U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10795820

Date: JAN. 14, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, a food importer and distributor, seeks to continue the Beneficiary's temporary employment as its managing director and chief executive officer (CEO) under the L-1A classification for nonimmigrant intracompany transferees who are coming to be employed in the United States in a managerial or executive capacity. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. The matter is now before us on appeal.

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.

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, or in a position requiring specialized knowledge 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)(1). 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. 8 C.F.R. § 214.2(l)(3)(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 does not claim that the Beneficiary would be employed in a managerial capacity in the United States.

"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.

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.

A. Job Duties

The Petitioner states that its foreign affiliate, [redacted], in Argentina, manufactures and distributes [redacted] derived products such as [redacted], [redacted], fresh and dried [redacted], and [redacted] products. It states that [redacted]. exports its products to the United States, and that the Petitioner handles the promotion, distribution, and sales in the American market. At the time of filing the extension petition in September 2019, the Petitioner indicated that the Beneficiary will continue to perform the following duties as managing director and CEO:

- Develop a distribution system for the foreign entity's products in the United States;
- Negotiate and enter into contracts with regional local distributors;
- Oversee maintenance of product quality throughout the distribution chain;
- Direct the adaptation of the foreign entity's products to the U.S. market, ensure contract compliance, and oversee all legal and regulatory compliance;
- Monitor the market and sales and make decisions regarding expansion into further regional markets;
- Determine the need for personnel and establish a personnel management structure;
- Handle budget and budget projections;
- Closely coordinate with the management of the foreign entity on such matters as product and labeling adaptation to the U.S. market, determining budget requirements, and calculating cost projections.

In a request for evidence (RFE), the Director advised the Petitioner that the submitted job description was insufficient. The Director's RFE appropriately emphasized the need for additional details about the Beneficiary's typical duties, as well as information regarding the amount of time he allocates to specific tasks.

In its response to the RFE, the Petitioner stated the Beneficiary's duties in the United States and percentage of time devoted to these duties as follows:

- Determine what services are needed for importation of food products and negotiate contracts for services to the Petitioner for import, customs, warehousing, transport services, and distribution in the United States (25% of time);

- Coordinate with General Manager of the foreign affiliate for the modifications required in the production of food products for export to the United States; request and evaluate data, analysis results, information and reports from relevant departments of the foreign entity regarding raw materials and food production processes and conditions as required by U.S. authorities for import approval; assure factory compliance with U.S. legal requirements for packaging health and safety of food products; and coordinate with the foreign entity's departments and direct modifications in the area of administration, invoicing, record keeping, financial records for the needs of the Petitioner (50% of time);

- Assess U.S. market trends in the company's sector of the food industry and, in coordination with the foreign entity's general manager, determine what new products in U.S. demand are within the company's capability and advantage to produce; assess costs and budgets with the assistance of the foreign entity's tax and finance personnel (10% of time);

- Direct foreign entity's marketing personnel in designing and implementing publicity campaigns in the press, social media and commercial networks for the U.S. market (10% of time); and

- Prepare progress reports to the foreign entity's board of directors with budgets (5% of time).

In the denial decision, the Director determined that the list of duties did not support a claim that the Beneficiary's actual duties would be primarily executive in nature and that his subordinates relieve him from non-qualifying duties. He stated that the job description was overly broad and recited vague job responsibilities, without providing any specific examples or any insight into the nature of his daily tasks within the context of the Petitioner's business activities. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). For example, the Director determined that the record is unclear regarding the types of services the Beneficiary develops, the goals and policies he sets, the contracts that he negotiates, and what is involved in the overall progress of the overseas staff that he purportedly manages. Additionally, the Director concluded that the record does not indicate how the Beneficiary maintains relationships with clients and vendors, nor does it explain how this task is an executive-level duty.

On appeal, the Petitioner asserts that the Director failed to consider the evidence submitted showing that the Beneficiary will continue to perform as an executive with the Petitioner. Although the Petitioner asserts on appeal that it would submit a brief and/or additional evidence within 30 days, we have not received a brief or additional evidence from the Beneficiary nearly one year after the appeal

was filed. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). It has not done so here. The Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's activities in the course of his daily routine, despite the fact that he has already held the offered position in the United States since 2015 and information regarding his typical duties should be readily available.[1]

Also, the new job description provided in response to the RFE is inconsistent with the original list of the Beneficiary's duties. For example, his initial job description states that he would oversee maintenance of product quality throughout the distribution chain. However, the later description does not mention his oversight of product quality. Further, the initial job description states that he would make decisions regarding expansion into further regional markets, but the later description does not reference expansion into additional markets. Also, the initial job description states that he would determine the need for personnel and establish a personnel management structure, yet the later description does not indicate that he would have these personnel responsibilities. In addition, the later job description states that he will direct marketing personnel in designing and implementing publicity campaigns in the press, social media and commercial networks for the U.S. market, yet the initial job description does not mention oversight of any marketing responsibilities.

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* 8 C.F.R. § 103.2(b)(1). 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 altered many of the duties of the initial job description. The fact that the Beneficiary serves as the Petitioner's managing director and CEO does not necessarily establish that he would be employed 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.* Thus, while the Beneficiary may manage or direct the business, the Petitioner has not met its burden to establish that his actual duties would be primarily executive in nature.

As noted, we also must consider the submitted position descriptions within the context of the Petitioner's business, which requires a review of the nature of the business, its structure, and its staffing levels. For the reasons discussed below, the Petitioner has not established that the foreign entity's staff in place at the time of filing were able to support the Beneficiary in a position in which he would be required to perform primarily executive-level duties.

[1] We note that in response to the RFE, the Petitioner submitted quotes from [redacted] for warehousing of frozen [redacted] However, the record does not indicate that any of the foreign entity's food items have been imported to the United States. The record contains unsigned "proforma" invoices for various food products to be delivered to customers in New Jersey and New York in 2018, but the record does not demonstrate that those items were ever delivered to the listed customers.

B. Staffing and Organizational Structure

As noted, the Petitioner indicates that it promotes, distributes, and sells [redacted] derived products in the American market. It stated that it had one employee (the Beneficiary) when it filed the extension petition in September 2019. In the RFE, the Director requested the Petitioner to submit its organizational chart, payroll records, and quarterly wage reports, as the record was unclear who was employed by the organization. In response, the Petitioner submitted an organizational chart for the foreign entity identifying the Beneficiary with one direct subordinate, and listing several other employees below the Beneficiary's direct subordinate in the organizational hierarchy. It also listed the duties of several of the individuals on the chart. It stated that the Beneficiary would continue to oversee the foreign entity's employees from the United States and that the foreign employees would support his efforts in the U.S. However, the Petitioner did not submit an organizational chart for the U.S. entity. Further, it did not submit its payroll records or quarterly wage reports as requested by the RFE. 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In the denial decision, the Director concluded that the summary job descriptions provided for the foreign subordinates were broad and vague and do not sufficiently detail how they relieve the Beneficiary from non-executive duties necessary for the day-to-day operations of the U.S. company. He stated that the record does not provide sufficient evidence to demonstrate operational or administrative support to the Beneficiary on a daily basis. He noted that although the Petitioner indicates that it had the necessary lower-level staff at the time of filing to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove him from significant involvement in the day-to-day operations of the Petitioner, the record does not sufficiently support that claim.

On appeal, the Petitioner asserts that the Director erred in failing to consider the case *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), for the principle that the U.S. entity's executive may rely on the foreign company's staff for the support services necessary for the executive to perform his executive function. We will consider a beneficiary's control over employees abroad under some circumstances. *Matter of Z-A-, Inc.* concerned a company with "staff members within the parent company's headquarters office in Japan [who] exclusively support the Beneficiary's work." *Id.* at 2. Those foreign employees were effectively the Beneficiary's subordinates because they provided services to the petitioning U.S. company. The Petitioner has not shown that similar circumstances apply in the present case. The foreign company was already actively engaged in manufacturing and distribution before it had a U.S. affiliate. The Petitioner has not shown that there is significant interaction between the U.S. and foreign entities beyond the Beneficiary's continued involvement with both companies. The relationship does not appear to be two components of an integrated whole. A beneficiary cannot qualify as an intracompany executive simply by being physically present in the United States while maintaining control over a business abroad. The mere presence of an agent or office does not constitute doing business. *See* 8 C.F.R. § 214.2(1)(1)(ii)(H).[2] Further, the petitioner

[2] The Petitioner has not established that it is a qualifying organization. The regulations define a qualifying organization

in *Matter of Z-A-, Inc.* had two employees in the United States to accomplish non-managerial duties, and it had revenues of nearly $600,000 in the previous eight months. Conversely, the record here demonstrates that the Petitioner has no employees other than the Beneficiary in the United States to accomplish non-executive duties, and the record contains no evidence of revenues earned by the Petitioner.[3]

The statutory definition of the term "executive capacity" focuses on a person's elevated position. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will "direct the management" of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the organization, major component, or function as an owner or sole managerial employee. Based on the foregoing, we cannot determine how much time the Beneficiary devotes to directing the management and establishing the goals and policies of the company, what duties he performs, or the extent to which the foreign entity's staff relieves the Beneficiary from engaging in non-executive duties. Thus, the Petitioner has not met its burden to establish that it would employ the Beneficiary in an executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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as one doing business as an employer in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). "Doing business" is defined as the regular, systematic, and continuous provision of goods or services. 8 C.F.R. § 214.2(l)(14)(ii)(A) and 8 C.F.R. § 214.2(l)(1)(ii)(H). In any future proceedings, the Petitioner must establish that it is doing business as an employer in the United States.

[3] On the petition, the Petitioner left blank the boxes at Part 5 requesting its gross annual income and net annual income. The record contains the Petitioner's bank statements from April 2018 to April 2019, and most months, it showed $0 in deposits and credits, indicating that it had no revenue from promoting, distributing, or selling the foreign entity's products.