U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9461315

Date: AUG. 31, 2020

Appeal of California Service Center Decision

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

The Petitioner,[1] which states that it is engaged in the distribution of clay roofing products and heavy machinery, seeks to temporarily employ the Beneficiary as its general manager 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that it would employ the Beneficiary in a managerial or executive capacity. The Petitioner subsequently filed a motion to reopen, which the Director dismissed. 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 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). 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. 8 C.F.R. § 214.2(l)(3)(ii).

[1] On the Form I-129, the Petitioner is identified as [redacted]' and on the Form I-290B, Notice of Appeal or Motion, it is identified as '[redacted]. The record reflects that [redacted] is a Florida company established in 2010, which owns 50% of [redacted], a Florida company established in 2018. The Federal Employer Identification Number (FEIN) provided on the Form I-129 is assigned to [redacted] The Petitioner has consistently indicated that the Beneficiary would work for both U.S. companies upon approval of the petition.

II. NEW OFFICE

As a preliminary matter, we note that the Petitioner indicated on the L Classification Supplement to the Form I-129 that the Beneficiary is coming to the United States to open a new office. The term "new office" refers to an organization which 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).

At the same time, the Petitioner indicated that it was established in 2010, stated at Form I-129, Part 2, that it is a requesting a "Change in previously approved employment" and provided the receipt number for a prior L-1 petition. The Petitioner stated the following where asked to provide information regarding its previous L-1 filings on the Beneficiary's behalf:

> The Petitioner [filed] a first L-1 with valid dates from 08/25/2012 to 08/24/2013, case No. [redacted] A second L-1 visa was filed and approved with valid dates from 06/15/2014 to 06/14/2016, case No. [redacted]. Now the petitioner entered on a business partnership and have 50% of shares of [redacted], for which [it] is asking an L-1A extension with some changes for two (2) more years.

Therefore, the record reflects that U.S. Citizenship and Immigration Services (USCIS) already granted the Petitioner a one-year new office approval six years prior to the filing of this petition and granted the Beneficiary an extension of stay at the end of that one-year period. The Petitioner, which claims it has been doing business in the United States since 2010, is not a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F).

It appears that the Petitioner requested that it be treated as a new office because its 50%-owned subsidiary, [redacted] was established in April 2018, approximately eight months prior to the filing of this petition. However, based on the information provided on the Form I-129, [redacted] is not the petitioning employer in this case, nor does the Petitioner indicate that the Beneficiary will work exclusively for [redacted] On appeal, the Petitioner indicates that he will allocate 70% of his time to the subsidiary, and spend his remaining time managing its own ongoing operations.

The regulations applicable to new offices allow a newly established petitioner one year to develop to a point where it can support the employment of a beneficiary in a managerial or executive capacity. See generally, 8 C.F.R. § 214.2(l)(3)(v)(C). The Petitioner, as an existing office that has been doing business for eight years, 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).

III. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The primary issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a managerial capacity.[2]

[2] The Petitioner has at times referred to the proposed position as "managerial/executive" but clarified on motion that the position is primarily managerial in nature. Accordingly, we will not consider whether the Beneficiary will be employed in an executive 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, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(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 managerial 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 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 a given beneficiary's duties will be primarily managerial, 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.

A. Staffing and Organizational Structure

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.

In both the initial denial decision and the decision dismissing the Petitioner's motion, the Director acknowledged the Petitioner's claim that the Beneficiary will oversee the petitioning organization as a whole. However, the Director determined that it did not establish that it had the staff to support the Beneficiary in a managerial capacity and to relieve him from significant involvement in operational and administrative tasks as of the date of filing. Accordingly, the Director determined that the Petitioner had not met its burden to establish that the Beneficiary's actual duties would be primarily managerial.

As noted, the Petitioner indicates that the Beneficiary will act as the general manager of two separate, but related entities and therefore, we will consider evidence regarding each entity's business activities, staffing, and structure. The Petitioner states that it is engaged in the distribution of heavy machinery and parts and indicates that it will continue to provide "commercial, technical and logistical support" to its customers in the United States, Venezuela and Panama. The Petitioner indicated that the company was downsized when the Beneficiary's prior L-1 visa expired in 2016. However, it provided a copy of its 2017 federal income tax return indicating ongoing sales, as well as sales invoices it issued

throughout 2018. The Petitioner has not provided its organizational chart or evidence that it had any employees as of the date of filing. The submitted 2017 tax return indicates that it paid no salaries or wages, but the reported expenses indicate that the company has been paying at least one subcontractor.

The Petitioner indicates on appeal that the Beneficiary will initially allocate 30% of his time to overseeing its heavy equipment and parts business, but has not provided evidence that he would have any staff to relieve him from performing non-managerial duties associated with its day-to-day operations. The Petitioner provided position descriptions for staff employed by its Venezuelan parent company but did not indicate whether or to what extent these employees would assist with the routine operational and administrative activities of the U.S. company. Based on the limited information provided regarding the Petitioner's staffing, structure and operations, the Petitioner has not met its burden to establish that it can support the Beneficiary in a managerial capacity.

The Petitioner's subsidiary, [redacted] was established in April 2018 to engage in the wholesale distribution of clay roofing tiles from Venezuela and Spain. The Petitioner indicated on the Form I-129 that it has four employees, but the submitted payroll documentation confirms that this number reflects [redacted]'s staffing levels. Specifically, the Petitioner provided evidence that [redacted] hired an administrative manager, a logistics manager and a sales manager in October 2018 and had three employees as of the date of filing. Its payroll documents also include an accounting firm which receives $200 per month as an independent contractor. The Petitioner indicates that the Beneficiary will primarily spend his time overseeing [redacted] and its staff.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A) of the Act. Here, the Petitioner has not articulated a claim that the Beneficiary will be responsible for managing an essential function of the company. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Id.[3]

The record reflects that [redacted]'s three employees have managerial job titles; however, as of the date of filing in December 2018, they were the company's only employees and none of them had subordinate staff to manage or supervise. The Petitioner indicates that the logistics manager will supervise a custom specialist and a warehouse specialist, the administrative manager will supervise an administrative assistant/receptionist and an in-house accountant, and the sales manager will supervise

[3] To determine whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

a total of six subordinates – two sales teams, each led by a sales coordinator. However, none of these employees were in place at the time of filing or when the Petitioner responded to the RFE, at which time the Petitioner indicated that [redacted] was "at 75% progress" in terms of carrying out the activities needed to start up operations. For example, the Petitioner stated that it was still awaiting county approval of its permit applications as of March 2019.

While the Petitioner provided lengthy position descriptions for the Beneficiary's proposed subordinates, those descriptions reflect the duties the three department managers are expected to perform once their subordinate staff have been hired and are available to support them with the activities of their respective departments. The evidence does not establish that they were engaged in managerial or supervisory functions at the time of filing, other than in position title. The Petitioner claims a contracted accounting firm ([redacted]) as an "employee" of its subsidiary and indicates that the administrative manager acts as its supervisor. The record does not contain a copy of [redacted]'s contract with the accounting firm specifying the nature and scope of its services or reflecting that it is working under the company's supervision and control.

Accordingly, the evidence does not establish that the Beneficiary's subordinates were acting as managers or supervisors as of the date of filing. Rather, the record reflects that they are engaged in the activities necessary to prepare the company for operations. Although the Petitioner indicates that its subsidiary plans to fill the vacancies on its organizational chart throughout 2019, and had filled one position (a sales coordinator) as of April 2019, 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).

The Petitioner did not establish, in the alternative, that the Beneficiary would be managing professional staff. The Petitioner provided evidence that its administration manager has a "Superior Technician in Informatics" credential and a certificate in 3D animation. However, the Petitioner did not establish that this position or the logistics manager or sales manager positions require a bachelor's degree as a minimum requirement, or that any of its employees have a bachelor's degree. Thus, the Petitioner has not shown that the Beneficiary's proposed subordinate employees at [redacted] are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

As noted, in order to be eligible for L-1A nonimmigrant visa classification as a manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(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 managerial position. For the reasons discussed above, the Petitioner did not establish that all these elements have been met.

Furthermore, the Petitioner has not established that it employs staff that will relieve the Beneficiary from performing non-qualifying duties. The Petitioner indicates that the Beneficiary will allocate up to 30% of his time to its heavy machinery business but has not established that it has any employees to relieve him of the day-to-day operational tasks associated with that business. Regardless of the Beneficiary's position title, the record does not establish that the staffing of either the Petitioner or the subsidiary would support a managerial level position as of the date of filing. Even though the

Petitioner emphasizes that its subsidiary is in a preliminary stage of organizational development, the Petitioner is not relieved from meeting the statutory requirements.

B. Job Duties

In determining that the Petitioner had not met its burden to establish that the Beneficiary would be employed in a managerial capacity, the Director primarily focused on the many vacancies in the submitted organizational chart, and the Petitioner's reliance on proposed staffing to establish eligibility. The Director also found that the Petitioner had not sufficiently clarified how the Beneficiary would allocate his time between different entities within the organization.

As noted, on appeal, the Petitioner states that the Beneficiary is expected to initially allocate 30% of his time to its heavy equipment and parts distribution business and 70% of his time to [redacted]'s clay roofing products business.

The Petitioner provided a breakdown of the Beneficiary's duties, but many of the stated duties were vague and did not identify the day-to-day tasks he would perform with respect to each entity. For example, the Petitioner indicated that he will allocate 20% of his time to duties that include "organizing and overseeing the development of all the operation tasks related to the . . . distribution of clay products and heav[y] machines, parts, business entities and accessories," "take control of all management, finances and budgeting for the expansion of the businesses," and be responsible for "organizing, directing and overseeing the development of [redacted]" In addition, the Petitioner stated that an additional 20% of his time would be spent providing leadership on policies and procedures, setting goals and evaluating results against operational objectives.

These broad responsibilities convey the Petitioner's level of authority but provide little insight into the nature of his day-to-day tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. 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).

The Petitioner further explained that the Beneficiary will spend 20% of his time directing the planning, implementation and execution of marketing plans, controlling "cross-functional teams" in Venezuela, Panama and Florida, and controlling a marketing manager. Based on the evidence submitted, neither the Petitioner, its U.S. subsidiary, or its foreign parent company has a marketing manager or any marketing staff for the Beneficiary to oversee and it is unclear how he would be relieved from performing non-managerial duties associated with this company function.

Finally, the Petitioner indicated that the remaining 40% of the Beneficiary's time would be spent on "national and international management . . . for all countries in which the petitioner is conducting business," overseeing and controlling [redacted]'s sales teams, overseeing the promotion and pricing of [redacted]'s products and services, and "overseeing the development and planning of new strategies to export heavy equipment machines/accessories products to Venezuela and Panama" by continuing to search for state-of-the art products, services and prices. Again, the Petitioner did not explain the specific tasks associated with "national and international management" and conclusory assertions regarding the Beneficiary's employment capacity are not sufficient to meet the Petitioner's burden of

proof. As discussed above, [redacted] did not have "sales teams" in place at the time of filing, and the Petitioner does not claim to have any employees to relieve the Beneficiary from performing the operational and administrative tasks associated with the heavy equipment export business carried out by the Petitioner.

The Petitioner also provided a chart intended to describe the Beneficiary's proposed duties during a typical workweek, which included many of the duties listed above. Overall, the Petitioner indicated that the Beneficiary will spend 90% of his time on "managerial and technical duties" and 10% of his time on "meetings for training and other tasks."

In a request for evidence (RFE), the Director noted the Petitioner's statement that the Beneficiary would be performing duties for the U.S. entity, but also for its overseas parent and asked that it clarify how his time would be divided. The Director also instructed the Petitioner to provide a more detailed description of the Beneficiary's typical managerial duties and the percentage of time to be spent on specific tasks.

The Petitioner submitted two additional letters in response to the RFE. One of the letters repeated the position description from the initial supporting letter. The second letter explained that the Beneficiary's management of the company would be divided into three areas: logistics/operations, administration and sales. The Petitioner emphasized that he will be responsible to manage, control and supervise three area managers and their staff, enforce the guidelines of the company, and have the authority to hire and fire employees. Neither letter was responsive to the Director's request for a more detailed description of the specific duties the Beneficiary will perform and the amount of time he will spend on each. Further, the second letter focuses only on the Beneficiary's future responsibilities for [redacted] once it is fully staffed. It does not describe his expected duties as of the date of filing, nor does it identify the specific tasks he would perform for the Petitioner.

The fact that the Beneficiary will manage a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) 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 may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, the position descriptions are not sufficiently detailed to establish that his actual duties would be primarily managerial in nature. Further, when considered in light of the Petitioner's lack of any documented staff and the fact that its subsidiary was not yet operational at the time of filing and has many vacancies on its organizational chart, the Petitioner has not met its burden to establish that it could support a managerial position when the petition was filed.

For the reasons discussed, the Petitioner has not established that it will employ the Beneficiary in a managerial capacity.

ORDER: The appeal is dismissed.