U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9164364

Date: AUG. 31, 2020

Appeal of California Service Center Decision

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

The Petitioner, a restaurant operator, seeks to continue the Beneficiary's temporary employment as its "Director" 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 matter is 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. Accordingly, 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in an executive capacity under the extended petition. Although the Director also considered whether the Beneficiary would be employed in a managerial capacity as defined at section 101(a)(44)(A) of the Act, the Petitioner has not claimed that the Beneficiary's position is managerial in nature.

"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.

A. Job Duties

When assessing the executive nature of an offered position, we examine a petitioner's description of the job's duties. See 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed").

The record reflects that the Petitioner has been operating a restaurant called [redacted]' since 2016 and seeks to continue the Beneficiary's employment as its "Director." The Petitioner explained at the time of filing in May 2019 that it is expanding its operations to include a second restaurant business called '[redacted]' at its existing location, expected to open in the third quarter of 2019, as well as a carwash and bakery to be opened by the end of 2019.

The Petitioner stated that the Beneficiary: "is in charge of the overall operations of the company and each location"; makes decisions about the company's long-term operation and is "accountable of all results"; "is responsible for all the financial, corporate and legal aspects of the business"; and "will continue to be responsible for the strategic and tactical oversight of the Company" with "wide latitude" and "P&L responsibility." The Petitioner explained that the Beneficiary's decision-making authority includes areas such as budgeting, brand positioning, new equipment acquisition, staffing, expansion plans, new site development, and financial decisions. It also provided several examples of actions he had taken to date, including renegotiation of food and vendor supplier agreements, selection of Doordash and UberEats delivery and marketing platforms, hiring of key staff, and negotiations for additional locations.

In a request for evidence (RFE), the Director advised the Petitioner that its initial description of the duties performed by the Beneficiary does not sufficiently explain the specific tasks he performs as part

of his day-to-day routine. The Director asked that the Petitioner submit a statement clearly explaining his typical duties and the percentage of time spent on each and indicate how his duties fall within the statutory definition of executive capacity at section 101(a)(44)(B) of the Act.

In response to the RFE, the Petitioner provided an expanded job description for the Beneficiary, but did not clarify the amount of time he would spend on specific tasks. It stated that the Beneficiary meets the first prong of the statutory definition (establishing the organization's policies and goals) by setting a wide range of policies impacting every area of operations. Some of the listed policies included personnel and employee training goals and policies, inclement weather policies, raw food materials sourcing, ambient music selection, packaging and portion size, on-site and online order intake, nutritional and caloric menu guidelines, menu pricing, "fusion goals," menu item selection, customer complaint management and others.

The Petitioner also stated that the Beneficiary directs the management of the organization by having regular meetings with the restaurant's general manager and kitchen supervisor, reviewing their verbal and written reports, paying on-site visits to the restaurant and vendor facilities, reviewing audit reports, reviewing restaurant performance metrics, and reviewing training logs for employees and contractors to determine if training policies are being followed. The remainder of the description focuses on the Beneficiary's discretionary authority, noting that he receives only general supervision from the Petitioner's foreign affiliate. The Petitioner stated that he will make the ultimate decision on menu items, ingredients and methods of preparation, decisions regarding music and lighting, and that he will attend trade events, pay onsite visits to competitor venues, approve pricing for special orders, review bank statements, and review and approve variances in training plans. The Petitioner also mentions his authority to determine the restaurant's operational scheduling, to hire managers and contractors such as accounting and legal staff, and to make decisions regarding the opening of additional businesses.

In the denial decision, the Director determined that the Beneficiary would be performing "the necessary tasks to provide a service or to produce a product." The Director highlighted several duties that relate to the Petitioner's menu and tasks such as visiting vendor facilities, noting that such duties are not typically performed by a managerial or executive employee.

On appeal, the Petitioner objects to this characterization of the Beneficiary's duties, noting that "his responsibilities do not primarily involve day-to-day sales, cooking, and other non-executive functions." The Petitioner also emphasizes that the Beneficiary was transferred to the United States to lead the company's effort to set up a chain of restaurants and emphasizes that he is primarily concerned with overseeing its short- and long-term expansion while other staff perform the non-executive duties.

Although the record supports the Petitioner's claim that the Beneficiary is responsible for the company's policies and long-term objectives, the job descriptions provided at the time of filing and in response to the RFE do not provide sufficient insight into the nature of his day-to-day tasks. As such the Petitioner did not meet its burden to establish that the Beneficiary's actual duties would be primarily executive in nature. The initial description focused on the Beneficiary's overall authority without providing any insight into how he spends his time. For example, the Petitioner indicated that he is "in charge of the overall operations of the company" and is "accountable of all results" but did

not articulate the job duties he performs within the scope of these broad responsibilities. 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 job description provided in response to the RFE, while lengthy, also lacked specifics regarding the Beneficiary's actual day-to-day duties. Instead, the Petitioner focused on explaining the scope of his authority. It provided a long list of policies and decisions that the Beneficiary had made, most of them related to the daily operation of the restaurant. However, the Petitioner had been operating the restaurant for three years and did not explain why it would require an executive to spend a significant portion of his time on policy decisions regarding, for example, its menu, ingredients, portions, personnel policies, customer service, lighting and ambient music selection on a regular and ongoing basis. Although the Petitioner also emphasized the Beneficiary's responsibility for overseeing the expansion of the company into additional locations, the job description offered little information about his duties in this regard. 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., 724 F. Supp. at 1108.

Further, the Director requested a specific description of the Beneficiary's duties and the percentage of time he spends on specific tasks. The Petitioner did not provide this requested breakdown of his duties in response to the RFE and for the reasons discussed above, we agree that the provided descriptions of the Beneficiary's role did not clearly delineate his duties and were therefore insufficient to demonstrate that those duties would be primarily executive in nature. The Petitioner bears the burden of documenting what portion of the Beneficiary's duties will be executive and what proportion will be non-executive. See Republic of Transkei v. INS, 923 F.2d 175, 178 (D.C. Cir. 1991).

In support of the appeal, the Petitioner now submits a pie chart listing 15 tasks the Beneficiary performs and indicates that each requires between 3% and 11% of his time. When, as here, the record shows that a petitioner was put on notice of an evidentiary deficiency and was given an opportunity to address that deficiency, we will not accept evidence regarding that deficiency when offered for the first time on appeal. See, e.g., Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). Further, this new breakdown includes only very brief descriptions of the Beneficiary's tasks (such as "emails," "benchmarking policy review" and "executive decisions") and would be insufficient to establish the nature of the Beneficiary's duties even if it had been submitted in response to the RFE.

The fact that the Beneficiary occupies a top placement within the Petitioner's organizational hierarchy and serves as its director does not necessarily establish that the Beneficiary would be employed 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. Thus, while the Beneficiary may manage or direct the business and possess the requisite level of authority over the company's personnel, growth, vendors, and practices and procedures, his discretion over these business matters is not sufficient to establish that his actual duties would be primarily executive in nature.

As noted, we also must consider the submitted position descriptions within the context of the Petitioner's business, which requires a review of the nature of the business, its structure, and its staffing levels. For the reasons discussed below, the Petitioner has not established that the staff in place at the time of filing were able to support the Beneficiary in a position in which he would be required to perform primarily executive-level duties.

B. Staffing and Organizational Structure

The record reflects that the Petitioner operates the [redacted] which is described in the submitted documentation as a 2,250 square foot restaurant, with seating capacity for 56 patrons. The Petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it had seven employees when the petition was filed.

According to the Petitioner's organizational chart and supporting payroll evidence, the [redacted] had only six employees at the time of filing: the Beneficiary, a general manager, a kitchen supervisor/chef, an executive assistant, one cook and one server. The organizational chart also shows vacancies for a second cook position and a second server position that remained unfilled at the time of the appeal.

In addition, the organizational chart depicts the proposed employees of a second restaurant called [redacted]' which the Petitioner indicates it intends to operate from its existing location beginning in the third quarter of 2019. The Petitioner provided evidence that its current space was being remodeled to accommodate a separate dining room with its own entrance and noted that the two restaurants would share a kitchen and prep area. Although the Petitioner signed the remodeling contract and included projections regarding the new restaurant's staffing and revenue in its 2019 business plan, we note that the submitted Florida fictitious name registration for [redacted] indicates that this new business is owned by five individuals (the Beneficiary and four others); it was not registered as a fictitious name for the petitioning company.

The Petitioner indicated that the second restaurant would have the same staffing structure as the [redacted], with a general manager, executive assistant, kitchen supervisor/chef, cook and server. It submitted copies of partially completed Forms I-9, Employment Eligibility Verification, for the six individuals identified on the proposed organizational chart. Forms I-9 verify that a business has made an effort to ascertain whether particular individuals are authorized to work, but they do not verify that those individuals have actually begun working. See Matter of Ho, 22 I&N Dec. 206, 212 (Assoc. Comm'r 1998). Here, we note that the second restaurant was not staffed or operational when the petition was filed and the renovation appears to have been ongoing at the time of the appeal.

The Petitioner also provided evidence related to a car wash and bakery business and stated that it is acquiring this business through a separate entity called [redacted] According to a submitted shareholder agreement, the Petitioner owns a 49% interest in this entity, although we note the investment funds for the business purchase were provided by the Beneficiary from his personal account. Additional evidence would be needed to establish that this entity is a qualifying subsidiary or affiliate of the Petitioner as defined at 8 C.F.R. § 214.2(l)(1)(ii)(K) or (L). Nevertheless, the record reflects that the Petitioner anticipated that this business would be operational no earlier than the fourth

quarter of 2019 and the Petitioner did not identify the projected staffing of this separate entity in its organizational chart.

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). Therefore, our review of the Petitioner's staffing will be limited to the structure that was in place at the time of filing, which included only the staff of the [redacted]

The Petitioner provided position descriptions for all staff, noting that the general manager works 40 hours per week, supervises the kitchen supervisor/chef, and spends most of his time (85%) on (1) reviewing weekly sales reports, updating business plans and forecasts, and reviewing supply agreements; (2) developing pricing strategies; (3) developing and implementing operating methods and procedures; and (4) implementing internal audit procedures and quality standards policies. The Petitioner states that he spends the remainder of his time on managing the budget, hiring and training staff, and "constantly" negotiating contracts and supply agreements.

The Petitioner indicated that its kitchen supervisor/chef works 40 hours per week, supervises one cook, and performs the following duties: (1) manages overall functions and oversees the operation of the restaurant by arranging equipment maintenance and services, reviewing weekly purchases, and implementing sales policies; (2) reconciling monthly activity, generating year-end reports, and fulfilling tax related requirements; (3) managing supplier contracts; (4) establishing policies, procedures, employee schedules and meeting schedules; (5) managing the budget; (6) contributing to short- and long-term organizational planning and strategy; and (7) establishing standards for personnel performance, mentoring and developing staff and maintaining operational records. Despite the inclusion of "chef" in this employee's job title, the Petitioner does not indicate that he performs any duties related to the restaurant's menu or food preparation tasks.

The submitted job description for the cook indicates that she works 40 hours per week, has no subordinates, and spends 60% of her time "supervis[ing] the operation of the establishment" by monitoring food handling and preparation procedures, training staff in these procedures, monitoring staff for correct handling of cash and other payment methods, and monitoring the quality of customer service. Her remaining duties are divided between performing opening and closing activities; monitoring inventory levels and submitting order requests; assigning staff studies; and implementing the site's budget by monitoring equipment and ingredient use. The Petitioner does not indicate that she is involved in preparing food despite her "cook" job title and we observe that the job description focuses almost entirely on supervisory duties despite her lack of subordinates.

Finally, the Petitioner stated that its server works 40 hours per week, prepares tables, and attends to customers' food orders and collects payments, while the full-time executive assistant prepares various types of correspondence and reports, "collects and analyzes information," "produces information," orders office supplies, ensures "proper presentation of the reception area and showroom," and "manages multiple tasks that have been assigned to be completed before their deadlines."

On appeal, the Petitioner asserts that the Director placed undue emphasis on the number of staff working in the restaurant but "did not address the Petitioner's substantial evidence relating to the support provided by the staff." The Petitioner correctly observes that we must take into account the

reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. See section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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).

The Petitioner states that it operates a restaurant that is open Monday through Saturday, for a total of 69 hours per week. It claims that the Director, general manager, kitchen supervisor/chef and even the cook are engaged in managing or supervising the restaurant's operations but does not indicate that any of its staff are tasked with preparing food for customers. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; submitting an organizational chart with tiers of subordinate employees is not sufficient to establish that an organization is sufficiently complex to support an executive position. Here, the Petitioner's chart is accompanied by staff duty descriptions; however, several of those duty descriptions, particularly those of the kitchen staff, are not credible given that the restaurant clearly has a reasonable need for personnel who prepare food. Rather, it is more likely than not that both kitchen staff (the cook and the kitchen supervisor/chef) are primarily responsible for preparing food rather than performing the supervisory, budget management, purchasing, reporting and policy-related tasks attributed to them.

Further, the record does not establish how the kitchen and serving personnel are able to relieve the higher-level staff from performing the basic tasks needed to operate the restaurant during its operating hours. As noted, the Petitioner has one server who works for 40 hours per week; it does not explain who performs the duties of this position during the remaining 29 operating hours. With respect to the kitchen staff, the Petitioner indicates that it has a vacancy for a cook that remains unfilled and has not explained how one cook could singlehandedly staff the kitchen for 69 hours per week. In fact, on appeal, the Petitioner describes the preparation of its menu items as being "very labor intensive" suggesting that it reasonably requires more than one person engaged in food preparation activities during busier hours.

Overall, the record does not clearly illustrate how the non-executive, day-to-day operational tasks of the restaurant are distributed among the Petitioner's six-person staff. For the reasons discussed, the Petitioner has not established that the subordinate staff sufficiently relieve the Beneficiary from significant involvement in those non-executive tasks required to operate the restaurant. Despite the Petitioner's senior placement in the hierarchy, decision-making authority, and responsibility for the company's upcoming expansion, we cannot overlook the Petitioner's lack of support personnel to relieve the Beneficiary from having to take an active role in the existing restaurant business.

In light of the deficiencies discussed above, we conclude that the Petitioner did not establish that the Beneficiary will be employed in an executive capacity.

ORDER: The appeal is dismissed.