U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29769165

Date: FEB. 8, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner, an Indian manufacturer and exporter of textiles and packaging materials, seeks to employ the Beneficiary as the chief executive officer (CEO) of its U.S. subsidiary.[1] The Petitioner requests his classification under the L-1A nonimmigrant visa category as an intracompany transferee who would temporarily work in the United States in a "managerial capacity." *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15).

The Director of the California Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its subsidiary's proposed U.S. employment of the Beneficiary in the claimed managerial capacity. On appeal, the Petitioner contends that the Director overlooked evidence, mischaracterized terms, and based the decision, in part, on irrelevant findings.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record does not support many of the Director's findings. But substantial doubts remain as to whether the Beneficiary would primarily work in a managerial capacity. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An intracompany transferee is a noncitizen who - for at least one continuous year in the three years before their initial U.S. admission in nonimmigrant status - worked abroad and seeks to enter the country to temporarily work for a branch, parent, affiliate, or subsidiary of their foreign employer in a capacity that is managerial, executive, or involves "specialized knowledge." Section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(A). If a U.S. petitioner seeks to employ a transferee in a managerial

[1] A foreign employer may file an L-1 visa petition. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G) (defining a "qualifying organization" to include either a U.S. or foreign firm); *see also* U.S. Citizenship and Immigration Services (USCIS), "Instructions for Petition for Nonimmigrant Worker," 16, www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf ("Either a U.S. employer or foreign employer may file the petition, but the foreign employer must have a legal business entity in the United States.")

or executive capacity, the business seeks the beneficiary's L-1A classification. USCIS, "Instructions for Petition for Nonimmigrant Worker," 16, www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf; *see also* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations). In contrast, if the proposed U.S. work involves specialized knowledge, the petitioner seeks the noncitizen's L-1B classification. *Id.*

II. ANALYSIS

A. The Proposed Intracompany Transferee

The record shows that the Beneficiary, the holder of a bachelor's degree in textiles engineering and a master of business administration degree, has worked for the Petitioner in India since 2005 as its managing director/CEO. The company - which, as of June 2023, had 31 workers on its payroll - manufactures and exports textiles and packaging materials.

In 2017, the Petitioner established a wholly owned subsidiary in the United States. The U.S. subsidiary imports and distributes packaging material from the Petitioner and exports textiles, chemical fibers, and agricultural commodities.

In 2018, the Petitioner successfully petitioned for the Beneficiary to open the U.S. operations in L-1A status as the subsidiary's CEO. Because the subsidiary constituted a "new office" that had been doing business in the United States for less than one year, *see* 8 C.F.R. § 214.2(l)(1)(ii) (defining the term "new office"), the L-1A petition was initially valid for one year. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). During that period, however, government records show that U.S. officials abroad denied an L-1A visa to the Beneficiary, finding that he illegally assisted his twin brother to enter the United States. *See* section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i). U.S. officials also denied the Beneficiary's application to waive the inadmissibility ground. *See* section 212(a)(6)(E)(iii) of the Act.

In 2022, the Petitioner filed a second L-1A petition for the Beneficiary, which USCIS denied. The Agency found insufficient evidence that the Petitioner's subsidiary would employ him in the United States in the claimed managerial capacity. In 2023, the Petitioner filed this petition, which the Director denied on the same basis.

Although the Beneficiary has never been in L-1A status in the United States, the U.S. subsidiary has been doing business since 2017. The Petitioner concedes that the subsidiary has employed no full-time workers for most of that time, with company employees in India supporting the subsidiary's operations and the Beneficiary managing activities from abroad.

As the subsidiary has conducted business for more than one year, it no longer constitutes a new office. Thus, unlike in the Petitioner's initial petition for the Beneficiary, the company in these proceedings must demonstrate that he would work in a managerial capacity immediately upon his L-1A admission to the country. *See* 8 C.F.R. § 214.2(l)(3)(v)(C) (requiring a petitioner to demonstrate that a new office would support an executive or managerial position *within one year of the petition's approval*) (emphasis added). Also, because the eligibility requirements for the Petitioner's initial and current petitions differ, USCIS need not defer to its approval of the 2018 petition. *See generally* 2 *USCIS*

Policy Manual A.(4)(B)(1) (stating that USCIS should not defer to prior approvals involving the same parties and underlying facts where circumstances or eligibility requirements have materially changed).

B. The Nature of the Proposed U.S. Job

The Petitioner claims that its U.S. subsidiary would employ the Beneficiary in a "managerial capacity." The term means work in which an employee "primarily:"

- Manages an organization or its department, subdivision, function, or component;
- Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an "essential function" with the organization, department, or subdivision;
- Has the authority to hire, fire, or recommend those and other personnel actions, or, if not directly supervising an employee(s), functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the daily operations of the activity or function for which the employee has authority.

Section 101(a)(44)(A) of the Act.

As the term's statutory definition indicates, "managerial capacity" recognizes both personnel managers and function managers. Personnel managers must primarily supervise and control the work of other supervisory, professional, or managerial employees. *Matter of G- Inc.*, Adopted Decision 2017-05, 3 (AAO Nov. 8, 2017). In contrast, function managers must primarily manage an essential function within the organization. *Id.* Function managers may also oversee personnel, if incidental to managing the function. *Id.*

The Petitioner states that it would employ the Beneficiary as a function manager. The company states that he would manage essential functions of the U.S. subsidiary, including: multinational trading, exports, imports, and distribution of goods; and developing new business.

To establish a beneficiary's proposed employment as a function manager, a petitioner must demonstrate that:

- the function is a clearly defined activity;
- the function is "essential," i.e., core to the organization;
- the beneficiary will primarily manage, as opposed to perform, the function;
- the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and
- the beneficiary will exercise discretion over the function's day-to-day operations.

Matter of G-, *supra*, at 4.

When determining whether an L-1A beneficiary would primarily manage an essential function, USCIS must weigh all relevant factors, including evidence that employees of another related entity within a qualifying organization would perform day-to-day non-managerial tasks for a beneficiary. *Matter of Z-A-, Inc.*, Adopted Decision 2016-02, 6 (AAO Apr. 14, 2016) (approving an L-1A petition for a

functional manager who would receive support from eight foreign employees of the petitioner's parent).

The record does not support many of the Director's findings regarding the Beneficiary's proposed U.S. employment as a function manager. Noting the U.S. subsidiary's lack of full-time employees, the Director questioned the essentiality of the functions that the Beneficiary would manage. The Director stated:

> It very well may be that the multinational trade, exports, imports and distributions functions are essential to your business abroad, but since you have been successfully conducting business since 2017 without the beneficiary or a consistent staff in the United States, USCIS is unable to conclude that these functions are essential or critical in the United States.

On appeal, the Petitioner contends that the functions the Beneficiary would manage are essential because all the U.S. subsidiary's revenues and profits stem from them. *See Matter of G-*, Adopted Decision 2017-05, at 3 (defining an essential function as "a core activity of an organization"). The Petitioner states that the Director "mischaracterized" the meaning of essential functions. The company argues that essential functions do not depend on a business's number of employees but rather on the functions' importance to the business's operations and goals.

The Act and case law support the Petitioner's contentions. The Act requires USCIS, when determining the managerial or executive nature of a proposed job, to consider "the reasonable needs of the organization, component, or function in light of [its] overall purpose and stage of development." Section 101(a)(44)(C) of the Act. "An individual shall not be considered to be acting in a managerial or executive capacity . . . merely on the basis of the number of employees the individual supervises or has supervised or directs or has directed." *Id.*

Also, when determining whether a worker would manage an essential function, we consider a U.S. entity's overall purpose and developmental stage under section 101(a)(44)(C) of the Act. *See Matter of Z-A-*, Adopted Decision 2016-02 at 7 ("Given the overall purpose of the organization and the organization's stage of development, the Petitioner has established a reasonable need for a senior-level employee to manage the essential function.") Moreover, as previously indicated, a function manager's supervision of employees is "incidental" to their managing a function. *Matter of G-*, *supra*, at 3. Thus, the Director erred in finding that the U.S. subsidiary's number of employees, alone, cast doubt on the essentiality of the functions the Beneficiary would manage.

The Director also doubted the Petitioner-provided percentages of time that the Beneficiary would spend on his U.S. job duties. The Director found that the percentages totaled 120%, more than the Beneficiary's total time of 100%.

As the Petitioner contends on appeal, however, the Director incorrectly added the time percentages. In response to the Director's request for additional evidence, the Petitioner provided a "list of proposed duties and responsibilities," with the duties totaling 100% of the Beneficiary's time. The percentages included: 33% on business development and marketing activities; 37% on strategies and policies for marketing and business development; 10% on overseeing and supervising execution of trade

transactions; 10% on hiring a team of professionals; and 10% on executive duties. Thus, the record does not support the Director's doubts regarding the percentages of time the Beneficiary would spend on his U.S. duties.

The Director also found that the Petitioner inadequately explained how its employees in India would support the Beneficiary in his U.S. duties. The Director noted that the Petitioner's time zone in India is about 9.5 hours ahead of the U.S. subsidiary's time zone. The Director found that the Petitioner:

> did not provide sufficient information as to what the beneficiary will be doing on a day-to-day basis without subordinates available and working at the same time. Therefore, it is not readily apparent how the beneficiary will be relieved from performing non-managerial duties during the working hours in the United States.

The Petitioner contends that the Director's time zone concern is "not [a] relevant factor." The company states that the Beneficiary would spend only 10% of his time supervising the Indian subordinates who would primarily execute the U.S. subsidiary's trade transactions. Also, the Petitioner states that the subsidiary's trading is not subject to "real-time monitoring" but rather involves longer-term steps and processes. The company indicated that trade operations can involve: sending product samples to customers; issuing purchase or sales orders; coordinating production; arranging pre-shipment quality inspections; and arranging loading of goods. Further, the Petitioner states that its employees have been profitably executing the subsidiary's trade transactions since 2017. The record supports the Petitioner's arguments. Thus, we find that the Director overestimated her concerns about the differing time zones.

Despite these errors, however, the record raises doubts that the Beneficiary's management of essential functions would constitute his primary duties in the United States. As the Director found, the Petitioner lists a U.S. residential address for the subsidiary. The company provided a copy of a lease and details of a proposed U.S. office at another address and indicated that the Petitioner had begun to recruit U.S. employees. But the Petitioner stated that it would continue to use the residential address "till we set up a physical office in the U.S." The Petitioner did not indicate when it would open an office. But, if it waits until after the Beneficiary's U.S. admission in L-1A status, the record does not explain how he - immediately upon admission - could perform his proposed managerial duties or who would relieve him of the non-managerial duties of opening the office.

Also, the Petitioner states that, until the U.S. subsidiary hires staff, it would continue to rely on its employees in India to support the Beneficiary. An organizational chart for the subsidiary lists proposed U.S. positions and their place in the subsidiary's proposed structural hierarchy. But the Petitioner did not provide the proposed positions' job duties. Thus, we cannot accurately determine whether the proposed U.S. staff would relieve the Beneficiary from non-qualifying duties and allow him to focus primarily on managerial duties.

Further, the proposed U.S. organizational chart places managers of the future logistics and accounts/finance departments under the Beneficiary, suggesting that he would supervise these managers. But none of his proposed duties involve overseeing these employees. If the Beneficiary would supervise these managers, the record does not explain which of his proposed duties would be eliminated or on which proposed duties he would spend less time. The Petitioner also indicated that

the Beneficiary's duties would include visiting and meeting the management of potential customers and participating in international trade fairs and conferences. The record, however, does not indicate which current or future support worker would arrange his travel and hotel accommodations or the amount of time these non-managerial duties would take. These omissions and inconsistencies prevent the Petitioner from demonstrating that the Beneficiary would primarily work in a managerial capacity. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence point to where the truth lies).

The Director did not inform the Petitioner of these additional evidentiary deficiencies. We will therefore remand the matter. On remand, the Director should inform the company of the deficiencies discussed above.

If supported by the record, the Director may notify the Petitioner of any additional derogatory evidence or potential denial grounds. The Director, however, must afford the company a reasonable opportunity to respond to all issues raised on appeal. Upon receipt of a timely response, the Director should review the entire record and issue a new decision.

III. CONCLUSION

The record does not support many of the Director's findings. But substantial doubts remain as to whether the Beneficiary would primarily work in the United States in a managerial capacity.

ORDER: The Director's decision is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.