U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11822325

DATE: NOV. 25, 2020

Appeal of California Service Center Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a freight services and transportation business, seeks to temporarily employ the Beneficiary as its president/chief executive officer (CEO) 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 the grounds that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial capacity or that he would be employed in a managerial or executive capacity[1] in the United States.

On appeal the Petitioner asserts that the evidence of record establishes that the Beneficiary has been employed abroad in a managerial capacity and will likewise be employed in the United States in a managerial capacity. The Petitioner does not assert that the Beneficiary has been employed abroad or will be employed in the United States in an executive capacity.

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. Upon de novo review, we will dismiss the appeal because the Petitioner has not established that the Beneficiary will be employed in a managerial capacity in the United States. As this is a fundamental element of eligibility which the Petitioner has not satisfied, we will reserve the remaining issue of whether the Beneficiary has been employed abroad in a managerial capacity.

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

[1] The Petitioner has not claimed that the Beneficiary will be employed in an executive capacity in this proceeding.

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).

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). In determining whether a 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 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.

II. ANALYSIS

The Petitioner, established in 2012, is an affiliate of [redacted], a global dispatch company headquartered in [redacted] North Macedonia. Both companies are wholly owned by [redacted] [redacted] hired the Beneficiary in December 2014 as a dispatcher and promoted him to the position of operation manager in January 2017. In October 2019 the Petitioner filed the instant petition to transfer the Beneficiary to the United States to serve in the position of chief operating officer.

A. Employment in the United States

In the Form I-129 petition (page 23, item 7) the Beneficiary's proposed duties in the United States were described as follows:

> Chief operating officer/COO – working together with key participants to compile the budget, super-heading [sic] strategies to steer the company's future in a positive direction, driving the company's operating capabilities to surpass customer satisfaction and retention, and company goals. Monitoring invoices, money handling procedures, accounting and bank processes, preparing timely and accurate performance reports, overseeing marketing initiatives and implementing better business practices, delegating responsibilities to ensure staff members grow as capable participants, completing performance reviews, assessing and implementing improved processes and new technologies, and collaborating with management regarding the implementation of these improvements, full understanding of DOT, HOS, CSA initiatives and DOT Safety/Compliance regulations. Lead and oversee all aspects of monitoring, development, implementation, standardization (where appropriate), and management of the company's DOT Trucking compliance programs, including assist with coordinating new driver on-boarding and current driver retraining/corrective action regarding safety standards and processes.

The Petitioner's initial evidence included an organizational chart of the U.S. company, which identified seven employees. The Beneficiary's position of COO is subordinate to the CEO position held by the Petitioner's owner, [redacted] The organizational chart shows four positions directly

subordinate to the COO – including an accounting director, a fleet manager, a safety director, and a recruiting manager – and one assistant position directly subordinate to the fleet manager.

Also submitted with the petition was a letter from its owner/president/CEO which provided a detailed listing of the Beneficiary's proposed job duties as COO, and the percentage of time to be spent on each duty. It reads as follows:

- ∑ Establish and ensure open communication channels regarding safety, transportation, strategy, and people in coordination with Fleet Manager, Safety Manager, Recruiting Manager, and Accounting Director (7%)
- ∑ Under the general guidance of President/CEO, ensure operational compliance with all stated company policy and procedures, and adhere to the company's mission, vision and values (7%)
- ∑ Be accountable to maintain operational budgets; review performance to the budget and reports from Accounting Director, report budget variances and make budget suggestions to CEO/President (5%)
- ∑ Oversee Fleet Management, Safety Management, Customer Service, Operations Support, Logistics, and provide guidance and advice to Fleet Manager and Safety Manager (10%)
- ∑ Provide senior level input on business matters, including those outside functional areas managed (6%)
- ∑ Improve utility and revenue generating capacity of the fleet (5%)
- ∑ Support, implement and drive initiatives and protocols, especially regarding safety and equipment maintenance (5%)
- ∑ Control company costs and introduce tactical initiative to address theft and other losses (3%)
- ∑ Assess and implement improved processes and new technologies, and collaborate with managers and directors regarding the implementation of these improvements (3%)
- ∑ Keep familiar with DOT HOS, CSA initiatives and DOT Safety/Compliance Regulations, lead and oversee all aspects of monitoring, development, implementation, standardization (where appropriate), and management of the company's DOT Trucking Compliance Programs (5%)
- ∑ Based on reports of Assessment and evaluation from Fleet Manager, Safety Manager, determine new drivers on-boarding and current driver retraining/corrective action regarding safety standards and processes, in coordination with Recruiting Manager (10%)
- ∑ Function as the company's primary vendor/contact negotiator and enter into contracts with vendors and customers upon President's approval (10%)
- ∑ Maintain strong communication with the COO in Macedonian entity [redacted] to harmonize the company's policies and business strategies, and implementation of them to achieve the company's goal (5%)
- ∑ Ensure continuous delivery of services through management of service level agreements and monitoring performance (5%)
- ∑ Ensure all current safety security practices, protocols, audits and education plans are developed, maintained and communicated across the company (3%)
- ∑ Delegate responsibilities to ensure staff members grow as capable participants and employ various initiatives to coach employees to optimize their capabilities (5%)
- ∑ Evaluate job performance of managers and directors, promote them with CEO/President's confirmation, determine their raises and leave as well as make other personnel decisions (3%)

- ∑ Receive reports from managers and directors of their subordinate employees' job performances and approve or modify promotional decisions, adjust compensation levels (2%)
- ∑ Have authority to hire and fire employees of the company and confer with CEO/President with respect to hiring and firing of managers and directors (1%)

The letter from the Petitioner's owner/president/CEO also provided job descriptions of the four positions directly subordinate to the COO, including the education and experience of the four employees, which were supplemented by an exhibit with the following details:

Fleet Manager –

[redacted] who allegedly has a bachelor of science in electrical engineering and six years of experience in the trucking business as Dispatcher and Fleet Manager, performs the following duties:

- ∑ Oversee company trucks available for the transportation of general freight, sheets, coils, rolls, beverages, paper products.
- ∑ Under the guidance of COO, work alongside Safety Department and Recruiting Department managers to ensure deliveries and distributions are made on time and the required vehicles are available and operating as required.
- ∑ Oversee the scheduling of deliveries and ensure the department operates within the established budget.
- ∑ Responsible for assisting in the recruitment of quality drivers into the fleet, maintaining detailed records of vehicle servicing and inspection, and scheduling regular vehicle maintenance to ensure operational efficiency.
- ∑ Confer with Chief Operating Officer and provide guidance to contracted drivers on the best ways to maximize their earnings, while delivering a high level of customer service.
- ∑ Ensure that all drivers understand and procure the licenses and permits they need to legally carry loads to customer destinations and comply with the company policies.
- ∑ Collaborate with Recruitment Department manager and marketing to add quality employee drivers and contracted drivers to the fleet, and report and obtain authorization from COO.
- ∑ Work closely with the maintenance team to find ways to reduce downtime due to repairs or lack of routine maintenance.
- ∑ Ensure that all load paperwork associated with each run is accurate and submitted to the proper people.
- ∑ Monitor driver behavior and ensure a high level of customer service.

Safety Manager –

[redacted] who allegedly has a bachelor's degree in business administration and four years of experience in trucking safety, performs the following duties:

- ∑ Introduce and oversee systems and activities to maintain oversight of regulatory compliance status.
- ∑ Provide training and professional development for management and CMV operators.
- ∑ Coordinate and manage the crash management process.

- ∑ Conduct audits and inspections of the transportation safety management process.
- ∑ Coordinate with the Fleet Manager in crafting short and longer term strategies, and report to and confer with COO in building a culture of safety within the company.
- ∑ Report to COO and provide support, direction, and guidance to regional transportation leadership across all regions including locations in a multiplatform fleet comprised of private and outsourced drivers.
- ∑ Interact with and directly influence the behavior, performance and knowledge base of the private fleet CMV operators.
- ∑ Monitor driver qualification files and the hiring and selection process in coordination with Recruiting Manager, and report the changes to be made, rules and policies to be discussed with COO.
- ∑ Review accident file contents for accuracy and documents needed; function as gatekeeper for accident preventable decisions; assure proper accountability is delivered for preventable accidents.
- ∑ Provide a comprehensive and accurate monthly report containing appropriate metrics and monthly scorecards which include tactics and activities from a national perspective to the COO and CEO.
- ∑ Conduct DOT compliance audits at regulated sites.
- ∑ Develop materials and conduct training for drivers in the implementation of the Transportation Safety Management System.

Recruiting Manager –

[redacted] who allegedly has a bachelor's degree in industrial design and five years of experience in the transportation industry, performs the following duties:

- ∑ Proactively recruits the best drivers from across the country by developing new recruiting strategies and proposes new recruiting techniques.
- ∑ Responsible for full cycle recruitment process from start to finish, including but not limited to reviewing candidates in our ATS, phone screens, in-person interviews, developing offers, and new hire paperwork.
- ∑ Develop and measure advertisement and promotional campaigns to recruit over the road drivers.
- ∑ Attend job fairs, driving schools, promotional events to recruit drivers.
- ∑ Conduct background checks, process motor vehicle reports and ensure compliance with all DOT and company hiring standards.
- ∑ Conduct both phone and in-person interviews (primarily phone screening) and arrange further interviews with department managers and COO in determining the hiring.
- ∑ Handle the job postings through all social media and online media.

Accounting Director –

[redacted] who allegedly has three years of accounting experience in the trucking business, performs the following duties:

- ∑ Responsible for all accounting and financial reporting functions. The Company's accounting systems include general ledger, receivables, payables, payroll, fixed assets, inventory and job costing by preparing journal entries and maintains accuracy/integrity of GL; update AR and issue invoices and AP and performs reconciliations.
- ∑ Responsible for the preparation of timely and accurate financial reports, in accordance with generally accepted accounting principles, company policies, and established deadlines. Interprets financial results and variances from budgets. Responsible for the preparation and timely submission of all reports required by the Public Utilities Commission, other governing bodies and management.
- ∑ Process balance sheets, income statements and other financial documents.
- ∑ Build reports and analyze business trends and report them to COO.
- ∑ Assist with quarterly reviews, annual audits, and tax return preparation.
- ∑ Review expenses and payroll records.
- ∑ Prepare and submit weekly/monthly closing reports to COO.
- ∑ Assist with operating and strategic plans for the company management, including capital budgets.
- ∑ Participate in the development and implementation of an organizational plan that effectively addresses all short and long-term company goals and objectives identified in the operational and strategic plans.
- ∑ Responsible for selecting, developing, supervising and motivating a competent work force to meet performance objectives and provide management continuity.

In response to the Director's request for evidence (RFE) the Petitioner submitted an additional letter linking specific duties of the COO position to the four definitional elements of "managerial capacity" in section 101(a)(44)(A) of the Act. The RFE response was presented as follows:

1. How the Beneficiary will manage the organization, department of the company:

    - ∑ [The Beneficiary] will take over the initiatives of the organization, in collaboration with the President/CEO.
    - ∑ The financial part of the company such as financial management of the company including quarterly inventories and financial reports to the banks will be completed by [the Beneficiary].
    - ∑ Health insurance, life insurance, workers compensation enrollment will be regulated by [the Beneficiary].
    - ∑ The business seminars needed for future development of the company will be organized by [the Beneficiary].
    - ∑ As the technology is always changing, [the Beneficiary] will be responsible for improvement of the company software and replacing with new ones when needed.
    - ∑ [The Beneficiary] will take over the supervision of the regulatory [sic] of the ELD which is taking enormous time of the CEO/president's schedule.
    - ∑ Fleet management is to be trained by [the Beneficiary].

2. How the Beneficiary will supervise and control the work or other supervisory, professional employees:

   ∑ Establish and participate in team meetings to direct the organization's improvement and work.
   ∑ Evaluate the work performance of the dispatchers, fleet managers, maintenance directors and accountants and provide review and guidance to the employees every month.
   ∑ Participate in daily, weekly, monthly and quarterly leadership meetings, taking ownership of strategic financial decisions and initiatives.
   ∑ Evaluate, establish and oversee relationships with third party solution providers, including budgetary decisions.
   ∑ Check safety scores on monthly basis, check driving record reports and fines and tickets for the drivers on monthly basis.
   ∑ Check the miles driven by drivers and work on continuously planning better loads.

3. Whether the Beneficiary will have authority to hire and fire, or recommend hiring and firing as well as other personnel actions (such as promotion and leave authorization):

   ∑ [The Beneficiary] will have the authority to evaluate employees' job performance at [the U.S. business] as well as decide on their promotion. Bringing [the Beneficiary] to the United States will allow him to better oversee the Petitioner's employees and check their daily performance.
   ∑ [The Beneficiary] will have the authority to hire and fire employees and recommend all administrative measures throughout the organization.
   ∑ He will establish and maintain required skill sets for team members, work on employee manual as well as drivers manual.

4. [The Beneficiary] will be responsible for exercising discretion over day-to-day operations of the Team:

   ∑ He will report to the [CEO/]President with respect to the company policies and general guidelines and will have wide latitude in implementing them and advise his subordinates: Fleet Manager, Safety Manager, Recruiting Manager, Accounting Manager.

In denying the petition the Director stated that the proposed job duties of the COO appeared to show that the Beneficiary will be primarily engaged in producing a product or service, activities which are not managerial in nature. The Director indicated that the evidence of record, including the organizational chart and the job descriptions of the support staff, did not establish that the Beneficiary would be relieved from performing primarily non-managerial activities associated with the day-to-day operation of the business. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial (or executive) capacity in the United States.

On appeal the Petitioner contends that the Director did not properly consider all of the evidence it submitted, including the gross and net income figures on its 2017 and 2018 federal income tax returns

showing that the business is thriving and needs the Beneficiary's managerial services to allow the CEO to focus on further expanding the business, as well as the job duties of the four subordinates to the COO which show that the Beneficiary will be overseeing other managerial employees. While the tax returns and other financial documentation submitted by the Petitioner do appear to show that the business is doing well, it is still a relatively small operation with six employees (including the owner/CEO) at the time of filing. The Beneficiary, as a prospective seventh employee, would directly oversee four employees – the accounting director, the safety director, the fleet manager, and the recruiting manager. In order to establish that the Beneficiary would be employed in a managerial capacity, the Petitioner must show that the individuals in the positions directly subordinate to the COO, or at least some of them, are themselves "supervisory, professional, or managerial employees," as required by section 101(a)(44)(A)(ii) of the Act.

The Petitioner asserts that three of the four subordinate employees, all except the accounting manager, have bachelor's degrees in various fields. A bachelor's degree is generally the minimum educational requirement for a professional position. No documentary evidence has been submitted to show that any of the three subordinate employees has the bachelor's degree claimed by the Petitioner.[2] Moreover, the Petitioner has not shown that a bachelor's degree is a prerequisite for any of the three positions – fleet director, safety director, or recruiting manager – or that a bachelor's degree is necessary to perform the specific job duties of those positions. The Petitioner does not even assert that the position of accounting manager requires a bachelor's degree. Therefore, the record does not demonstrate that any of the COO's four subordinates is a professional. Furthermore, the record does not indicate that any of the four subordinate positions are supervisory or managerial in nature, first and foremost because three of the four – all except the fleet manager – have no subordinate(s) to supervise or manage. While the organizational chart shows that the fleet manager has an assistant, no job description for that position has been submitted and the job duties of the fleet manager do not list any supervisory or managerial tasks vis-à-vis his assistant. The job duties of the fleet manager, like those of the accounting director, the safety director, and the recruiting manager, concentrate on day-to-day operational tasks of the business. Thus, whatever supervision and control the COO may exercise over his subordinates, it does not constitute the supervision and control or other supervisory, professional, or managerial employees.

As previously discussed, the definition of "managerial capacity" contains four elements. The Petitioner must show that the position meets each of the four elements. In looking at the second element in this case, the evidence of record does not show that the Beneficiary will "supervise[] and control[] the work of other supervisory, professional, or managerial employees" in the United States, as required to meet the first part of the definitional element of "managerial capacity" at section 101(a)(44)(A)(ii) of the Act. The Petitioner does not allege that the Beneficiary will "manage[] an essential function" [3] of the U.S. business, which is the second part of the definitional element of

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[2] As previously stated, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act. 8 U.S.C. § 1361. See also Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966); Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

[3] If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily manage, as opposed to perform, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." Matter of G., Inc., Adopted Decision 2017-05 (AAO Nov. 8, 2017).

"managerial capacity" at section 101(a)(44)(A)(ii) of the Act. As the record does not establish that the Beneficiary meets either part of the definitional element at section 101(a)(44)(A)(ii) of the Act, and thus does not establish that the Beneficiary will be engaged in primarily managerial activities rather than day-to-day operational tasks of the business, the Petitioner has not established that the Beneficiary will be employed in a "managerial capacity" in the United States.

B. Employment Abroad

As previously indicated, we reserve the issue of the Beneficiary's employment abroad in a managerial capacity.

III. CONCLUSION

The Petitioner has not established that the Beneficiary will be employed in a "managerial capacity" in the United States. Therefore, the Petitioner has not established that the Beneficiary is eligible for the L-1A nonimmigrant visa classification and admission to the United States as an intracompany transferee. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.