U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8936669

Date: JULY 28, 2020

Appeal of California Service Center Decision

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

The Petitioner, which sells sports-related nutritional supplements, seeks to continue the Beneficiary's temporary employment as its president and chief executive officer (CEO) 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 will employ the Beneficiary in the United States in a managerial or executive capacity.

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. LAW

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).

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from September 14, 2017 to September 13, 2018. 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.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that it seeks to employ the Beneficiary in a managerial capacity. Therefore, we restrict our analysis to the Petitioner will employ the Beneficiary 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.

To be eligible for L-1A nonimmigrant visa classification as an executive, a 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.

A beneficiary's proposed position must meet all four elements of the term's definition. If a petitioner establishes that the offered position meets all elements set forth in the statutory definition, the petitioner must then 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 the beneficiary's duties will be primarily executive, we consider the description of the job duties, the company's organizational structure, the duties of the 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 the business.

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

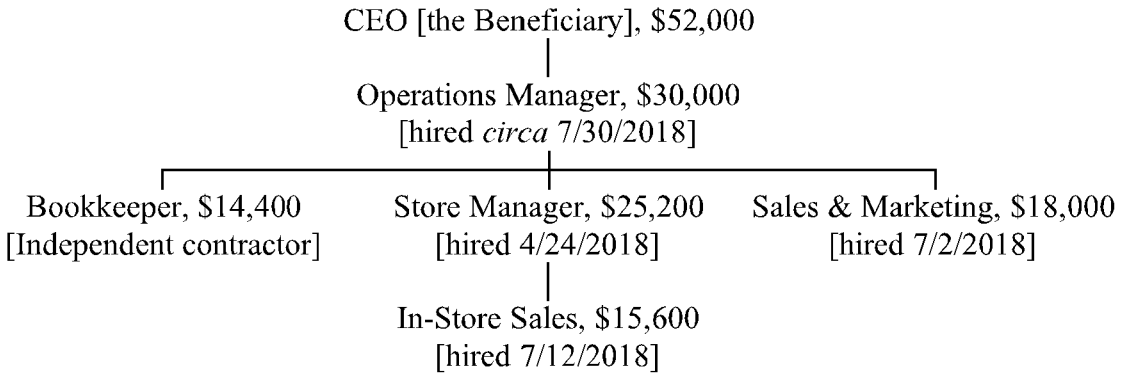
Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

The Petitioner provides a job description for the Beneficiary that includes executive-level tasks, but the supporting evidence does not corroborate these duties or show who actually performed the non-executive tasks that the Beneficiary would have overseen. For example, one of the Beneficiary's stated duties is to "[d]evelop and manage personnel policies to ensure . . . staff development and training are in place." The record does not show who performed the non-executive tasks of staff development and training. Also, the Petitioner states that the Beneficiary "[s]elected and directed the use of sales forecasting models and analytics tools," but the record does not identify those tools, document their use, or identify the subordinate employees who use them.

The Beneficiary's high-level control over the petitioning organization is not in question. The issue is whether the Beneficiary *primarily* performs executive-level duties rather than lower-level tasks such as supervising sales workers and ordering inventory.

The Beneficiary has engaged the services of contractors for functions such as tax preparation and payroll. An executive may make the decision to rely on such services, but entering into these contract agreements does not establish an ongoing executive-level function that would support a conclusion that the Beneficiary's duties are *primarily* those of an executive.

An organizational chart shows the following positions at the petitioning company, with salary figures (annualized below for consistency) and hiring dates taken from other materials in the record:



The Petitioner did not provide information about the duties performed by the subordinate employees, although the Director had requested that information.

In 2018, when the petition was filed, the minimum wage in California was $11.00 per hour, which is about $22,880 for full-time, year-round employment.[2] The stated salaries for the sales workers are too low to be consistent with full-time employment. The operations manager's stated salary exceeds the full-time minimum wage by less than 32%. It is not readily evident that this rate of pay is consistent with a managerial position. Furthermore, payroll documents in the record do not show that the employees earned the full salaries shown on the organizational chart.

Payroll reports show total payments to the Petitioner's five employees as of September 7, 2018 and June 3, 2019. By comparing the two reports, we can also see how much each employee earned between those two dates:

	Hiring-9/7/18	9/7/18-6/3/19	Hiring-6/3/19
President/CEO	$8844.86	$4000.00	$12,844.86
Operations Manager	1204.32	2132.72	3335.04
Store Manager	6514.32	14,031.94	20,546.26
Sales and Marketing	213.91	0.00	213.91
In-Store Sales	596.44	0.00	596.44

[2] *See* https://www.dol.gov/agencies/whd/state/minimum-wage/history (last visited Jul. 16, 2020).

The total gross wages paid to all employees between January 1, 2018, and June 3, 2019 amounted to $37.536.51.

The Petitioner has not explained the duties of the Beneficiary's subordinate employees. Managerial titles do not suffice to show that any of the subordinates are employed in managerial roles. The Petitioner has not established that the company requires layers of management as shown in the organizational chart.

Invoices and other documents show that the Petitioner sells its products online in addition to operating a retail store. The Petitioner has not shown who handles the shipments of online orders, or who works in the warehouse space shown in the record.

As shown by the above payroll figures, the two identified sales workers received minimal wages before the petition's September 14, 2018 filing date, and do not appear to have worked at all after the filing date.[3] In their absence, the only subordinate employees who remain to perform sales duties are the two with managerial titles. The record suggests that they are sales workers rather than managers.

The employee named as the store manager on the organizational chart is identified on payroll documents as a "sales associate," working about 33 hours per week for $12 per hour. Her April 2018 job application lists three "job functions" for the "sales associate" position: "providing outstanding customer service at store"; "receive, check & shel[ve] merchandise, keep store clean"; and "complete customer transaction." An accompanying "Summary of Responsibility" lists other front-line retail sales duties; the individuals identified as sales workers signed other copies of the same document.

The job application for the individual identified as the operations manager also refers to the position as "sales." The Petitioner has not submitted the operations manager's "Summary of Responsibility" or any other job description, or submitted any affirmative evidence to show that he has managerial responsibilities. As noted above, this individual has earned substantially less than the salary stated on the organizational chart, and the Petitioner did not pay the two identified sales employees after September 2018. The available evidence therefore suggests that the employee named as the operations manager is actually a part-time sales worker.[4]

The record does not establish that the petitioning entity has a level of organizational complexity that would require or justify the presence of an executive. The Petitioner has not shown that the company has any management for the Beneficiary to direct; the record offers no credible support for the four-tiered organizational structure that the Petitioner claims. Direct supervision of what appear to be two part-time sales workers does not constitute directing the management of the organization.

On appeal, the Petitioner identifies new initiatives that the company has undertaken in 2019, several months after the filing of the extension petition. This information cannot establish that the company

[3] The company's structure and operations after the filing date are relevant because the Petitioner must continue to meet all eligibility requirements throughout the adjudication of the petition. *See* 8 C.F.R. § 103.2(b)(1).

[4] We note that this individual applied for the position in late July 2018. A printout in the record shows that this individual left a five-star review on the Petitioner's Yelp page on August 2, 2018, identifying himself as a customer rather than as an employee. The Beneficiary acknowledged the review, saying "It's always nice to see you giving us a visit." Because this exchange does not disclose the employee's connection to the company, it raises further questions of overall credibility.

was able to support an executive petition within one year of the approval of the new office petition in September 2017, or that the Beneficiary's position met the requirements of an executive capacity at the time of filing. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

III. CONCLUSION

The Petitioner has established the Beneficiary's authority over the U.S. business, but the evidence in the record does not corroborate the job description submitted or otherwise establish that the petitioning entity requires, or can support, a primarily executive position. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.