U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30252401

Date: MAR. 6, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner, an importer and seller of snack foods, seeks to extend the Beneficiary's temporary employment as its president under the L-1A nonimmigrant classification for intracompany transferees.[1] *See* 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 the record did not establish that the Petitioner had a qualifying relationship with the Beneficiary's foreign employer. The Director further determined that the Petitioner did not demonstrate that the Beneficiary would be employed in a managerial or executive capacity under an extended petition. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal, as the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Since this issue is dispositive, we decline to reach and hereby reserve its arguments with respect to whether the Petitioner had a qualifying relationship with the Beneficiary's foreign employer. *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).

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a one-year period ending on January 10, 2023. 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.

I. LAW

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity 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)(3)(v)(B). 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.*

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

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

The sole issue we will analyze is whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity in the United States.

"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.

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

A. Duties

To be eligible for L-1A nonimmigrant visa classification as a manager or 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)(A) and (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 managerial or 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 managerial or executive duties, as opposed to ordinary operational activities alongside its 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 managerial or 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 indicated that it was established in 2021 to explore the distribution and sale of "Natural & Healthy salty crackers" in the United States. In a letter submitted in response to the Director's request for evidence (RFE), the Petitioner stated the Beneficiary would be tasked with leading and overseeing its importing and distribution operations and strategic decision-making and policies, establishing a strong administrative structure, building a positive corporate culture, and exploring business opportunities in the United States. The Petitioner submitted the following duty description for the Beneficiary:

> **Directing and Management Operations [15%]:**
> - Develop and implement efficient and effective operational processes to optimize productivity and reduce costs.
> - Monitor performance indicators, identify areas for improvement, and take corrective actions as needed.
> - Collaborate with senior managers to ensure smooth execution of day-to-day operations.
>
> **Establishing Policies and Contracting Companies [12%]:**
> - Work closely with contracting companies to outline clear policies and guidelines for importing and distribution activities.
> - Negotiate contracts, terms, and service level agreements to align with the company's objectives.
>
> **Exercising Wide Latitude in Decision Making [10%]:**
> - Exercise independent judgement and autonomy in handling critical business issues.
> - Anticipate potential challenges and devise proactive solutions.
>
> **Overseeing Financial Performance and Investments [12%]:**
> - Monitor the company's financial performance and conduct regular reviews of financial reports.

Wage and Bonus Distribution and Major Contracts Approval [8%]:
- Review and approve wage and bonus distribution plans in line with company policies.
- Evaluate major contracts and credit lines, ensuring they align with the company's goals and risk tolerance.

Establishing Interior Administrative Procedure [10%]:
- Develop and establish a robust administrative structure within the organization.
- Oversee top-level personnel appointments and ensure the recruitment of qualified talent.

Proposing Development Plan and Budget Schemes [7%]:
- Collaborate with the Board of Directors to develop mid- and long-term development tactics and business schemes.
- Present renewal, rebuilding, and development plans, as well as off-books budget schemes.

Addressing Critical Incidents and External Relationships [6%]:
- Handle critical incidents that may arise within the company's operations promptly and effectively.

Building Corporate Culture and Image [10%]:

Pioneering Work on Business Operation [5%]:

Convening Meetings and Reporting to the Board [5%]:
- Organize and chair General Meeting Office conferences and theme meetings to ensure effective communication within the company.
- Provide regular performance reviews of senior management staff to the Board of Directors and the headquarters in the Czech Republic.

The Petitioner submitted supporting documentation on the record indicating that the Beneficiary was substantially involved in performing non-qualifying operational duties as of the date the petition was filed. The Petitioner submitted documentation indicating that the Beneficiary listed job postings for an administrative assistant in January 2022, just prior to the date the petition was filed[2], indicating that he required an employee at this time to relieve him from performing non-qualifying operational tasks. The provided evidence indicates that the Petitioner had no operational-level employees when the petition was filed to relieve the Beneficiary from performing non-qualifying duties. For instance, the Petitioner provided documentation dated in December 2022, again just prior to the date the petition was filed, reflecting the Beneficiary arranging for a booth at an industry convention to showcase his crackers, including him paying the $175 invoice. Likewise, the Petitioner indicated that it received a large shipment of consignment goods in August 2022 and provided documentation indicating that it did not execute agreements with contractors to handle these export tasks until after the petition was filed in March 2023. Some of the duties listed the provided export services contract included this

[2] The petition was filed on January 11, 2023.

contractor creating customs profiles, dealing with remittance instructions, and handling other customs issues. It is reasonable to conclude that the Beneficiary was responsible for these tasks when the petition was filed, as noted by the Director, given that the contractor agreement had not been signed until after the petition was filed. The Petitioner further discussed the Beneficiary's responsibility for signing and endorsing checks, orders of payment, and bills of lading in a response letter submitted in response to the Director's request for evidence (RFE) in July 2023, again suggesting his deep involvement in the day-to-day operational aspects of the business.

Although the Petitioner points to several contractor agreements signed by the Beneficiary as evidence of his executive-level authority, the record indicates that these agreements were signed near to or after the date the petition was filed, leaving question as the other inherent non-qualifying operational tasks that likely took place in arranging these contracts. In sum, the Petitioner's statements and the submitted evidence suggest that the Beneficiary was involved in all the day-to-day operational tasks of the business when the petition was filed in January 2023. The affected party has the burden of proof to establish eligibility for the requested benefit at the time of filing the benefit request and continuing until the final adjudication. 8 C.F.R. § 103.2(b)(1); *see also* Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts.").

Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial or executive. *See* sections 101(a)(44)(B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties were managerial or executive-level functions when the petition was filed and what proportion were non-qualifying operational tasks. The Petitioner submitted evidence indicating that the Beneficiary's duties likely included several administrative or operational tasks, but it did not sufficiently quantify the time he spent on these duties as compared to qualifying managerial or executive-level duties. For this reason, we cannot determine whether the Beneficiary was primarily performing the duties of a manager or executive as of the date the petition was filed. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In contrast, the Petitioner did not sufficiently articulate or document what executive-level tasks he was performing when the petition was filed. The submitted evidence reflects that the Petitioner was not sufficiently operational to allow the Beneficiary to perform several of the asserted managerial and executive-level tasks included in his duty description, such as collaborating with senior managers, approving wages and bonuses, or conducting performance reviews of "senior management staff." The Petitioner also did not detail or document the operational processes the Beneficiary had put in place, the solutions he devised, financial decisions he had made, administrative procedures, development tactics, or business schemes he had formulated, company image and culture he had created, or credit lines he established. The Petitioner only points to his negotiation of contractor agreements as evidence of his performance of qualifying tasks, yet this only accounted for 12% of his duty description, leaving substantial question as to whether he was primarily performing qualifying managerial or executive tasks when the petition was filed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive 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).

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 a managerial or executive capacity within the meaning of section 101(a)(44)(A) and (B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or 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 managerial or executive in nature.

B. Operations and Staffing

Pursuant to section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Although we acknowledge that certain global forces may have delayed the Petitioner's business plans during the first year, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require us to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The Petitioner asserts that the Beneficiary would have qualified as an executive under an approved extension. 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 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 submitted evidence and statements of the Petitioner reflect that it had limited operations as of the time the petition was filed leaving substantial uncertainty as to whether it could have supported the Beneficiary in an executive capacity. For instance, the Petitioner indicated in support of the petition was it had not hired any employees and had only just listed a job posting for an administrative assistant at the time the petition was filed. The Petitioner emphasized that it engaged a brokerage company to supply sales representatives to sell its products in the United States. However, the record reflects that

this brokerage agreement was signed only ten days prior to the date the petition was filed, and there is little supporting evidence to reflect that the Petitioner had sufficient staff to allow the Beneficiary to act in an elevated executive-level position at this time. There is no supporting evidence reflecting the Beneficiary's direction of subordinates, and discussed, and there is little documentation to support his performance of qualifying executive-level duties. In fact, as discussed previously in this decision, the provided supporting documentation suggests that he was involved in all operational aspects of company when the petition was filed.

In response to the RFE, the Petitioner proceeded to emphasize employees it hired after the date the petition was filed, including an e-commerce front-end developer, two sales representatives, and a bookkeeper. First, since these employees were not in place when the petition was filed, they are not probative in demonstrating the Beneficiary's eligibility as an executive. Further, even if these employees were considered, it is questionable that one tier of non-supervisory employees would elevate the Beneficiary to an executive-level capacity where he could be primarily focus on broad goals and policies rather than the day-to-day operations. Now on appeal, the Petitioner, for the first time, asserts that the Beneficiary was supported by over 40 employees working for the foreign employer. This assertion is questionable given that claimed foreign employees supporting the Petitioner and Beneficiary were not mentioned in support of the petition, nor later in response to the RFE. The Petitioner has also submitted no supporting documentation to substantiate foreign employees working for the Beneficiary while in the United States as necessary to elevate him to an executive-level role. Therefore, the Petitioner did not sufficiently establish that the Beneficiary was acting in an executive-level capacity when the new office extension petition was filed in January 2023.

On appeal, and again for the first time on the record, the Petitioner appears to assert that the Beneficiary also qualified as a function manager when the petition was filed. The Petitioner contends that even if it had not demonstrated that the Beneficiary qualified as a personnel manager the Director should have considered whether he qualified as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than performs the duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

We disagree that the Director should have considered whether the Beneficiary qualified as a function manager, as the Petitioner did not assert this previously on the record, but only now raises this on appeal. Regardless, the Petitioner did not sufficiently establish that the Beneficiary was acting as a function manager when the petition was filed. In offering this assertion, the Petitioner again points to the contractor agreements the Beneficiary executed, indicating that contractors and foreign employees relieved him from primarily performing non-qualifying operational tasks. However, again, the Petitioner provides little supporting documentation to corroborate the Beneficiary's direction of

contractors or foreign employees in the United States, or evidence of them relieving him from performing the operational tasks of his claimed function. Further, the Petitioner does not explain the Beneficiary's claimed function in detail, beyond appearing to indicate that he was managing the company as a whole. As such, the Petitioner did not demonstrate that the Beneficiary was employed as a function manager when the petition was filed in January 2023.

For the foregoing reasons, the Petitioner has not sufficiently established that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

ORDER: The appeal is dismissed.