U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12485957

Date: JAN. 14, 2021

Appeal of California Service Center Decision

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

The Petitioner, a motel, seeks to temporarily employ the Beneficiary in the United States as its president, director 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 Petitioner was doing business as defined by the regulations; 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 demonstrate that the Petitioner is doing business and that the Beneficiary would act primarily in an executive capacity in the United States.

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 the whether the U.S. Petitioner is doing business. *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 provided the following duties to be performed by the Beneficiary as follows:

> The duties of the Sole Director of the Board of Directors are as follows:
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> 1. [The Beneficiary] spends approximately 30% of his work time on the following tasks:
>   a. Establish [the Petitioner's] goals, policies and procedures;
>   b. Analyze business forecasts and sets company budgets accordingly;
>   c. Anticipates the company's future needs;

d. Establishes and maintains security for the safety of the hotel's employee and customers; and
e. Reviews and improves employment policies, including benefits.

2. [The Beneficiary] spends approximately 30% of his work time on the following tasks:
   a. Developing strategies for expanding the hotel's market;
   b. Determining room rates for each season;
   c. Restructuring the management and other personnel positions;
   d. Studies hotel upgrade feasibility and costs for guest rooms and other facilities;
   e. Monitors the upgrade process as the hotel upgrades its guest rooms and adds other facilities;
   f. Evaluates the advantages and drawbacks of joining the hotel franchise group; and
   g. Determines the hotel's future business directions in general.

The duties [the Beneficiary] has as the President of [the Petitioner] are as follows:

1. He spends approximately 20% of his work time on the following tasks
   a. Supervising and overseeing the hotel's upgrade project and its progress;
   b. Engaging consultants, accountants, attorneys and other professional services he deems necessary for the company's business;
   c. Hires and terminates employees based on their performance;
   d. Reviews employee performance for adjustment of salary;
   e. Represents [the Petitioner] for necessary supplies, building maintenance and repairs.

2. He spends approximately 20% of his time overseeing the day to day operation of the Hotel including the following tasks:
   a. Determining and defining employee job descriptions and duties;
   b. Supervising the general manager and other front desk employees;
   c. Enforcing the security rules and policies for the safety of hotel staff and customers;
   d. Administers rules and policies for employee benefits and vacations; and
   e. Implements company business policies at large.

In response to the Director's request for evidence, the Petitioner explained that the hotel is undergoing a major renovation and it closed in July 2019 in order to complete the renovations. In addition, the Petitioner stated that the Beneficiary's duties have "changed a bit because the engineer hired to oversee the renovation has become ill and is unable to fully participate in the work, so [the Beneficiary] has taken a more active role in the supervision of the renovation, taking a greater percentage of his time." The Petitioner also explained that this change "resulted in a shift away from staffing duties, which will arise again at the conclusion of the renovation as the hotel business gets going again." Thus, the Beneficiary will only supervise the general manager until the hotel re-opens.

In response to the RFE, the Petitioner provided a more detailed breakdown of the main duties to be performed by the Beneficiary. For the sake of brevity, we will not quote the most recent version; however, we note that we have closely reviewed and considered the duties. The Petitioner stated that the "vast majority of these duties are executive in nature, involving financial and market analysis, setting policies, procedures and/or goals, negotiating contracts and directing the management of the hotel through delegation to lower level employees."

Although the duties appear to be similar from the initial job description to the response to the RFE, the Beneficiary's directive has drastically changed. For example, when the petition was filed, the Beneficiary oversaw running a hotel and supervising hotel employees but in response to the RFE, the hotel is no longer in operation and it is undergoing a large renovation. At that point, the Beneficiary is now in charge of supervising the renovation and is no longer operating a hotel. 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 has 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 the Petitioner's business goals, policies, and procedures; developing strategies for expanding the hotel's market; hires and terminates employees based on their performance; and, determine and define employee job descriptions and duties and supervise the General Manager. 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 determining room rates for each season; studies hotel upgrade feasibility and costs for guest rooms and other facilities; monitors the upgrade process as the hotel upgrades its guest rooms and adds other facilities. These duties involve the day to day operations of front desk activities including bookings, processing upgrades and the release of guest rooms. Further, the Beneficiary's non-qualifying operational duties are that he will visit and research hotels in the surrounding area to determine market conditions; he

utilizes his experience managing a factory in China to look at market conditions and analyze forecasts and budgets supplied by the General Manager; analyzes the surrounding available resources, in particular looking at future events in the area such as conferences, sports events to determine the needs to the hotel renovation and future plans; conducting field research to understand the advantages and disadvantages of surrounding competitors; and, analyze market conditions to determine the appropriate rates based on the time of year, events occurring in the area. All these duties appear to be marketing and sales duties, and the Beneficiary will not supervise any marketing or sales departments. The lack of subordinate employees involved in marketing and sales brings into question how much time the Beneficiary can actually devote to executive duties.

Furthermore, the Petitioner stated that the Beneficiary will spend approximately 20 percent of his time overseeing the day to day operation of the Hotel including supervision of other front desk employees; enforcing the security rules and policies for the safety of hotel staff and customers; and, administers rules and policies for employee benefits and vacations. It appears that these operations duties deal with security operations and human resources operations which are operational duties and not primarily executive in nature.

The duties are also focused on the renovation of the hotel and it appears that the Beneficiary will act like a project manager for the renovation. He will spend more than 30 percent of his time "supervising and overseeing the hotel's upgrade and renovation and its progress." Further, several of the job duties involve hiring employees, developing employment policies, maintain security for employees, hire and terminate employees, review employee performance. However, since the hotel is closed for renovations, it currently employs only the general manager and it does not appear that the Beneficiary will actually perform these stated duties without the hotel employees. In addition, these tasks involve the human resources operations of the Petitioner and are not 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 general manager rather than primarily delegating these functions.

Finally, the Petitioner submitted a signed franchise agreement between the Petitioner and [redacted] The Petitioner did not submit sufficient information regarding the Beneficiary's role with the hotel when it operations as a franchise when the hotel re-opens. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.*
The Petitioner submitted an organizational chart reflecting that the Beneficiary would supervise a general manager, who in turn supervises a housekeeper, a maintenance employee, a secretary, and a warehouse manager. The Petitioner did not explain why a hotel would need a warehouse manager. Further, in response to the RFE, the Petitioner explained that the hotel was closed since it was undergoing a major renovation, and the only current employees are the Beneficiary and the general manager. As noted above, since the Beneficiary and the general manager are the only two employees, it appears that the Beneficiary would be performing several non-qualifying tasks such as managing the renovation, creating budgets for the renovation, negotiating contracts, sales and marketing duties, and human resources duties.

Furthermore, the Petitioner did not provide a detailed description of the duties to be performed by the general manager. It is not clear how the general manager would relieve the Beneficiary from performing the day-to-day operational duties. In addition, since the only other employee is the general manager, it is reasonable to conclude that the general manager was not acting in a supervisory capacity. In light of the other documentary evidence also reflecting that the Beneficiary was performing various other non-qualifying operational tasks for the Petitioner, it is likely that he would have been engaged as a first line supervisor of the general manager, rather than as an executive primarily performing higher-level tasks related to goals and policies.

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 a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.