U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12801904

DATE: NOV. 25, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a convenience liquor store, seeks to temporarily employ the Beneficiary as store director of its "new office"[1] 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 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 on three grounds. The Director determined that the Petitioner did not establish (1) that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding his application for admission to the United States in the L-1A nonimmigrant classification, (2) that the Beneficiary was employed abroad in a managerial or executive capacity, and (3) that the Beneficiary would be employed in the United States in a managerial or executive capacity within one year of the petition's approval.

The Petitioner filed an appeal, which we dismissed on the ground that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity within one year of the petition's approval. As this determination was dispositive of the appeal, we reserved the Petitioner's appellate arguments regarding the Beneficiary's claimed employment with the foreign parent entity.

The matter is now before us on a motion to reopen. Upon review, we will dismiss the motion on the ground that the record still does not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity within one year of the petition's approval. We continue to reserve the remaining issues of whether the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding his application for admission to the United States in the L-1A nonimmigrant classification and whether he was employed abroad in a managerial or executive capacity.

[1] 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. 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 capacity that is managerial, executive, or involves specialized knowledge. 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).

Since this is a new office petition, the petitioner must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year of the petition's approval. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. See generally, 8 C.F.R. § 214.2(l)(3)(v).

As defined in section 101(a)(44)(A) of the Act, the term "managerial capacity" means an assignment within an organization in which the employee primarily –

(i) Manages the organization, or a department, subdivision, function, or component of the organization;
(ii) 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;
(iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

As defined in section 101(a)(44)(B) of the Act, the term "executive capacity" means an assignment within an organization in which the employee primarily –

(i) directs the management of the organization or a major component or function of the organization;
(ii) establishes the goals and policies of the organization, component or function;
(iii) exercises wide latitude in discretionary decision-making; and
(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(C) of the Act further provides that:

> 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] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

To be eligible for L-1A nonimmigrant visa classification as a manager or an executive, a petitioner must show that the beneficiary will perform the high-level responsibilities set forth in the statutory definitions at sections 101(a)(44)(A)(i)-(iv) and 101(a)(44)(B)(i)-(iv) of the Act, each of which has four elements. If the record does not establish that the offered position meets all four elements of the pertinent statutory definition, we cannot conclude that it is a qualifying managerial or executive position. If a petitioner establishes that the offered position meets all four elements of the applicable statutory definition, it 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).

II. ANALYSIS

The Petitioner, a convenience liquor store established in September 2016, is the subsidiary of [redacted] dba [redacted] located in [redacted] India. Both businesses are wholly owned by [redacted], who also serves as the president of both entities. The Petitioner asserts that the Beneficiary has been employed by [redacted] as its director of sales from the time that business was founded in December 2010. In October 2016 the Petitioner filed a "new office" petition requesting L-1A classification for the Beneficiary to work as the store director of the U.S. business.

A. Employment in the United States in an Executive or Managerial Capacity Within One Year

In denying the petition on June 6, 2019, the Director reviewed the Petitioner's initial description of the prospective U.S. position, the documentation submitted in response to a request for evidence and a subsequent notice of intent to deny, and determined that it failed to establish that the Beneficiary would be employed in a managerial or executive capacity within one year of the petition's approval. The Director recounted the Petitioner's description of the new office in the United States as a convenience store offering produce, packaged foods, drinks, staples, clothing, and other items, with the parent company adding to the inventory by shipping clothing products to the Petitioner for sale in the United States. According to the Petitioner it intended to hire, in addition to the Beneficiary as store manager, a general manager, two assistant managers, and six general retail staff employees within the first year of operation.

The Director stated that the description of the store director's job duties was too general in nature, did not sufficiently explain what the Beneficiary would do on a day-to-day basis, included non-qualifying tasks, and did not indicate the percentage of time the Beneficiary would spend on each duty. The

Director concluded that the evidence did not establish that the Beneficiary would be employed primarily in a managerial or executive capacity within one year of the petition's approval. The Director also analyzed the Petitioner's prospective organizational chart and the job duties to be exercised by the prospective employees. The Director concluded that the Petitioner had not provided sufficient evidence to demonstrate that its prospective organizational structure would reach a level of complexity within one year of the petition's approval whereby the Beneficiary would be employed in a managerial or executive capacity. In summation, the Director stated that the evidence of record did not establish that the new U.S. business would support an executive or managerial position within one year of the petition's approval.

On appeal the Petitioner's only submissions with regard to the Beneficiary's prospective employment in the United States were copies of a "Site Feasibility Report" (dated January 6, 2016) for the proposed development of a commercial lot in [redacted] Georgia, and the Petitioner's business plan which was already in the record. The Petitioner did not explain how the site feasibility report for a lot in [redacted] Georgia, related to the Beneficiary's prospective employment with the new U.S. business in [redacted] Texas, and the contents of the business plan had already been considered by the Director in his decision.

In dismissing the appeal we stated that the Petitioner did not specifically dispute the Director's adverse conclusion regarding the Beneficiary's proposed employment in a managerial or executive capacity in the United States or explain how the Director erred in making that adverse determination, and therefore had abandoned its challenge of the decision on this ground. We also reviewed the Petitioner's previously submitted evidence, analyzed in the Director's decision, and concluded that it did not show the Petitioner's operations would support the Beneficiary in a managerial or executive capacity within one year of the petition's approval.[2]

The Petitioner has filed a motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) provides that:

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

In its motion[3] the Petitioner asserts that the Beneficiary "serves as an executive" with "responsibilities "far beyond the scope of a manager or supervisor" because he negotiated the purchase of the U.S. business, filed articles of incorporation, will negotiate the purchase of inventory, train management staff, establish cash handling procedures, and oversee the financial reporting for the business. The Petitioner submits a copy of a document purporting to be a "Bill of Sale" dated October 1, 2016, whereby the [redacted] business in [redacted] Texas, was purchased by the Beneficiary on behalf of the Petitioner. Neither the business activities described by the Petitioner nor the alleged purchase and sale transaction demonstrate that the Beneficiary's job duties with the Petitioner are

[2] As previously indicated, in our dismissal of the appeal we reserved the Petitioner's arguments regarding the Beneficiary's claimed employment with the foreign parent entity.

[3] The Petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that it was filing a motion to reopen. The brief that accompanied the motion was entitled "Motion in Support of Motion to Reopen and Reconsider." At the outset of the brief, however, the Petitioner stated that it "submits this Motion to Reopen . . . supported by documentary evidence demonstrating eligibility for the requested immigration benefit." Reading the document as a whole we conclude that the Petitioner intended to file a motion to reopen, as indicated on the Form I-290B, and not a combined motion to reopen and reconsider.

primarily executive in nature, which appears to be the Petitioner's emphasis (for the first time) on motion. The Petitioner has not shown how the Beneficiary's employment in the United States meets all four elements of executive capacity as defined in section 101(a)(44)(B) of the Act. Nor has the Petitioner shown that the Beneficiary's U.S. employment meets all four elements of managerial capacity as defined in section 101(a)(44)(A) of the Act. Furthermore, the Petitioner has not established that the Beneficiary will be primarily engaged in executive or managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. See Family Inc. v. USCIS. In short, the facts and evidence submitted on motion are not sufficient to overcome our previous determination that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity by the U.S. business within one year of the petition's approval. Thus, the Petitioner has not shown proper cause to reopen this proceeding.

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 in this case.

B. Reserved Issues

As previously indicated, we reserve the issues of (1) whether the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding his application for admission to the United States in the L-1A nonimmigrant classification and (2) whether the Beneficiary was employed abroad in a managerial or executive capacity.

III. CONCLUSION

For the reasons discussed above the Petitioner has not shown proper cause to reopen this proceeding. The motion will be dismissed for this reason.

ORDER: The motion to reopen is dismissed.