U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14735602

Date: FEB. 23, 2021

Appeal of California Service Center Decision

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

The Petitioner, a water treatment solutions company, seeks and to temporarily employ the Beneficiary as the president of its new office[1] under the L-1A nonimmigrant classification for intracompany transferees. See 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 Petitioner did not establish, as required, that (1) the Beneficiary's foreign employment was in a managerial or executive capacity; (2) the new office would support the Beneficiary in a managerial or executive position within one year of the petition's approval; and (3) the Beneficiary's services would be used for a temporary period. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal because the Petitioner did not establish that it would support the Beneficiary in a managerial capacity[2] within one year of the petition's approval, as claimed. Since the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's arguments regarding the remaining grounds for denial. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year within the date of approval of the petition to support an executive or managerial position.

[2] The Petitioner does not claim that the Beneficiary's proposed position would be in an executive capacity.

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.

Further, in the case of a new office petition, the petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. See generally 8 C.F.R. § 214.2(l)(3)(v).

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The issue to be addressed in this discussion is whether the Petitioner established that its operation would support the Beneficiary in a managerial capacity within one year of the petition's approval.

"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.

In the case of a new office petition, we review a petitioner's business and hiring plans and evidence that the business will grow sufficiently to support a beneficiary in the intended managerial or executive capacity. The burden is on the Petitioner to establish that it would realistically develop to the point where it would require the Beneficiary to perform primarily managerial or executive duties within one year of the petition's approval. Accordingly, we consider the totality of the evidence in analyzing whether the proposed managerial or executive position is plausible based on a petitioner's anticipated staffing levels and stage of development within a one-year period. See 8 C.F.R. § 214.2(l)(3)(v)(C).

If staffing levels are used as a factor in determining whether an individual will be acting in a managerial or executive capacity, U.S. Citizenship, and Immigration Services (USCIS) takes into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. See section 101(a)(44)(C) of the Act.

At the time of filing this petition, the Petitioner stated that the Beneficiary will be temporarily transferred to the United States to serve as the president of its water treatment solutions company, which was established in 2019. In support of the petition, the Petitioner submitted a copy of its commercial lease and its business plan, which described the Petitioner's personnel plan and the role of the Beneficiary as follows:

> [The Beneficiary], the company manager, makes all executive decisions. He will also generate most of the sales and production leads. The administrative staff is planned to

increase in order to handle the higher sales volume. In the future, a sales manager will be hired to allow [the Beneficiary] more time to dedicate himself to company management.

The business will require additional personnel including Store Manager, Chemical Operator, Manager Business Development, Product Manager, Assembly Operator and Senior Buyer. Few part-time sales person will also be hired.

The personnel plan reflects what the business would need to keep as a steady positioning throughout the years. The total headcount will increase from 4-10 over the period of time.

- President / Manager
- Store Manager
- Chemical Operator
- Manager Business Development
- Book Keeper
- Product Manager
- Assembly Operator
- Record Keeper
- Senior Buyer
- Assistant Store Manager

The business plan further indicated that in the first year of operations, the Petitioner would hire the Store Manager, the Chemical Operator, and the Manager Business Development to support the Beneficiary.

The Director determined the initial evidence submitted by the Petitioner was insufficient, and issued a request for evidence (RFE), noting specifically that the evidence regarding the Beneficiary's duties was vague and failed to specifically articulate the duties of the Beneficiary during the first year of operations. The Director also noted that the Petitioner had failed to clarify whether the Beneficiary's proposed position was primarily managerial or executive in nature. Finally, the Director noted that the record contained insufficient details regarding the proposed positions and associated duties of the Beneficiary's subordinates and their positions within the Petitioner's organizational hierarchy. In the RFE, the Director requested additional details regarding the Beneficiary's proposed duties. The Director also requested the Petitioner to supplement the record with additional evidence and provided examples of acceptable documentation, including but not limited to a detailed organizational chart showing the Petitioner's proposed hierarchy, the position titles of its proposed employees along with their proposed duty descriptions and expected educational levels, and a letter or statement from the Petitioner or foreign entity explaining the need for the need for the new office and the manner in which the intended operation would support the Beneficiary in a managerial or executive capacity within one year.

In response, the Petitioner submitted an organizational chart, demonstrating that the Beneficiary would be at the top of the Petitioner's hierarchy. According to the chart, the Beneficiary would directly supervise three individuals: the Chemical Operator, the Business Development Manager, and the

Operations Manager. Further, the chart indicated that the Chemical Operator would supervise the Operator and the Record Keeper, the Business Development Manager would supervise "Associates," and the Operations Manager would supervise the Product Manager and the Assistant Store Manager, who in turn would oversee the Bookkeeper. The only position filled on the chart was that of the Business Development Manager, who was identified as [redacted] Although specifically requested in the RFE, no additional evidence regarding the Beneficiary's proposed U.S. employment was submitted in response to the Director's request. The Petitioner declined to submit a statement of duties for the Beneficiary, nor did it supplement the record with information regarding the Beneficiary's proposed subordinates, their respective duties, or the education required for their positions.

In the denial, the Director determined that the Petitioner did not demonstrate how it will support the Beneficiary in a managerial or executive position within one year of the petition's approval. The Director determined that the Petitioner did not provide sufficient details regarding the duties of the Beneficiary or the duties of his subordinates to establish that the Beneficiary would be employed in a primarily managerial or executive capacity at the end of the first year of operations.

On appeal, the Petitioner asserts that the Beneficiary will be employed in a primarily managerial capacity, based on the fact that he will devote 35% of his time to managing the organization as a whole, and 30% of his time supervising the work of professional and managerial employees. In support of this assertion, the Petitioner submits a letter providing a detailed overview of the duties of the Beneficiary's proposed position, and clarifies that the proposed position will be in a primarily managerial capacity. The Petitioner also submits an overview of the duties and educational levels of the Beneficiary's subordinates.

Although we acknowledge the submission of duty descriptions for the Beneficiary and his subordinates on appeal, the Petitioner neglected to provide this evidence when it was first requested in the RFE. 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, 766 (BIA 1988) (barring consideration of evidence on appeal where a party received prior notice and a reasonable opportunity to submit required evidence); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's request for evidence. Id. We therefore decline to consider the new materials on appeal.

Upon review, we concur with the Director's determination that the proposed job duties of the Beneficiary are too vague to demonstrate the Beneficiary's claimed employment in a managerial capacity. See 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) (stating: "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"). Here, the Petitioner simply stated that the Beneficiary "makes all executive decisions" without specifying how the Beneficiary would accomplish them. The

Petitioner does not indicate whether the Beneficiary would supervise others to accomplish the tasks or complete the duties on his own.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act. 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." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the Petitioner indicates that the Beneficiary will also supervise personnel, his proposed duties in this area were described in abstract terms and did not convey how much time he would spend on personnel-related activities. Absent such a delineation, we cannot evaluate whether these claimed employees are managerial, supervisory, or professional. Based on these deficiencies, we cannot determine whether the Beneficiary's duties will be primarily supervisory in nature.

Further, the Petitioner submits a new organizational chart on appeal, indicating that the Beneficiary will directly supervise [redacted] in the position of sales manager, who in turn will supervise two "marketing" positions, filled by [redacted] and [redacted] We note that the new chart changes the title of [redacted]s position from business development manager, as claimed in the chart submitted in response to the RFE, to sales manager, which is a position not previously identified in the business plan. Further, the two "marketing" positions listed on the newly submitted organizational chart were also not previously identified as potential personnel positions in the Petitioner's business plan. According to the Petitioner's business plan, the intended personnel to be hired during the first year of operations were the chemical operator, the store manager, and the manager business development.

On appeal, the Petitioner explains that complications resulting from the Covid-19 pandemic have caused the Petitioner to alter its business plan. Specifically, the Petitioner states in its appeal brief that because of the downturn resulting from the pandemic, it has "prioritized hiring marketing and sales staff, rather than closely following its business plan's hiring order, in order to maximize revenue generation and help protect the company from volatility." The Petitioner states that this modification should not be held against the Petitioner given the extraordinary circumstances resulting from the global pandemic. We note, however, that the instant petition was filed in December 2019, several months prior to the onset of the pandemic. 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).

We further note that, in its response to the RFE dated August 2, 2020, the Petitioner claimed that it would support the Beneficiary in a qualifying capacity by the end of its first year of operations, noting that it "swiftly initiated its operations in 2019 and within a span of five months has generated a revenue of $111,382." It appears, therefore, that the Petitioner's hardship claims surfaced in response to the Director's denial of the petition. 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).

The new office regulations are premised on the understanding that a new company will progress to a stage of development where it will be able to support a beneficiary in a managerial or executive capacity. Here, the Petitioner provided a deficient business plan that contains vague information regarding the goals of the company, the duties of the Beneficiary, and its hiring timeline. It also lacks sufficient information that would allow us to gain a meaningful understanding of the specific benchmarks that the Petitioner intends to meet during its first year of operation to ensure that it will adequately develop and have the ability to relieve the Beneficiary from having to primarily perform its operational and administrative tasks within one year of this petition's approval.

We acknowledge that the Beneficiary would assume a position as the Petitioner's senior employee and that as a result, he would have authority to make major decisions regarding the overall direction of the business. However, 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. While a beneficiary may exercise discretion over a petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making beyond the petitioner's initial phase as a new office, the Petitioner here has not provided sufficient information about the duties the Beneficiary would be expected to perform once that initial phase of its operation is over.

III. CONCLUSION

Given the deficient evidence offered to support this petition, we cannot conclude that the Beneficiary would be employed in a managerial capacity within one year of this petition's approval.

ORDER: The appeal is dismissed.