consistently claimed that the Beneficiary is, and will remain, the highest-ranking individual at the petitioning U.S. entity, with the authority to control its activities and direct the activities of individuals working for that entity. But the Petitioner has not established that the Beneficiary was in a position to serve in a primarily managerial capacity at the time of filing.

On the petition form, asked if the Beneficiary's position will be full-time, the Petitioner answered "yes." On the same form, the Petitioner provided a brief summary of the Beneficiary's duties, stating that he "will hire & fire staff, set work schedules and assignments . . . , do performance reviews with team

supervisors and . . . oversee all administrative, advertising, legal and financial aspects of [the] company." The Petitioner did not specify to whom the Beneficiary delegated "administrative, advertising, legal and financial" tasks. The Petitioner described an organizational structure in which the Beneficiary directly oversaw two supervisors or team leaders, each of whom oversaw two workers. All these subordinates were part-time contractors rather than employees.

Later in the proceeding, the Petitioner has changed its organizational structure, adding another team leader and promoting one of the team leaders to a newly created "operation supervisor" position, with oversight over the team leaders. This enlarged structure did not exist when the Petitioner filed the petition in April 2018. The Petitioner has also submitted revised and expanded job descriptions for the Beneficiary. These job descriptions make specific reference to delegation of tasks to the operation supervisor, a position that did not exist at the time of filing.

The Petitioner must meet all eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. See Matter of Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

For the above reasons, we will not consider post-filing job descriptions built around an organizational structure that was not in place at the time of filing. On appeal, the Petitioner asserts that its organizational structure at the time of filing supported a managerial position, but the Petitioner pairs this structure with a more recent job description. That description lists a number of non-qualifying tasks said to be delegated to the operation supervisor, without showing who was responsible for those tasks at a time when the company did not employ an operation supervisor. Because this job description is contingent on conditions that did not exist at the time of filing, we cannot conclude that it accurately reflected the Beneficiary's duties at the time of filing.

Also, although the Petitioner initially specified that the Beneficiary would work full-time, the Petitioner later stated, in response to a request for evidence, that the Beneficiary's position "is not always a full time job." Later still, on motion, the Petitioner asserted that, "because [the Petitioner] is a small and still developing company, the position of the Managing Director is part time." This repeated downward revision of the Beneficiary's schedule, even as the company grew more complex and arguably should have demanded more of his time, raises questions about the credibility and consistency of the Petitioner's (largely unsubstantiated) initial assertions regarding the nature of the Beneficiary's work.

The Director also found that the Petitioner had not established that it employs the Beneficiary; prior payroll documents do not name the Beneficiary. The Beneficiary appears to be employed within the overall organization, but here, as elsewhere, there are questions of consistency. On appeal, the Petitioner cites an operating agreement stating that the Beneficiary "will be paid a guaranteed salary . . . of $25,000.00 per year." This figure conflicts with the petition form, which specified "a base salary of $20,000.00 per year."

Also, that operating agreement indicates that the foreign parent company, not the Petitioner, would pay the $25,000 salary. Such an arrangement is acceptable for a U.S. company's first year as a new

office. See 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The Petitioner's status as a new office, which was granted based on plans and projections from which the Petitioner later substantially deviated, elapsed in April 2017. (We have not accepted the Petitioner's claim that it is entitled to a second full year as a "new office.") An extension petition following the new office period must establish the U.S. employer's financial status. 8 C.F.R. § 214.2(l)(14)(ii)(E). Tax documents in the record show that the Petitioner's net income in 2017 (the last full year before the filing date) was below the $25,000 figure cited on appeal.

The Beneficiary also receives distributions from the Petitioner's income, but he is entitled to these distributions as a member of the limited liability company, rather than as an employee. (The foreign company also receives such distributions, but is not employed by the U.S. company.)

The record includes inconsistent descriptions of the Beneficiary's duties, work hours, and compensation. This lack of consistency precludes a determination that the Petitioner has met its burden of proof.

Furthermore, it is significant that the Petitioner filed this petition as an extension petition, contingent on the approval of an earlier petition that has been denied, and its appeal dismissed. The Petitioner acknowledges that the Beneficiary's "[l]ast L-1A status expired 4/13/2017," nearly a year before the Petitioner filed the present petition. At the time of filing in April 2018, the Beneficiary had no valid nonimmigrant status to extend. An extension of stay cannot be granted when the beneficiary's nonimmigrant status expired before the petition was filed. 8 C.F.R. § 214.1(c)(4).

III. CONCLUSION

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.