U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12890108

Date: NOV. 27, 2020

Appeal of California Service Center Decision

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

The Petitioner, an "E-cigarette and Business" company, seeks to continue 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 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 matter is now before us on appeal.

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. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity, or in a position requiring specialized knowledge 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)(1). The prospective U.S. employer must also be a qualifying organization that seeks to employ a beneficiary in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(i).

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;

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period December 11, 2018, until December 10, 2019. 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.

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 issue to be addressed is whether the Petitioner provided sufficient evidence establishing that the Beneficiary's position with the U.S. entity would be in a managerial or executive capacity.

When examining the managerial or executive capacity of a given beneficiary, we 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). Beyond the required description of the job duties, we examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a 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.

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

A. Managerial Capacity

First, we will address whether the Beneficiary's proposed employment under an extended petition meets the statutory definition of managerial capacity.

"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.

1. Factual Background

The petition form indicates that at the time of filing the Petitioner claimed six employees and a gross annual income of $254,732. In a supporting statement, the Petitioner offered a job duty breakdown indicating that the Beneficiary will have broad discretionary authority over the company's finances, plans and objectives, growth strategies, and a management staff consisting of a sales manager, an internet promotion manager, a service manager, and an office manager. The Petitioner stated that the Beneficiary will make adjustments to its products and strategies in accordance with "local policies" and operations of other e-cigarette vendors. The Petitioner explained that "the right General Manager" had not yet been hired at the time of filing and that the Beneficiary would therefore "shoulder[] the responsibility" until "the right person" is hired to fill the general manager position. The Petitioner

also provided its organizational chart listing eight positions of which two – an "office manager & bookkeeper" and a "web site designer" – were indicated as vacant. The organizational chart shows the Beneficiary at the top of the hierarchy overseeing a sales manager, a service manager, an internet promotion manager, and the vacant "office manager & bookkeeper" position. The sales manager is depicted with two subordinates – a sales assistant and a warehouse assistant – and the internet promotion manager is depicted as overseeing the vacant website designer position. In addition, the Petitioner provided quarterly wage reports for the first three quarters of 2019. The quarterly wage report for the third quarter lists six employees, showing that full-time wages were paid to the Beneficiary, the sales manager, the sales assistant, and one other employee whose name does not appear on the organizational chart. Two other employees, including the service and internet promotion managers, were compensated wages that are commensurate with part-time employment and the individual named on the organizational chart as the warehouse assistant was not included in that quarterly wage report.

The Director issued an RFE instructing the Petitioner to clearly identify the Beneficiary's proposed position as either managerial or executive. The Petitioner acknowledged the Petitioner's claim, that the Beneficiary would "shoulder[] the responsibility" for the lack of a general manager, instructing the Petitioner to clarify how the Beneficiary planned to compensate for this position vacancy. The Director also instructed the Petitioner to provide an organizational chart showing its organizational structure and staffing levels and to provide detailed job descriptions separately listing the job duties the Beneficiary performed during the previous year and those he would perform under an approved petition. The Director asked the Petitioner to disclose the percentage of time the Beneficiary would allocate to each listed job duty and to provide performance reviews completed by the Beneficiary for subordinate employees, if claiming that the proposed employment will be in a managerial capacity.

In response, the Petitioner provided a statement from the Petitioner's counsel and a statement signed by the Beneficiary in his capacity as the Petitioner's president. In the former statement, counsel reiterated the original claim that the Beneficiary would be employed in a managerial capacity and stated that the Beneficiary would oversee subordinates who are "professionals with supervisory duties" and who would relieve the Beneficiary from having to perform non-managerial job duties. In the latter statement, Petitioner claimed that the Beneficiary "has been concurrently undertaking some managerial work from December 2019 to April 2020," but that the Beneficiary's position is nevertheless "executive in nature." The Petitioner restated the original job duty breakdown and elaborated on each of seven job duties, adding a percentage and hourly breakdown to those duties in compliance with RFE instructions. The Petitioner stated that the Beneficiary "has been and will continue to perform" the listed job duties, which include the following:

- Developing and updating the business plan;
- Conducting "abundant research regarding new market potential";
- Recruiting employees to fill the positions of sales and marketing manager, service manager, and internet promotion manager;
- "[C]ultivat[ing]" an existing employee to fill the position of general manager;
- Pproviding "orientation and substantial training to new employees";
- Approving and denying leave requests; and
- "[D]irecting" a sales manager, an internet promotion manager, a service manager, and an office manager.

The Petitioner also provided an employee chart, which named eight employees, including the Beneficiary, and included employee position titles, salaries, and education levels. The Petitioner explained that even though it hired seven "temporary workers" subsequent to the approval of the prior L-1A petition, "all temporary workers were temporarily dismissed" as a result of the "work stoppage caused by the Covid-19 virus." The Petitioner also provided employee leave requests containing the Beneficiary's signature, employment agreements for a sales and marketing manager, a purchasing manager, a service manager, and general manager, and meeting notes that described the subject matter and listed attendees of meetings that were claimed to be held between January 2019 and April 2020.

After reviewing the evidence, the Director denied the petition, finding that the Petitioner did not adequately explain why the Beneficiary's duties under an extended petition would be the same as the duties he performed during the Petitioner's first year of operation, when it was a new office. The Director also discussed the Petitioner's staffing composition, questioning whether it had reached a level of development that would enable it to support a managerial or executive position and pointing to the lack of evidence showing that the Petitioner hired a warehouse assistant and the lack of clarity as to which of its employees were deemed "temporary workers" and the duties they performed. Regarding evidence of changes that the Petitioner claims took place after the petition was filed, the Director noted that eligibility must be determined based on facts and circumstances that existed at the time of filing and that evidence of changes that may have taken place after this petition was filed are not relevant.

On appeal, the Petitioner asserts that "the Beneficiary has been and will be relieved from perform [sic] non-qualifying day-to-day jobs by her subordinates, that she is primarily engaged in managerial duties" and further notes that "she receives the highest salary compared with the rest of [the] employees"[2] and exercises authority directly over a general manager and indirectly over three department managers.

2. Analysis

As a preliminary matter, we note that the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. We further 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 set 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. In the present matter, the Petitioner does not clarify whether the Beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. As indicated earlier, the Petitioner makes inconsistent claims

[2] We note for the record that the Beneficiary in this matter is male.

on this issue by first claiming that the Beneficiary will be employed in a managerial capacity, then claiming executive capacity in response to the RFE, and reverting to the original claim on appeal. In the matter of any claim, however, the Petitioner must support its assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010). In addition, the Petitioner's claim that the Beneficiary "has been and will continue to perform" the same list of job duties indicates that there would be no distinction between the job duties the Beneficiary performed during the Petitioner's new office phase of operation and those he would perform under an approved petition. This lack of a distinction leads us to question how or whether the Petitioner progressed beyond the new office phase of operation during which the Beneficiary is expected to focus on primarily managerial or executive job duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services for an entity that is not a new office is not considered to be "primarily" employed in a managerial or executive capacity. See, e.g., sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); Matter of Church Scientology Int'l, 19 I&N Dec. 593, 604 (Comm'r 1988).

Further, although the Petitioner focuses on the Beneficiary's top placement with the U.S. organization and his authority over "management staff," it does not clarify whom it deemed as its "temporary workers" or how the absence of those workers will affect the Petitioner's operation and its ability to support the Beneficiary in a managerial capacity. Although the Petitioner claims that it hired a general manager since the filing of this petition, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Because the Petitioner did not employ a general manager at the time this petition was filed, we will not consider this new information when making an eligibility determination. Instead, we will focus on evidence that is relevant to the Petitioner's circumstances at the time of filing. Here, the record contains conflicting evidence as to whom the Petitioner employed at the time of filing and the positions those employees occupied.

As noted earlier, the Petitioner offered several employment agreements in response to the RFE. According to one such agreement, [redacted] was offered employment as the Petitioner's "sales and marketing manager" in January 2019. [redacted]'s employment agreement indicates that this individual was offered the same position in September 2019, three months prior to the date this petition was filed. However, the organizational chart provided at the time of filing does not include a "sales and marketing manager" position and further shows that [redacted] and [redacted] held separate positions as sales manager and internet promotion manager, respectively.[3] Given that the Petitioner provided a promotion letter and corresponding employment agreement stating that [redacted] was not promoted to the position of general manager until April 2020, it is unclear why [redacted] was offered [redacted]'s position of sales and marketing manager in September 2019, a position [redacted] presumably held until being purportedly promoted to another position.

Further, although [redacted]'s employment agreement indicates that this individual was offered the position of purchasing manager in June 2019, the Petitioner's organizational chart did not list a purchasing manager position as part of its organizational hierarchy. Moreover, it is unclear why [redacted] was listed as a participant in an April 2019 meeting if, as stated in the employment

[3] The position of "office manager & bookkeeper" was also depicted as the Beneficiary's direct subordinate, but was shown to be vacant at the time of filing.

contract, this individual was not hired until June 2019, two months after the alleged meeting took purportedly took place. The Petitioner provided no evidence showing that it employed [redacted] in any capacity in April 2019 or that a purchasing manager position was part of its organizational hierarchy at the time this position was filed. We also noted that although the previously mentioned employee chart indicates that a bonus or commission will be paid to each employee in addition to their base salary, this compensation structure was not corroborated in any of the submitted employment agreements, which listed only monthly salaries and made no mention of additional compensation.

The Petitioner must resolve the inconsistencies described above with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id.

Lastly, we note that none of the Petitioner's meeting notes, the earliest of which date back to January 2019, specifically list [redacted] the Beneficiary, as a meeting participant. Rather, the notes list [redacted] as a participant in each meeting. The Petitioner has not acknowledged this anomaly or provided evidence establishing that [redacted] and the Beneficiary are the same individual. This anomaly, along with the various other irregularities, must be resolved through the submission of independent, objective evidence. Id.

By providing evidence containing the deficiencies and anomalies catalogued above, the Petitioner has undermined its credibility, thereby also detracting from the reliability of its claim that the Beneficiary would be employed in a managerial capacity.

B. Executive Capacity

We will also address the new claim the Petitioner made in its RFE response statement, where it stated that although the Beneficiary "has been concurrently undertraining some managerial work," his employment is "executive in nature."

"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.

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.

Given the claim that the Beneficiary planned to "concurrently" perform managerial and executive job duties at the time of filing, it appears that the proposed employment would not be primarily "executive in nature" as claimed, but rather that it would be a "hybrid" manager/executive position. However, as discussed above, the Petitioner 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.

Further, 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, his actual duties may not be primarily executive in nature. Because of the evidentiary deficiencies described in this decision, the Petitioner has not demonstrated that it was adequately staffed and able to relieve the Beneficiary from having to carry out primarily non-executive job duties at the time of filing. As such, we cannot conclude that the Beneficiary would primarily "direct the management" and "establish the goals and policies" of the U.S. entity.

In light of the above, the Petitioner has not established that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

ORDER: The appeal is dismissed.