U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9732029

Date: AUG. 31, 2020

Appeal of California Service Center Decision

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

The Petitioner, which operates a childcare center, seeks to continue the Beneficiary's temporary employment 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in an executive capacity under the extended petition. 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 that 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). 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established it will employ the Beneficiary in an executive capacity.[1]

"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;

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

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

First, we will discuss the duties to be performed by the Beneficiary. We note that the actual duties themselves 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).

In a letter submitted at the time of filing, the Petitioner provided a description of the Beneficiary's position as president that included 20 duties. The Petitioner indicated that her activities include planning and decision making for current and future investments, developing and evaluating operational policies as needed, approving marketing and advertising strategies, controlling all financial aspects of the company, and monitoring compliance with state rules and ensuring the renewal of licenses, certification and insurance. The Petitioner noted that she reviews software communications systems, escalated parent issues, management of collections and revenue, expenses and supplier contracts, new equipment orders, payroll, and financial and legal issues. With respect to the daycare center's staff, the Petitioner stated that the Beneficiary develops training protocols, presides over monthly staff meetings and quarterly parent meetings, ensures that the center director and staff participate in workshops and seminar. Finally, some of the stated duties related to the Petitioner's possible expansion and related planning, such as investigating new locations and determining capital requirements.

In a request for evidence (RFE), the Director advised that the description was too general and appeared to include a combination of qualifying duties along with tasks that are operational and administrative tasks necessary to operate the Petitioner's day care center and pre-school. We agree with this assessment of the initial description because, while it indicates the Beneficiary's authority to develop the company's policies and her general oversight of the company, it is too broad to establish the nature of her day-to-day activities and does not demonstrate how she divides her time between higher-level

duties and non-executive 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 Director instructed the Petitioner to provide a more detailed description of her specific executive duties and information regarding the amount of time she is expected to spend on each task.

In response, the Petitioner stated that the Beneficiary's "typical daily allocation of time" is as follows:

- Observe student drop off (1%)
- Review financial report (5%)
- Read and respond [to] emails. Read Education materials, news (10%)
- Meeting with school director (15%)
- Meet with school director and assistant director (10%)
- Walk through facilities (5%)
- Office time/troubleshoot problems (10%)
- Quick walk through dining area (1%)
- Working lunch (7%)
- Meetings with social media management (2%)
- Teleconference with web site manager (1%)
- Working meetings to obtain permits and buildout for new space (12%)
- Observe student drop off (1%)
- On a weekly rotational basis: Meal, liability and payroll management (5%)
- Staff meetings [] with parent company (5%)
- Meeting with new venue location manager (realtor) (5%)
- Executive open door policy meetings (5%)

Some of these tasks are inherently operational or administrative, while others are so vaguely described that the Petitioner has not shown them to be at an executive level. This breakdown of duties therefore did not provide the requested detailed and specific description of how the Beneficiary typically allocates her time. For example, we cannot determine that responding to emails, reading news, having "office time," walking through the Petitioner's facility, and holding "open door policy meetings" are inherently executive tasks. Further, although the Petitioner indicates that the Beneficiary spends a significant portion of her time on duties related to the company's planned expansion, the record does not establish that the company had reached the point where it was obtaining permits for a new space at the time of filing, nor does the record support a finding that she was meeting with a realtor on a daily basis.

The Petitioner also provided a four-page listing of the Beneficiary's activities and indicated how they fall under the four prongs of the statutory definition of executive capacity at section 101(a)(44)(B)(i)-(iv) of the Act. While lengthy, this list was repetitive, resembled the initial position description provided by the Petitioner, and was also not responsive to the Director's request that the Petitioner clearly describe the Beneficiary's duties and the amount of time she allocates to specific tasks. Instead, the Petitioner focused on explaining the scope of her 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 day care

center. However, the Petitioner had been operating the center for over three years and it has not explained why it would require an executive to spend a significant portion of her time on policy decisions for nearly every aspect of operations on an ongoing day-to-day basis.

The Petitioner added that the Beneficiary "instituted the outsourcing of most non educational core business tasks," such as "administrative services, bookkeeping, human resources, financial reporting, payroll, social media management, tax preparation and website management." The Petitioner indicated that the Beneficiary directs the management of the organization by meeting with the school director and subcontractors and reviewing their reports, and by reviewing audit reports, personnel logs, and key performance indicators. The Petitioner also asserted that the Beneficiary's wide latitude in discretionary decision making includes elements such as hiring and firing teachers; engaging the services of subcontractors and negotiating the terms of those contracts; approving school equipment and supplies; deciding the location of any new campus, and meeting with parents who have requested waivers of school policies.

The Beneficiary's authority to make high-level decisions for the petitioning entity is not in dispute. Such authority, however, is only part of the definition of executive capacity. Here, none of the submitted position descriptions sufficiently detail the nature of the Beneficiary's specific day-to-day tasks and the amount of time she allocates to qualifying duties. As such, the Petitioner has not shown that the Beneficiary's duties are primarily those of an executive. The Petitioner has placed emphasis on the Beneficiary's intention to expand the company into a franchise, but the Petitioner has not shown that these efforts have so far resulted in any significant expansion. The Petitioner documented a brokerage agreement relating to the potential purchase of additional properties but has not shown that it operates at more than one location.

The fact that the Beneficiary manages or directs 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" of an executive nature. While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that her actual duties, as of the date of filing, 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.

B. Staffing and Organizational Structure

The Petitioner indicated on the Form I-129, Petition for a Nonimmigrant that it had 14 employees in July 2019.

The Petitioner's undated organizational chart submitted at the time of filing included 13 employees and showed that the Beneficiary's only immediate subordinate is the school director. The director is depicted as supervising a "director assistant," who, in turn, supervises eight teachers and two teacher aides. An accompanying staff list identified the same employees but indicated that six of them are teachers and four are aides.

The evidence submitted in the Petitioner's October 2019 response to the Director's RFE indicated that five members of the teaching staff who were included on the initial organizational chart had terminated their employment in June 2019, prior to the filing of the petition. Based on this information, the initial organizational chart did not accurately reflect the Petitioner's staffing at the time of filing.

The Petitioner submitted a new organizational chart dated August 2019 which identifies the Beneficiary, the school director, director assistant, seven teachers, three teacher aides, and a cleaning and maintenance employee. We note that one teacher [redacted], one teacher aide [redacted], and the cleaning employee [redacted] do not appear on the Petitioner's ADP payroll summary for August 2019, and the Petitioner has not corroborated its employment of these workers.

We further observe that the initial chart indicated that the Petitioner has six classrooms, while the new chart included only four class levels and did not include an infant room or infant room staff. However, all other evidence suggests that the Petitioner's day care center provides care for infants and continues to require staff to care for the center's youngest children. In addition, the Petitioner indicates that it is fully enrolled with 90 students and it operates in a highly regulated industry that has mandatory minimum adult-to-child ratios that must be met to maintain licensing. Given some of the apparent inconsistencies noted in the staffing levels and number of classrooms, the Petitioner has not established that it was fully staffed with teachers and aides during its operating hours (7 a.m. to 6 p.m. on weekdays) at the time of filing and remains fully staffed. This raises questions as to whether the director and director assistant are required to spend time in classrooms in addition to performing the duties the Petitioner attributes to their positions.

In fact, the Petitioner's initial evidence included a "2018-19 VPK School Year Monitoring Report" from May 2019, prepared by the Early Learning Coalition of [redacted], which summarizes this entity's monitoring visit at the Petitioner's pre-kindergarten classroom. According to this report, [redacted] was "in the role of Director as stated on Form OEL-VPK 10" but it also states that [redacted] was "in the role of teacher assistant as stated on Form OEL-VPK11A." The Petitioner did not disclose in its supporting statements on or its organizational chart that [redacted] (the school director) serves in this dual role, nor did it clarify the information revealed by the monitoring report or explain how [redacted] divides her time. This omission is material since the Petitioner states that the Beneficiary directs the management of the company through the director and director assistant.

For example, the Petitioner submitted a lengthy position description for the director indicating that she has been assigned 42 wide-ranging tasks that include developing programs to ensure adherence to government codes, curriculum planning, student evaluation planning, developing admission goals and strategies, working closely with "the finances department," developing marketing campaigns, directing all education, nutrition and parent involvement programs, planning and overseeing school logistics programs, overseeing staff training, recruiting new staff, holding teacher meetings, directing equipment maintenance, maintaining inventory, etc. If the school director is spending a significant portion of her hours in the pre-Kindergarten classroom, it is unclear to what extent she is available to perform the higher-level duties the Petitioner attributes to her.

Given the evidence indicating that the school director is required to perform teaching duties, it is reasonable to question whether the director assistant may also have additional classroom-related responsibilities. The director assistant's job description includes a number of vague duties such as

"manages and oversees functional areas of the institution," "actively participates in institution planning, development and team building," "monitors student satisfaction," "establish policies," developing and implementing "admissions goals and strategies," developing "educational programs and standards," and working closely with "the human resources department" and "the head of each educational department as well as the financial aid team." The Petitioner does not otherwise claim to have a human resources department, multiple educational departments, or a financial aid team.

Overall, we cannot determine whether the job descriptions submitted for the director and director's assistant completely and accurately reflect the full scope and range of duties performed by these employees. On appeal, the Petitioner submits an updated chart dated "October 2019" which adds a tier of "teacher leaders" above the teaching staff. However, the total number of teaching staff (including leaders, teachers and aides) is reduced to nine, with one aide and one teacher no longer included. The new chart also indicates that the individual previously identified as the cleaning staff is a teacher aide, while one of the recently-hired teachers is now the company's financial manager. 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; adding tiers of subordinate employees with senior or supervisory job titles is not probative and will not establish that an organization is sufficiently complex to support an executive position. Further, any recent revisions to the school's structure and staffing cannot retroactively establish that the Petitioner already met all eligibility requirements at the time of filing, as required by 8 C.F.R. § 103.2(b)(1).

The organizational charts have consistently identified a number of contractors as the Beneficiary's direct subordinates. The Petitioner claims that these external companies act as "managers" for non-core functions such as finance and administration (accounting/tax, payroll, insurance), nutrition (meals/catering), marketing (social media and web design), and "new venue location management" (a real estate broker). The Petitioner, however, has not shown that these contractors work exclusively or extensively for the petitioning entity, despite providing position descriptions suggesting that they each perform a day-to-day role in the company. For example, the Petitioner indicates that the social media management company "sells classifieds and advertising space for print or media publications," prepares ad layouts, creates marketing campaign, develops and implements an internal marketing plan, plans and delivers campaigns, presents and negotiates rates, among other duties. However, the supporting evidence demonstrates that the Petitioner pays the social media management company only $50 per month. The Petitioner assigns similarly broad duties to the web management company, but the only supporting evidence related to that contractor is a proposal to create the Petitioner's website for a fee of $600.

Similarly, while the Petitioner submitted invoices showing that it pays a monthly $300 fee to an accounting firm [redacted], it has not provided its services agreement outlining the nature and scope of services the firm is contracted to provide. Without such evidence, we cannot determine whether the "Accounting and Tax" job description submitted by the Petitioner accurately reflects the external accountants' responsibilities. The evidence reflects that [redacted] prepared the Petitioner's quarterly federal tax returns and annual income tax returns. However, the submitted job description submitted for this firm includes 39 discrete duties and would appear to require daily services to the petitioning company, the provision of which is not adequately supported in the record.

Overall, although the Petitioner claims that its contractors serve as "function managers," we note that the performance of incidental, one-time, or automated services do not constitute management of the Petitioner's functions. The Petitioner has not shown that the Beneficiary exercises executive-level control over the work performed by the various contractors, or that the contractors provide the level of services indicated in the submitted position descriptions.

On appeal, the Petitioner submits a new business plan and indicates that its existing day care will be expanding into an adjacent space, with plans to increase enrollment by 50% and increase its staffing levels accordingly. The Petitioner also emphasizes that the Beneficiary has successfully directed the business as reflected by the company's full enrollment numbers and waitlist. However, as noted, the fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. To show that a beneficiary will "direct the management" of an organization, a petitioner must show how the organization is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such.

Here, the Petitioner's description of the Beneficiary's duties did not provide the requested level of detail with respect to how she allocates her time to specific tasks. Further, although the Petitioner submitted an organizational chart showing contractors as subordinate managers and several tiers of subordinate employees, the evidence indicates that the contractors are not acting as managers and the Beneficiary's direct subordinate is also providing services as an assistant teacher. Finally, we noted some inconsistencies when comparing the Petitioner's payroll evidence and organizational charts which raises questions as to whether the company has a sufficient number of teachers and aides to maintain an appropriate adult-child ratio during its operating hours. For all of these reasons, the Petitioner has not established that the Beneficiary is primarily focused on the broad goals and policies, or that the staff in place at the time of filing was sufficient to relieve her from involvement in the day-to-day operations of the business, such that she would be performing primarily executive-level tasks.

Based on the deficiencies discussed above, the Petitioner has not established that it will employ the Beneficiary in an executive capacity.

ORDER: The appeal is dismissed.