U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12486634

Date: FEB. 25, 2021

Appeal of California Service Center Decision

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

The Petitioner, a wholesaler of window film products, seeks to temporarily employ the Beneficiary in the United States as its CEO/President 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 the record did not establish that (1) the Beneficiary's employment abroad was in a managerial or executive capacity; and (2) the Beneficiary would be employed in a managerial or executive capacity in the United States. On appeal, the Petitioner contends it has provided sufficient evidence to overcome the Director's concerns.

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. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's arguments regarding whether the Beneficiary's position abroad was in a managerial or executive capacity. *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, 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue we will address is whether the Petitioner established that the Beneficiary would be employed in a managerial or 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 whether the Beneficiary would be employed in an executive capacity.

"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 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 capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

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 explained that it "specializes in the marketing and sale of window films providing sun protection." The Petitioner also stated that the Beneficiary has been serving as CEO/President for the foreign company and is coming to the United States to perform the same executive duties. In addition, the Beneficiary is coming to the U.S. to "expand [the Petitioner's] sales organization by creating jobs." The Petitioner provided the duties to be performed by the Beneficiary as follows:

- Management – 15%

  Establish policies on all business operations, communicate with managing employees in real time by making management decisions on potential issues and strategic areas through reports and communication

  Weekly business reports: Analyze and feedback the reported sales status, marketing status, inventory status, etc. per week.

  Monthly management meetings: Thoroughly analyze the financial status, secure financial soundness, and check the status of all long-term and short-term goals setting and achievement feedback through data analysis.

- Business Management – 25%

  HR/General Affairs: Make an optimized organizational structure to realize the highest productivity in operations, sales, and services; Have the final say in hiring/dismiss personnel; Supervise and manage the overall personnel recruitment procedures by anticipating the company's goals, current human resources, and future businesses.

  Funding management, including taxing and accounting: Have the final say in checking the status of the funds and in paying the funds, and actively seek to attract investment.

  Logistics: Feedback on the feasibility by reviewing the status of logistics.

- Sales Management – 35%

  1. Reassess the value of each product (tinter position - customer position) and reestablishment of the product portfolio accordingly – Review the price and functions comprehensively (it is necessary to review in conjunction with the manufacturer).
  2. Establish response measures after analyzing and evaluating new brands and manufacturers' products – Likely to link with product strategies (price, product portfolio, service, etc.).
  3. Define customer experience and make field improvements – Likely to link with agency policy.
  4. Establish measures to enhance the brand loyalty of dealerships (refer to U.S. headquarters agency policy, point system, treatment of excellent customers, etc.).
  5. Push ahead with Sales and Marketing Meetings (Marketing Team consults on the meeting agenda with the Sales Team to proceed with the meeting plan/ This meeting is based on the operation of the working group without management).

- Marketing – 20%

  1. Set the marketing goals.
  2. Establish, plan and manage the marketing strategies.

3. Review and manage the marketing strategy.
4. Marketing department's KPI setup and management.
5. Marketing budgeting and management.
6. Tracking KPI Performance with Regular Reports.
7. Promote effective collaboration with marketing, sales and development teams.
8. Marketing planning and strategy establishment through data-based reports.
9. Analyze marketing strategy and suggest improvement plan through data driven analysis.

- Other – 5%
  Use the open door policies which can create an effective working environment. Create the environment in which the free communication is possible with employees.

In response to the Director's request for evidence (RFE), the Petitioner provided an updated job description for the Beneficiary that is similar but provided a different percentage breakdown of the duties. For example, the initial job description stated the following duties and percentages of time spent on each duty: Management (15%); Business Management (25%); Sales Management (35%); Marketing (20%); and, Other (5%). However, in response to the RFE, the Petitioner indicated the following duties and the new percentages of time as: Business Management (30%); Sales Management (15%); Marketing (15%); and, Other (10%). The Petitioner did not explain these changes in the job description. 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, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Further, the Petitioner provided few details and little supporting evidence to support that the Beneficiary would likely be primarily engaged in executive-level tasks. Whether the 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).

The Petitioner submitted duty descriptions for the Beneficiary that do not credibly demonstrate that he would primarily perform executive tasks. The Beneficiary's duties include several general duties that can be performed for any company such as establish policies on all business operations, communicate with managing employees in real time by making management decisions on potential issues and strategic areas through reports and communication; make an optimized organizational structure to realize the highest productivity in operations, sales, and services; and use the open door policies which can create an effective working environment. 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 organizational structure and the strategies for an effective working environment. 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 are non-qualifying operational duties such as the Beneficiary will thoroughly analyze the financial status, secure financial soundness, and check the status of all long-term and short-term goals setting and achievement feedback through data analysis. It is not clear the Beneficiary's role in checking the status of long-term and short-term goals and whether those duties are more operational rather than executive in nature. In addition, the Beneficiary will supervise and manage the overall personnel recruitment procedures by anticipating the company's goals, current human resources, and future businesses. It appears that these duties are human resources tasks. The Beneficiary will also reassess the value of each product; define customer experience and make field improvements, establish, plan and manage the marketing strategies. The marketing budgeting and management and marketing planning and strategy all appear to be duties that fall into finance, sales and marketing operational duties. Without more information, it appears that the Beneficiary will perform operational duties that do not rise to an executive nature. 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 adequately explain the role of the staff to allow a determination that 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 prevalence of the non-qualifying duties throughout the Beneficiary's duty description indicates that it is more likely he would be directly engaged in these tasks alongside with the staff rather than primarily delegating these functions.

Even though 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

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 the following positions: sales manager – East coast, sales manager – West coast, sales manager – Midwest, administrator, customer support and operation, operations manager – Midwest, operation manager – West coast, and operation staff – West coast. However, when reviewing the W-2, Wage and Tax Statements for 2018, only four individuals named in the organizational chart received a salary. The Petitioner did not provide W-2 forms for several of the individuals listed in the organizational chart, and did not explain this discrepancy. The Petitioner also submitted several W-2s for individuals not listed in the organizational chart and it is unclear what positions they held for the Petitioner. It is the Petitioner's burden to submit evidence that sufficiently corroborates its claims. Statements made without supporting documentation are of limited probative value and are insufficient to satisfy the Petitioner's burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

In response to the RFE, the Petitioner submitted a new organizational chart with almost all new job titles. 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, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The positions listed in the original organizational chart were as follows: manager director, inside sales account supervisor, two inside sales account managers, two positions in operations, warehouse manager, administrative generalist, and a business administration intern. The Petitioner responded to the RFE and stated that "since the filing of the Petition, there was a change of staff," but the Petitioner did not explain the reason for this change. The Petitioner provided job descriptions that were brief and general providing little insight to the day-to-day work duties. Upon review of the brief job descriptions submitted for each position, the Inside Sales Account Supervisor and the Inside Sales Account Manager have the exact same duties and thus it is hard to understand how one position is a supervisory level if they perform the same duties as the account manager. Also, the two inside sales managers do not supervise any employees so it is unclear why the position is elevated to a management position. The same question arises with the warehouse manager position as that position does not supervise other employees. In addition, the "operations" employee and the "warehouse manager" will handle receiving, shipping, loading, and storing products

so it appears that they are performing the operational duties rather than managing subordinates who perform the operational duties.

The Petitioner submitted a portion of the Quarterly Contribution Return and Report of Wages from the Employment Development Department from the State of California. The submitted page showed the employee information for the quarter ending on September 30, 2019, and it stated that the Petitioner employed two individuals in the first, second, and third month of that quarter. According to the new organizational chart, these two individuals hold the position of warehouse manager and operations. It is not clear why this document did not include the additional employees listed in the organizational chart. In addition, the Petitioner did not provide any evidence documenting that the additional employees listed in the organizational chart were in fact employed by the Petitioner.

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.