U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7749565

Date: MAR. 27, 2020

Appeal of California Service Center Decision

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

The Petitioner, a provider of IT consulting services, seeks to temporarily employ the Beneficiary as its president under the L-1A nonimmigrant classification for 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 California Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in the United States in a managerial or executive capacity. The Petitioner subsequently filed a motion to reopen and reconsider, which the Director dismissed. That matter is now before us on appeal.

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. Upon *de novo* review, we conclude that the Petitioner did not overcome the Director's basis for denial. Therefore, 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 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*.

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

The primary issue to be addressed in this discussion is whether the Petitioner provided sufficient evidence to establish that the Beneficiary's position with the U.S. entity would be in a managerial or executive capacity. Although the Petitioner claims that the Beneficiary will be employed in one capacity or the other, it does not clearly and consistently state whether the proposed position qualifies as employment in a managerial capacity or in an executive capacity. At the time of filing, the Petitioner claimed that the Beneficiary will assume an "executive position" where he will focus on

expanding the business by entering into agreements with "major clients," "completing" the recruitment of managers and professionals, and forming an IT department. However, the Petitioner has not pursued this claim either on motion or on appeal. Instead, the Petitioner stated on motion that the Beneficiary will manage "several essential functions" and later stated on appeal that the Beneficiary will manage "an essential function."

"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 "function manager" applies generally when a beneficiary does not primarily 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 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.*

As a threshold matter, we note that a petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each set of criteria as put forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity.

As stated earlier, the Petitioner has offered competing claims regarding the Beneficiary's proposed employment. In a supporting cover letter, the Petitioner stressed the Beneficiary's role in encouraging agreements with "major clients" and provided the following job duty breakdown and time allocations:

- 20% to "lead[ing] the company through two years of business," setting "overall goals and guidelines for growth," "lead[ing] the establishment of the company," making decisions on

company expansion, and working with "senior management of clients and stakeholders" to ensure that the Petitioner attains its growth targets;

- 20% to "directing and overseeing the coordination of the company's overall financial and budgetary activities," "reviewing and analyzing financial data," and retaining services of "financial professionals" to oversee budget implementation and planning;
- 20% to making personnel decisions and determining staff requirements, overseeing human resources and "personnel processes," and assigning "daily operations and responsibilities";
- 15% to establishing "departmental responsibilities" and coordinating functions among departments, directing and implementing policies and objectives, and supervising the implementation of marketing plans;
- 15% to providing reports to the Petitioner's board of directors and shareholders and ensuring accuracy of necessary reports; and
- 10% to analyzing operations and evaluating the company's performance on the basis of reports from managers and professionals, and overseeing implementation of the company's business plan and plan adjustments.

After the petition was denied, the Petitioner filed a motion in which it summarized key elements of the above job description. Notwithstanding the Petitioner's reiteration of the original claim, it introduced a competing claim, first stating that the Beneficiary "will manage several functions" but then focused its discussion on a single function, which was identified as "directing and overseeing petitioner's [*sic*] overall financial and budgetary activities, funding and reporting." The Petitioner explained that because it relies primarily on foreign-based subcontractors, "budgeting, financial planning and tax compliance becomes an essential function of the business." However, the above job duty description does not support the Petitioner's claim that the Beneficiary will primarily manage the budgeting, financial planning, and tax compliance function. In fact, the above job description indicates that only 20% of the Beneficiary's time would be allocated to activities concerning finances and budgets while the remainder of his time would be devoted to other aspects of the business, including marketing and growth targets, policy making and implementation, and personnel management, none of which indicate that the Beneficiary would primarily manage an essential function. The Petitioner has not offered independent, objective evidence to resolve the material inconsistencies among its varying claims regarding the classification of the Beneficiary's employment as being in either an executive or managerial capacity, nor has the Petitioner provided sufficient evidence establishing the nature of the job duties the Beneficiary would perform. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the Petitioner did not establish that the function the Beneficiary is claimed to be managing is essential to the organization. *See Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

On appeal, however, the Petitioner repeats its claim that the Beneficiary would manage an essential function, asserting that it retained the services of a "leading" financial consulting company to assist in the preparation of the Petitioner's tax returns. The Petitioner does not claim, nor has it provided evidence to show, that this outside contractor provides other services that support the Beneficiary in his claimed management of an essential function. Rather, the Petitioner claims that the "team of professionals and managers" in the finance department in the Ukraine help support the Beneficiary's essential function. However, the staff descriptions are broad and make no mention of the U.S. entity or explain how these positions would work to support that entity. Although two position descriptions – those of the accounting lead and one of her two subordinate accountants – indicate that they would

perform job duties concerning "newly created entities," it is unclear that the Petitioner is considered "newly created" and thus we cannot determine if and how these foreign employees or any of the employees in the foreign entity's administration department would support the Petitioner's operation or the Beneficiary's position. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Based on the statutory definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *See* sections 101(a)(44)(A) and (B) of the Act. The Petitioner must also prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). Further, the Petitioner must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are either in an executive or managerial capacity.

The Petitioner has offered competing claims about the Beneficiary's employment. On the one hand, it states that the Beneficiary would assume an "executive position" in which he will "lead the company," while on the other hand, it claims that the Beneficiary would manage "essential functions" or an essential function that focuses on the company's budgets and finances. Further, despite providing a job duty breakdown with time allocations, the Petitioner did not clearly describe the Beneficiary's proposed position or convey a meaningful understanding of his actual daily tasks. For instance, the Petitioner stated that the Beneficiary would set goals and guidelines for growth and identify ways to expand the company, but it provided no specific information describing the goals and guidelines he would set or state how the Beneficiary would effectively expand the U.S. client base and achieve its sales targets without any U.S.-based personnel to promote and sell its services. The Petitioner has not adequately explained how a foreign-based staff would market and sell its services. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner also stated that the Beneficiary would oversee and coordinate "overall financial and budgetary activities" and ensure that investments are maximized and company efficiency is increased. However, the Petitioner did not identify any such activities, nor did it identify any of the Petitioner's investments or specify the actions the Beneficiary would take to increase efficiency within the scope of an operation whose entire work force, with the exception of the Beneficiary and one other employee, is based overseas. Further, in considering the claim that the Beneficiary would make personnel decisions and oversee human resources, we cannot overlook the fact that the Petitioner has remained a two-person staff and employed the Beneficiary for over two years as of the date this petition was filed. It is also worthy to note that despite the Beneficiary's 2+ years of U.S. employment, the petition lacks details about the Beneficiary's proposed job duties. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true

nature of the employment. *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).

Thus, not only has the Petitioner not consistently stated whether the Beneficiary's job duties should be classified as executive or managerial, but it has also provided deficient job descriptions that preclude a meaningful understanding or precisely how the Beneficiary would either direct the management of the organization and set that organization's policies or how he would manage an essential function.

Furthermore, the fact that the Beneficiary 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) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (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 insufficient to establish that the Beneficiary's actual duties would be primarily managerial or executive in nature. As noted earlier, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376. The Petitioner's failure to meet fundamental requirements, as described above, impedes our ability to assess the Beneficiary's role within the scope of the U.S. organization and precludes a meaningful understanding of how the foreign employees and subcontractors, who are claimed to comprise the vast majority of the Petitioner's support personnel, would relieve the Beneficiary from primarily performing non-qualifying duties.

Lastly, USCIS has clarified that "an adjudicator's fact-finding authority . . . should not be constrained by any prior petition approval, but instead should be based on the merits of each case." USCIS Policy Memorandum, PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf. The memorandum also emphasized that "the burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought." *Id.*

In any event, the deficiencies and ambiguities described above hinder our ability to properly evaluate the merits of the Petitioner's claim and thus cannot conclude that the Beneficiary would be employed in a managerial or executive capacity.

ORDER: The appeal is dismissed.