U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-O-, LLC

DATE: JULY 12, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a hardware supplier for retail stores and building contractors, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for 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 Petitioner would employ the Beneficiary in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Director's decision contains legal and factual errors and reflects a failure to carefully review the totality of the evidence. The Petitioner maintains that it has established by a preponderance of the evidence that the Beneficiary would be employed as an executive or manager.

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

[1] The Petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it was seeking a "continuation of previously approved employment without change" but did not have a valid approved petition at the time of filing. See 8 C.F.R. § 214.2(l)(14)(i)(stating that "[a] petition extension may be filed only if the validity of the original petition has not expired"). The Beneficiary was previously authorized to work for the Petitioner in L-1A status from May 2015 until May 2018. In April 2018, the Petitioner filed a petition to extend the Beneficiary's status. The Director of the California Service Center denied that petition in July 2018. The Petitioner filed this new petition in September 2018, but did not disclose the denial of the immediate prior petition. *See* 8 C.F.R. § 214.2(l)(2)(i) (stating that "failure to make a full disclosure of previous petitions may result in a denial of the petition").

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. DEFINITIONS

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The term "executive capacity" is defined as 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.

Based on the definitions of managerial and 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 managerial or 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 at 1533.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in a managerial or executive capacity.

When assessing the managerial or executive nature of an offered position, we examine a petitioner's description of the job's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii) (requiring an L-1 petitioner to submit "a detailed description of the services to be performed"). 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 the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in a business.

A. Staffing and Organizational Structure

At the time of filing, the Petitioner claimed seven employees and submitted an organizational chart showing that the Beneficiary, as president, would directly supervise an office manager and a sales manager. The chart also depicts one sales agent reporting to the sales manager and four employees reporting to the office manager: an administrative assistant, a logistics and purchasing specialist, a warehouse specialist, and a logistics and warehouse specialist. Finally, the chart shows that the Petitioner uses the services of an attorney, a CPA, a payroll services provider, and a broker.

The Petitioner's supporting evidence included copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, and state quarterly wage reports for 2017 and the first two quarters of 2018, as well as monthly payroll statements for the period January 2018 through September 15, 2018.

In November 2018, in response to a request for evidence (RFE), the Petitioner submitted an updated organizational chart, a copy of its Form 941 and state quarterly wage report for the third quarter of 2018, and its payroll summaries for October 2018. At the time it responded to the RFE, the Petitioner indicated that it had eight employees (including the Beneficiary), plus the four external service providers identified on the original organizational chart.[2]

In the denial decision, the Director found that there were inconsistencies between the Petitioner's claimed number of employees and the information reported on its quarterly tax returns. Specifically, the Director noted that, while the Petitioner claimed seven employees at the time of filing and "8 direct workers and 4 contractors" in response to the RFE, the Petitioner reported four employees in each of its Forms 941 for the first three quarters of 2018.

On appeal, the Petitioner explains that some of the staff counted among its direct workers are paid as independent contractors on Form 1099, and therefore are not reported on the Form 941. The Petitioner emphasizes that these individuals are nevertheless part of the Petitioner's staff and were identified as 1099 contractors on the submitted payroll summaries. Therefore, the Petitioner contends that it sufficiently documented its payments to persons named on the organizational charts, and that the Director incorrectly found that there were inconsistencies in the record with respect to the Petitioner's staffing. In support of the appeal, the Petitioner submits "Earnings Records" for all employees and independent contractors for the first 10 months of 2018, as well as copies of 2018 IRS Forms 1099 and W-2 showing year-end earnings for its contract and payroll employees.

Upon review, the Petitioner has resolved the Director's specific concern regarding its staffing levels at the time of filing. However, the evidence submitted on appeal has introduced a new inconsistency. Specifically, we note that each employee's total earnings through October 31, 2018 (as reported on their individual earnings records) exactly matches their year-end 2018 earnings as reported on Form 1099 or Form W-2. As such, the newly submitted evidence reflects that the Petitioner did not pay any employees or contractors for their services in November 2018 or December 2018.

[2] The revised chart indicated that the individual previously identified as the office manager had moved to the sales manager position, while the office manager position was filled by the Petitioner's co-owner. The eighth employee was the Beneficiary, who, subsequent to the filing of this petition, obtained employment authorization based on a pending adjustment of status application.

This apparent reduction in staffing levels while the petition was pending is relevant because the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner emphasizes that the Beneficiary has a "growing staff of managers, who in turn manage sales agents, administrative assistant, warehousing specialists, and purchasing and requisition agents." However, based on the evidence as a whole, it appears that the Petitioner only temporarily expanded its staffing levels.

In June 2018, the Petitioner employed the Beneficiary as president, the administrative assistant (who earned $600), the sales manager (who earned $578), the logistics and warehouse specialist (who was paid by Form 1099 and worked 36 hours during the month), and a sales agent (another 1099 employee, who earned $421.39). The Beneficiary was the Petitioner's only full-time employee, and the record shows that the company operated with a core group of four employees throughout 2017 and most of the first half of 2018. Although the Beneficiary held L-1A status during this time, it is not clear how this structure was sufficient to support him in a managerial or executive position or to relieve him from involvement in the day-to-day operations of the company.

The payroll evidence shows that the Petitioner added the office manager, the warehouse specialist, and the logistics and purchasing specialist as payroll employees in July 2018, while salaries and wages for other staff increased that month.[3] However, as noted above, the evidence submitted on appeal indicates that the Petitioner did not pay these employees, or any employees, after October 2018. Even if we determined that the Petitioner established the ability to support a managerial or executive position at the time of filing, we cannot conclude that it could continue to do so by the time the petition was adjudicated. Nevertheless, we will briefly address the Director's specific findings.

The Director addressed the Petitioner's structure in analyzing whether the Beneficiary, in an executive capacity, would supervise subordinate managers. The Director, determining that the sales manager had only one subordinate[4] and that the office manager had two subordinates, concluded that "these positions are not considered to be acting in [a] managerial capacity." On appeal, the Petitioner emphasizes that the organizational charts submitted at the time of filing and in response to the RFE reflect that the office manager has four subordinates.

The Director's determination that the office manager had only two subordinates appears to be based on the Petitioner's job description for this position, rather than on the organizational chart. The job description submitted at the time of filing stated that the office manager was responsible for supervision of the administrative assistant and the purchasing specialist, but did not mention the other staff reflected as subordinates on the chart.

The Petitioner's claim that the office manager was, at a minimum, acting as a supervisor is noted; however, the earning statement for this employee indicates that she earned $8948 for her services from the time she joined the company in July 2018 through October 2018. The 2018 IRS Form W-2 for

[3] For example, the administrative assistant earned $1800 in each of the first two quarters of 2018 and $5112 in the third quarter.

[4] The Petitioner's payroll records reflect that the sales agent subordinate to the sales manager may have left the company in the first half of October 2018 as he did not receive a paycheck for the second pay period ended on October 31, 2018.

this employee indicates that she earned $8498 for the entire year and therefore did not earn wages after October 2018. Further, the Petitioner indicates that its co-owner assumed the office manager position in October 2018. The record reflects that the new office manager received $300 in wages in October 2018 and no wages during the remainder of the year. Therefore, the Petitioner has not established its ongoing employment of an office manager.

A company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity, and we must also take into account the reasonable needs of the company in light of its purpose and stage of development. *See* section 101(a)(44)(C) of the Act. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Absent evidence that the Petitioner continued to pay employees and/or contractors after October 2018, it is reasonable to believe that the Beneficiary and the Petitioner's co-owner, would share responsibility for all aspects of the day-to-day activities of the company, including routine operational and administrative tasks associated with purchasing, selling, and distributing its products to its customers. The Beneficiary's significant involvement in such tasks would prohibit him from spending his time primarily on managerial or executive duties.

Finally we acknowledge the Petitioner's assertion that the Director failed to consider the Beneficiary's continuing management of subordinate staff abroad. Citing to *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), the Petitioner contends that an L-1A beneficiary "can use his or her staff abroad to qualify as a manager or executive in the United States if such staff support the operations of the U.S. qualifying organization." We note that while the Petitioner has consistently indicated that the Beneficiary will continue to spend 20% of his time overseeing the foreign affiliate's operations, the Petitioner has not explained or documented whether or how the foreign entity's staff support the Petitioner's day-to-day U.S.-based operations from Venezuela. The Petitioner submitted the foreign entity's current organizational chart, but did not provide descriptions of job duties for its employees to corroborate a claim that they regularly assist with the U.S. entity's operations.

The Petitioner has not established that it would have the personnel necessary to support the Beneficiary in an executive or managerial position.

B. Job Duties

Next, we will address the Petitioner's description of the Beneficiary's job duties in his proposed position. *See* 8 C.F.R. § 214.2(l)(3)(ii).
The Petitioner submitted the following description of the Beneficiary's duties at the time of filing:

> Financial Accounting – 25%
> - Review weekly, monthly, quarterly, and annual accounting reports generated by the accounting team
> - Set financial strategies such as policies regarding working capital reserve levels,

approval of budget, approve capital expenditure plans, etc.
- Supervise the accounting team and approve their procedures

Marketing – 3%
- Approve marketing budget and strategies put forth by subordinates

Client Relations – 15%
- Meet with potential and current clients to develop relationships through lunches, networking, etc.
- Enter into contracts with client executives . . . or agree general terms for future sales
- Approve pricing for particular items as suggested by Sales Manager from time to time
- Supervise the Sales Manager

Human Resources – 7%
- Approve hiring or firing of staff, Office Manager provides such recommendations for all operational employees
- Approve salaries and bonuses depending on company performance . . .
- Set vacation policies for all employees

Procurement (product suppliers) – 12%
- Request subordinates to research new products (suppliers and cost) . . .
- Meet with potential and current supplier executives or managers to develop relationships . . .
- Enter into contracts with supplier executives and managers or agree general terms for future purchases

Warehouse Management – 10%
- Oversee budgets and performance reports of warehouse activities
- Review inventory reports
- Approve capital expenditures requested by Office Manager and warehouse team
- Review and approve plant procedures set forth by Office Manager and warehouse team

Logistics – 5%
- Review delivery reports and ensure corrective measures for on time deliveries are continually improved by approving procedures of warehouse team, drivers, and logistics providers
- Approve logistics vendors and their service fees

Management of [the Petitioner's foreign affiliate] – 20%

In the RFE, the Director advised the Petitioner that the submitted description was too generalized and requested a more detailed description as well as information regarding the percentage of time the Beneficiary would allocate to each specific task. The Petitioner submitted the same description of

duties in response to the RFE, with the same percentages assigned to each broad areas of responsibility. Rather than explaining the Beneficiary's specific tasks and the amount of time to be spent on each job duty, the Petitioner explained why it believes that the duties were consistent with the definitions of managerial or executive capacity. The Petitioner noted that many of the duties involve supervising subordinate staff, while others establish that the Beneficiary has the authority to establish the company's policies and goals, to exercise wide latitude in making discretionary decisions, to make personnel decisions, and to be "the face of the organization" in dealing with clients and suppliers.

The position description clearly indicates that the Beneficiary relies on subordinate staff to perform the company's routine day-to-day tasks related to sales, marketing, purchasing, warehousing, logistics, accounting, client relations, human resources, and administrative functions. It is evident that the Petitioner considers the subordinate staff of seven employees to be critical to its claim that the Beneficiary will be employed in a managerial or executive capacity. However, as discussed above, the Petitioner has not established that it would continue to employ workers to perform these operational and administrative duties, and in the absence of such employees, we cannot conclude that the job description accurately reflects the Beneficiary's expected duties under an extended petition.

On appeal, the Petitioner also contends that the Beneficiary's proposed duties are comparable to those typically performed by chief executives according to the U.S. Department of Labor's O*Net Online occupational classification resource. The Petitioner is expected to provide a detailed description of the beneficiary's actual duties within the context of its day-to-day operations and to demonstrate that the duties are reasonable in light of the nature, scope, and purpose of that organization. Accordingly, comparing the Beneficiary's job description to a general listing of job duties within a broad occupational classification does not assist us in understanding what the Beneficiary actually does or whether his actual duties would be primarily managerial or executive in nature. The evidence submitted on appeal indicates that the Beneficiary would continue to perform the same duties described at the time of filing, but also reflects that the company no longer pays any staff as of November 2018. The Petitioner did not submit an explanation to reconcile this incongruity in the record.

The fact that the Beneficiary will manage or direct the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of the statutory definitions. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive in nature. Section 101(A)(44)(A) or (B) of the Act. While 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, these elements alone are not sufficient to establish that his actual duties would be primarily managerial or executive in nature.

For the foregoing reasons, the Petitioner has not established that it would employ the Beneficiary in a managerial or executive capacity.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of I-O-, LLC*, ID# 4113514 (AAO July 12, 2019)