U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 12715111

Date: FEB. 25, 2021

Appeal of California Service Center Decision

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

The Petitioner, a company engaged in the sales of African/Shona sculpture, and installation and landscaping, seeks to continue the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A classification for nonimmigrant intracompany transferees.[1] 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 record did not establish, as required, that the new office developed to an extent that it was able to support a managerial and executive position.

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, we will dismiss the appeal because the Petitioner did not establish the Beneficiary's position in the U.S. is in a managerial or executive capacity.

## 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 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period January 23, 2019 until January 22, 2020. A "new office" is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary 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 one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(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. 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.

When examining the executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *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.

### A. Duties

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.

The Petitioner has provided few details and little supporting evidence to support that the Beneficiary would likely be primarily engaged in executive-level tasks. Whether a beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(B) of the Act. Here, the Petitioner does not sufficiently document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including several administrative or operational tasks. For this reason, we cannot determine whether the Beneficiary would primarily perform the duties of an executive under an approved petition. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

At the time of filing, the Petitioner claimed to have 3 employees and $230,000 in gross earnings. The Petitioner explained that it imports "quality and collectible pieces of art from Zimbabwe to the United States of America, encompassing oil paintings, pencil sketches, water-colors and photographic and giclee prints and in particular Shona Sculpture."

In response to the request for evidence, the Beneficiary explained that he performs in an executive capacity and stated that he spends 30 percent of his time on strategic operations and planning actions and is responsible for "approval of all strategic organizational documents, conceive and implement the firm's strategy and mission, develop business partnerships, prepare and implement company-wise policies, and hire (or terminate) various executive consultants and management consultants." The Beneficiary's duties include several general duties that can be performed for any company, and the Petitioner does not explain the business strategies and methodologies the Petitioner will develop, or the objectives and goals of the company, or the impact of the business partnerships. 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).

In addition, several of the duties appear to be non-qualifying operational duties such as the 10 percent of time the Beneficiary will spend on strategic marketing actions. For example, the Beneficiary decided to "transition from a web portal presence to an e-commerce website with social media presence and point of sale capability." He will also spend 20 percent of his time on strategic logistics and operations actions such as "improve the quantity, style and stone for purchase and shipment from our Zimbabwe affiliate" and "review the annual projections, costs and materials, conversion variances, and costs of personnel, shipment and other expenses, and develop pricing policies for our products." The Beneficiary will also "prepare the master budget for the company," make "some short-term decisions about purchases and expenditures;" and "review the shipping and warehouse policies." The Beneficiary also stated that he is responsible for strategic human resources action as the "sole authority to approve [the Petitioner's] human resource policies;" and will "field highly trained professional staff" and "oversee the training of my senior marketing staff." Many of these duties involve the day to day operations of running a business such as research, marketing, client relations, customer service, and employee development and training. In addition, the Petitioner does not sufficiently explain the role of the staff to determine if they will relieve the Beneficiary from performing the operational duties.

Without more information, it appears that the Beneficiary will perform several operational duties and will not perform duties that are primarily executive in nature.

The Petitioner also submitted a list of "2020 executive duties" that are general in nature and include several non-qualifying administrative and operational duties. For example, the Beneficiary will "identify and approve promotional and marketing channels;" "review sales analyses to identify, prioritize and approve the most successful sales outlets;" "develop distribution policy to ensure timely shipments to customer;" "identify and resolve corporate systemic issues;" "randomly inspect employee product handling to ensure high product quality standards are maintained;" "conduct annual employee performance reviews with primary staff;" "hire and mentor primary staff;" "create sculpture Garden Landscaping Sales Segment;" and "key person responsibility." The Petitioner did not explain with sufficient detail how the Beneficiary will perform these tasks. Further, the tasks require budgeting, client relations, human resources, and shipping tasks that appear to be operational and not executive in nature. Without further information regarding the specific tasks, it is difficult to conclude that the Beneficiary is acting primarily in an executive capacity.

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." Section 101(a)(44)(B) of the Act. The Petitioner stated that the Beneficiary will be the "key person" for the Petitioner. However, this vague phrase does not explain the actual underlying tasks that the Beneficiary would carry out on a daily basis. Aside from establishing that the Beneficiary has discretion over operational and policy matters, it is unclear precisely what the Beneficiary would be doing.

Although the Beneficiary holds a senior position within the organization, the fact that he 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" 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 position descriptions alone are insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we take 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.

As noted, the Petitioner claims the Beneficiary would act in an executive capacity in the United States. 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 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 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.*

At the time of filing the instant petition, the Petitioner submitted an organizational chart of the U.S. entity that indicated the Beneficiary would supervise a personal assistant, a chief financial officer/human resources, e-commerce, exhibition and events coordinator, administrator, and six part-time operations support staff. The organizational chart also lists legal advisors, business advisors, an accounting firm and "external contractors." The organization chart also listed two positions that are vacant which are marketing director and operations manager. In response to the RFE, the Petitioner provided an updated organizational chart that indicated the U.S. entity employed two consultants, two permanent employees and two part-time employees. The permanent employees are the Beneficiary, the CFO/HR Director, and the marketing director who is "in progress" and "doing a trial period." The two part-time employees are an exhibition director/CEO's administrative assistant and the administrator.

Regarding the two business advisors listed in the organizational chart, the Petitioner submitted two documents entitled, "Business Advisor's Agreement," between the Petitioner and two different advisors. Both agreements list general duties to be provided by the advisor such as "examine the current activities of business of the organization; monitor local businesses and establish methods for future development; provide appropriate advice related to the techniques which will help in the improvement of the organization, making it more generative and eminent." The agreements stated that the Petitioner will pay an initial retainer of $2000 and "the parties agree that further compensation will be paid when [the Petitioner] becomes profitable, at which time compensation will be paid at a rate of $200 per hour." Thus, it is not clear if these consultants are currently providing services to the Petitioner and it has not presented evidence to clearly identify the services they provide. The Petitioner has also not explained how the services of the contracted employees relieve the Beneficiary from performing non-qualifying duties related to running the business. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner also submitted an unsigned offer of employment for the administrator position that listed the duties as "handling external or internal communication or management systems; organizing, arranging and coordinating meeting; create and update records and database with personnel, financial and other data; keep track of inventory; maintain the bank account; payments to relevant parties; and other duties that the CFO may require." The offer also stated that the compensation "will be $200 per month." In addition, the Petitioner submitted a few invoices from the exhibition director/CEO's administrative assistant but did not clearly indicate the works performed and the amount of time she is working for the Petitioner. The Petitioner stated these positions were part-time but did not indicate how many hours per month these employees are providing services for the Petitioner.

Furthermore, upon review of the Petitioner's income statement as of December 31, 2019, it stated that $24,138 was paid in salaries and wages for that year, and consulting fees were paid. Thus, it is not clear how the Petitioner has two full-time employees, two part-time employees, and consultants when only $24,138 was spent in salaries and wages for the year. The Petitioner does not provide sufficient evidence to explain these inconsistencies.

On appeal, the Petitioner asserts that the Director did not consider the reasonable needs of the organization. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the Beneficiary from primarily performing operational and administrative tasks, the Petitioner is ineligible by regulation for an extension. In the instant matter, the Petitioner has not reached the point that it can employ the Beneficiary in a predominantly executive position.

Taking into account the inconsistent evidence regarding the Petitioner's employees, and the general and brief job descriptions for each position, it is not clear how the employees will relieve the Beneficiary from performing administrative and operational duties rather than primarily performing executive duties.

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

## III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.