U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12460488

Date: FEB. 23, 2021

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (L-1A)

The Petitioner, a biometric system manufacturing company, seeks to temporarily employ the Beneficiary as its chief executive officer under the L-1A nonimmigrant classification for intracompany transferees. 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 record did not establish, as required, that the Beneficiary was employed in a managerial or executive capacity abroad or would be employed in a managerial or executive capacity in the United States. On appeal, the Petitioner asserts that the Director did not review the totality of the record, thus the decision was made in error.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.[1] We review the questions in this matter de novo.[2] 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 capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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. The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

The term "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

[1] See Section 291 of the Act; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010).
[2] See Matter of Christo's Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015).

from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The issue we will address in this matter is whether the Petitioner established that the Beneficiary would be employed in an executive capacity in the United States. The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. Therefore, we restrict our analysis to the Beneficiary's employment in an executive capacity for the U.S. office.

Based on the definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. Champion World, Inc. v. INS, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, 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); Champion World, 940 F.2d 1533.

When examining the executive capacity of a given beneficiary, we review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in an executive or managerial capacity. See 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a 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. Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business, its staffing levels, and its organizational structure.

The Petitioner was established in the United States in 2016 to market and sell its biometric access control systems in the United States. The company's organizational chart reflects that the U.S. office is staffed with a business development director, two U.S. salespersons, an ambiguous number of sales support employees,[3] and a marketing and communication person.[4] The Petitioner's Korean branch office was formally established in December 2017. It is staffed with "experienced engineers" and divisions which include development and procurement, business development and IR [investment relations], planning, marketing operations, and corporate resources management. In a September 26, 2019 executives meeting at the Korean branch office regarding a 2020 organizational change, the Beneficiary noted the "current US performance is poor" and indicated his desire to move to the U.S. to "work with U.S staffs [sic] and have a good communication with Korea."

[3] The organizational chart names one individual in this role and then adds "2 staff" under the individual's name. It is not clear if the Petitioner claims to employ two or three individuals in this role.

[4] The record does not include corroborating evidence that these individuals were employed when the petition was filed in January 2020. Although the record includes the Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2019, this document reflects the employment of five individuals. The record does not include the names of the individuals employed in the third quarter of 2019, and further does not include additional quarterly reports more relevant to the time period the petition was filed.

In support of the organizational change, the Petitioner filed this petition on behalf of the Beneficiary on January 22, 2020. In support of the petition, the Petitioner submitted a broad overview of the Beneficiary's proposed duties in the U.S. position as follows:

- ∑ Preside over weekly sales meeting 35%
  - Determine Sales standard policy
  - Review Sales progress by [redacted], [redacted], and [redacted]
  - Determine terms and conditions on contracts and price
- ∑ Monitor and Control sales plan 15%
  - Review monthly and annual sales plan prepared by [redacted]
  - Review and Monitor budget and expense prepared by [redacted]
  - Approve Sales projects
- ∑ Determine and Participate [in] Marketing activity plan 30%
  - Review Exhibition plan prepared by [redacted]
  - Review Promotional material prepared by [redacted]
  - Review and Approve Marketing budget and expense
  - Participate in Exhibitions and Interview with various media
- ∑ Monitor and Control operation 20%
  - Review and Monitor weekly sales and operation reports prepared by Korea branch
  - Have authority to evaluate and to hire or fire employees
  - Determine salaries

The Petitioner noted in response to the Director's request for evidence (RFE), that the Beneficiary would make decisions regarding managing resources of the company, including securing funds and redistributing job duties, and would be more active in business development supporting the U.S. employees so that they could focus on field business development and sales activities in the United States. The Petitioner also changed the allocation of the Beneficiary's time and focus of his duties as follows (verbatim):

> The percentage of his duties will be 10% supervising subordinates, including hiring employees in the USA, 40% focusing on sales & marketing of products, 20% raising investment to expand business, 10% Business Development and Operation with change of the organizational structure, and 10% Other managing the organization or reporting to the Board of Directors as well.

This allocation of the Beneficiary's time totals 90%. The Petitioner does not account for the Beneficiary's responsibilities for the other 10% of time. Moreover, the Petitioner revises the duties by adding that the Beneficiary will spend 10 percent of time supervising subordinates and 20 percent raising investments to expand the business. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. See Matter of Michelin Tire Corp., I7 I&N Dec. 248, 249 (Reg'I Comm'r I978). If significant changes are made to the initial

request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description.

Further, both of the Beneficiary's duty descriptions are nonspecific and provide little insight into his actual day-to-day tasks. In fact, the Beneficiary's duty description includes no specific references to its type of business or credible examples of his activities. The descriptions are repetitive, and the Petitioner does not detail and sufficiently distinguish tasks related to reviewing sales progress of the sales team and reviewing the monthly and annual sales plan or determining terms and conditions on contracts and price and reviewing a budget and expenses. The Petitioner claims that the Beneficiary would be involved in U.S. sales and marketing, would participate in exhibitions, and would raise investment funds, but these overly broad tasks are insufficiently described and do not establish the need for or the extent of the Beneficiary's daily involvement in the U.S. business operations in an executive capacity. The perfunctory descriptions, without more, suggest that the Beneficiary will be performing primarily operational tasks to increase sales and expand the business.

It is also notable that the Petitioner provided little detail or documentation with respect to the current state of the U.S. office or how the Beneficiary would increase sales, develop the business, or otherwise manage the U.S. office resources. Although the Beneficiary may review and approve sales plans and projects, budgets and expenses, and review an exhibition plan and promotional material as well as the marketing budget and expense, these responsibilities do not include the necessary detail to credibly convey his role within the business. Additionally, other than noting that a portion of the Beneficiary's 35 percent of time spent presiding over weekly sales meetings would include determining sales standards, the Petitioner does not expand on what goals or policies he would establish. 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 also states that upon the Beneficiary's move to the U.S. office, he "will focus more on business development to boost sales" and will reorganize the U.S. staff, reducing the current business development director's role to supervising two salespersons and having responsibility for east coast sales and other operational tasks. The record also includes brief descriptions of the claimed U.S. employees' positions however, the descriptions are vague and insufficient to conclude that the subordinates perform duties other than operational tasks related to sales and marketing. Moreover, although the Petitioner claims on the Form I-129, Petition for a Nonimmigrant, that the U.S. office employs six individuals, the Petitioner does not include evidence corroborating the employment of these individuals when the petition was filed.

While there is no required number of employees within a business to establish that a beneficiary acts in an executive capacity, a close analysis of the Petitioner's staffing levels shows that the Beneficiary would not primarily focus on directing the management of the U.S. operation. Rather the description of his duties shows he would focus on the day-to-day sales, marketing, and business development of the business. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the

organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial or executive employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." Id. In this matter, the record does not demonstrate that the U.S. business is sufficiently complex so that the Beneficiary's duties would primarily encompass executive-level tasks, rather than his routine participation in the day-to-day operational tasks of the business.

On appeal, the Petitioner asserts that the Director did not consider the documentation submitted which supports the Beneficiary's executive capacity. However, the documentation submitted refers to his activities as chief executive officer at the Petitioner's foreign branch. The Petitioner does not explain how this documentation demonstrates what duties the Beneficiary would perform on behalf of the U.S. office. Further, although the Petitioner indicates that an unspecified portion of 20 percent of the Beneficiary's time at the U.S. office spent monitoring and controlling operations would include reviewing and monitoring the Korean branch's weekly sales and operations reports, the Petitioner does not otherwise refer to the Beneficiary's daily business activities as involving the operations of the Korean branch.[5] Here, the record is too meager to ascertain or analyze the Beneficiary's role within the organization as a whole and more specifically demonstrate that he would devote his time primarily to executive-level tasks for the U.S. office under an approved petition.

Even though a beneficiary holds a senior position within an organization, the fact that they will manage or direct 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" managerial or executive in nature. Id. 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; however, the record is insufficient to demonstrate that the Beneficiary would act in an elevated position within a complex organizational hierarchy and that he would be primarily tasked with directing the management of the organization and establishing the goals and policies of the organization. Reviewing the totality of the record regarding the Petitioner's U.S. office, including the inconsistent time allocation and descriptions, it is not possible to conclude that the Beneficiary's role at the U.S. office would be primarily executive in nature.

For the foregoing reasons, the Petitioner has not established that the Beneficiary would act in an executive capacity in the United States under an approved petition.

[5] The record does not include sufficient detail or evidence demonstrating that the Beneficiary will be involved in directing the management of the foreign branch of the Petitioner while he is based in the United States.

III. CONCLUSION

The appeal will be dismissed as the Petitioner has not established it is more likely than not that the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity. Since this identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its arguments regarding whether the Beneficiary acted in an executive capacity in his position abroad. 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).

ORDER: The appeal is dismissed.