U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12237175

Date: NOV. 27, 2020

Appeal of California Service Center Decision

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

The Petitioner, a digital design and marketing solutions company, seeks to temporarily employ the Beneficiary as its "Vice 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 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's proposed position would be 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, the Petitioner has not met this burden. Accordingly, 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). 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. 8 C.F.R. § 214.2(l)(3)(ii).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that it would employ the Beneficiary in an executive capacity. Although the Director also considered whether the Beneficiary

would be employed in a managerial capacity as defined at section 101(a)(44)(A) of the Act, the Petitioner has not claimed that the Beneficiary's position is managerial 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.

When examining the executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. *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. Duties

Based on the definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in 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); *Champion World*, 940 F.2d at 1533.

The Petitioner stated it was formed in 2016 and that it "creates websites, digital products, 3D artifacts, apps, and results-driven online marketing programs." At the time of filing, the Petitioner claimed 3 employees and $220,254 in gross earnings, stating that the Beneficiary would be compensated $75,000 annually. In its initial letter of support, the Petitioner stated that the Beneficiary would oversee two employees; namely, a "Senior Content Specialist and Trainer" and a "Content Specialist," and provided a general description of the Beneficiary's duties, which included tasks such as "oversee and control business development and company management" and "direct and coordinate the operation" of the company. The Petitioner also provided a job duty breakdown, stating that the Beneficiary would allocate his time as follows (verbatim):

- Own the relationship with digital marketing and product clients by forging strong communication and service legal agreement (SLA) with them (20%)
- Strive to acquire new key accounts in eCommerce, metal buildings, real estate, and interior design industries (20%)
- Oversee and direct activities for the following departments (30%):

    - Account Management – project planning with timeframe analysis, production reporting, resource allocation, budgeting and testing use cases.
    - Product Development – software product development with business analysis in the states industries above.
    - Sales and Marketing – generate more key accounts in the above mentioned.
- Lead the development, execution and optimization of all lead generation, nurturing, and paid customer acquisition campaigns (5%)
- Oversee search and social marketing efforts for [the Petitioner] and its clients, including managing a relationship with a high-performing search and social agency; ensuing that that the company is optimizing keyword and bid strategies, continually improving ad copy, and frequently testing landing page variations to deliver the maximum return on company spending (5%)
- Oversee and implement strategic social outreach research campaign on Facebook, Instagram, Snapchat, LinkedIn, and Pinterest for [the Petitioner] and its clients (5%)
- Oversee training of newly hired sales and marketing personnel in Search and Social Media Marketing – as a digital marketing consultant, [the Petitioner] is constantly managing big ad budgets spent on social and search platforms (5%)
- Develop comprehensive industry level solutions for the metal buildings industry (10%)

The initial statement of duties indicated that the Beneficiary will oversee various components of the Petitioner, such as account management, product development, and sales and marketing. While this overview of duties suggests that the Beneficiary holds a heightened degree of authority, it did not clarify what he would be doing on a day-to-day basis. For example, the Petitioner stated that the Beneficiary will "strive to acquire new key accounts in eCommerce, metal buildings, real estate, and interior design industries" and "forg[e] strong communication and service legal agreement[s] with clients, and that a combined 40% of his time would be devoted to these two tasks. The Petitioner did not explain how these duties fall within the definition of "executive capacity." Based on these statements, it appears that the Beneficiary is directly involved in client relations and will have substantial involvement in non-qualifying operational duties.

Additionally, the Petitioner indicated that significant efforts will be made to launch marketing campaigns through social media platforms such as Facebook and Instagram. While the Petitioner claimed the Beneficiary will oversee such activities, it does not explain who will carry out these activities. While we acknowledge the Petitioner's claim that the Beneficiary will "oversee training of newly hired sales and marketing personnel," there is no indication that such personnel had been newly hired at the time of filing. As noted above, the Beneficiary's subordinates consist of the senior content specialist and trainer and the content specialist, who "partner[] with businesses to help them clarify their message in order to better connect with both current and future customers and clients," and "contribute[] a significant amount of content creation," respectively. The vague description of the duties of the Beneficiary's subordinates precludes a determination that they would be assisting the Beneficiary with marketing, sales, and promotion activities at the time of filing.

In response to the Director's request for evidence (RFE), the Petitioner provided a revised description of duties, indicating that the Beneficiary would "direct the hiring for the managerial, operational, and project level administrative functions and oversee the initial hiring phase of the managerial staff." It stated that since the filing of the petition, it had hired a third employee in the position of "Business Development Manager." The Petitioner provided the following updated description of the duties of the Beneficiary:

> **(1) Direct the management of the organization or a major component or function of the organization**
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> [The Beneficiary] will initially direct the following components/functions:
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> - Web/Software Project Management – It is crucial for [the Petitioner] to find, train, and foster a project manager and project coordinator who can take care of its current and forthcoming projects. With multiple clients onboard, [the Beneficiary] will focus on establishing and strengthening the project management department quickly, to continue offering superior services to its clients. [The Beneficiary] will hire individual(s) based on demonstrated expertise and train them on [the Petitioner's] policies, project management life cycle, and processes. It is crucial for [the Beneficiary] to initially manage talent during their initial setup after which they can perform the managerial functions with the [foreign entity] team. [The Beneficiary's] experience and knowledge of the intimate workings of [the foreign entity] are essential to ensure that operations between the U.S. and India companies are streamlined and established property.
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> - Expand Digital Marketing Core Department – [The Beneficiary] will direct the development of Digital Marketing function by hiring, coaching, and positioning digital marketing supervisors in 2020. [The Beneficiary] is essential to the effective formation of new talent in this area. [The Petitioner has seen growth in 2019 and the company needs more people in right places so that clients can be served quickly and effectively. Any lag or hesitation in quality or service significantly undermine [the Petitioner's] expansion plan and [the Beneficiary] is uniquely qualified to bring his expertise and insight to ensuring steady growth. Complex projects (Digital Ad, Digital display campaigns, organic social campaigns) need active communication. The conduit between [the foreign entity] and [the Petitioner] is currently missing, and [the Beneficiary] is the essential piece to serve as a conduit to ensure the success of [the Petitioner's] ambitious aspirations for expansion into the U.S. market. [The Petitioner's] Digital Marketing Department should consist of 2-3 people with one supervisor by the end of 2020 and we expect significant growth under [the Beneficiary's] uninterrupted leadership and direction.
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> - Oversee [the Petitioner's] Operations – [The Beneficiary] will oversee the overall growth of [the Petitioner] and help it expand in terms of more USA based employees and stronger client contracts. He will hire Operations Managers once the company grows to 15+ employees (in different roles). It is imperative for [the Beneficiary] to establish policies, procedures, and protocols that the Operations Manager can utilize

(and build upon) to grow [the Petitioner] into a World-Class Digital marketing and Software Development firm.

- Under [the Beneficiary's] unique background and demonstrated track record of success, we expect significant growth under [the Beneficiary's] uninterrupted leadership and direction. He will be responsible for successful implementation of strategic plans and monitor these functions and subordinate personnel.

(2) Establish the goals and policies of the organization, component, or function

The Beneficiary will ensure achievement of company objectives and financial targets established in concert with [the foreign entity] while posturing for continued growth of [the Petitioner].

In addition to the above-mentioned major components and functions, [the Beneficiary] will also be responsible for setting up a semi-automated Administrative Department which will require utilization of software and an external service (yet to be identified). The Administrative Department will set up payroll, office management, work hour policies, phone usage policies, bonus policies, employee onboarding policies, etc.

[The Beneficiary] has significant authority over formation and implementation of company policy and will assist with the creation of [the Petitioner's] overall vision, mission, values, beliefs, and strategic goals. As stated above, it is imperative for [the Beneficiary] to establish policies, procedures, and protocols that the Operations Manager can utilize (and build upon) to grow [the Petitioner] into a World-Class Digital Marketing and Software Development firm.

(3) Exercises wide latitude in discretionary decision-making

[The Beneficiary] will have broad-based discretionary authority and be accountable for all activities involving business development and company management of [the Petitioner]. He will fill this position at a very high level of the company corporate hierarchy and will work in concert with the President of [the Petitioner].

(4) Receives only general supervision from higher level executives, the board of directors, or stockholders of the organization.

[The Beneficiary] will work closely with the President of [the Petitioner], the Sole Director and Shareholder[1] of [the Petitioner], but as [the Beneficiary] is the Founder and CEO of [the foreign entity] and is planning on assisting with the development of the company's "new office" in the US, he will set his own daily activities.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and

[1] This statement contradicts the assertion that the Beneficiary is the majority shareholder of the Petitioner.

that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. To show that a beneficiary will "direct the management" of an organization, a petitioner must show how the organization is managed and demonstrate that the beneficiary will primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

In its RFE response, the Petitioner reiterates the prongs that comprise the definition of executive capacity and continues to make broad statements about the Beneficiary's discretionary authority without providing evidence to support its claims. Regarding its claim that the Beneficiary will direct the management of the company, the Petitioner stated that the Beneficiary will "ensure achievement of company objectives and financial targets." The Petitioner further stated that the Beneficiary will oversee its operations, specifically the development of its web/software project management team and the development of its digital marketing function. Specifically, the Petitioner claimed that the Beneficiary will hire, coach, and position digital marketing supervisors in the U.S. entity, and "find, train, and foster a project manager and project coordinator who can take care of its current and forthcoming projects." The Petitioner noted that with multiple clients onboard, the Beneficiary must focus on establishing and strengthening the project management department quickly in order to sufficiently service its clients, as well as ensure appropriate staffing is in place in the digital marketing department to ensure the Petitioner's success in the U.S. market. The Petitioner concluded that once these goals are achieved, the Beneficiary will "be responsible for successful implementation of strategic plans and monitor these functions and subordinate personnel."

The Petitioner's organizational chart submitted in response to the RFE, however, indicates that the Beneficiary's subordinate employees include the senior content specialist and trainer, the content trainer, and the newly-hired business development manager. Although it is likely that the Beneficiary would have a level of discretion that is consistent with that of an executive, the Petitioner has not established that he will primarily implement strategic plans and monitor the functions noted above. Despite the presence of three subordinate employees, there is no indication that these individuals contribute to the performance of the marketing or product management functions identified above. Although the Petitioner claims that the Beneficiary will hire the claimed digital marketing supervisors and the project manager and project supervisor, which the Petitioner claims are essential to its operations due to the number of existing clients it must serve, the absence of staff required to perform the essential sales and marketing functions raises questions regarding the true role of the Beneficiary. Given the Petitioner's claim that the Beneficiary will primarily perform executive functions once these hiring goals are achieved, it appears that either the Beneficiary himself is performing the marketing and project management operations and functions or he does not actually manage these operations and functions as claimed by the Petitioner. In either case, we are left to question the validity of the Petitioner's claim and the remainder of the Beneficiary's claimed duties. Doubt cast on any aspect of the Petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the Beneficiary is performing the marketing and project management operations and functions, we note that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Based on these

observations, it is unclear how the Beneficiary would be able to "direct the management" of the organization as claimed by the Petitioner.

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." Section 101(a)(44)(B) of the Act. Here, the Petitioner states that the Beneficiary "will have broad-based discretionary authority and be accountable for all activities involving business development and company management," "will assist with the creation of [the Petitioner's] overall vision, mission, values, beliefs, and strategic goals," and "will set his own daily activities." However, these vague phrases do not explain the actual underlying tasks that the Beneficiary would carry out on a daily basis. Aside from establishing that the Beneficiary has discretion over operational and policy matters, it is unclear precisely what the Beneficiary would actually be doing.

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

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

In response to the RFE, the Petitioner updated its statement of duties to indicate that the Beneficiary will be tasked with hiring various managerial positions not yet established within the U.S. entity. For example, it stated that the Beneficiary will hire a project manager and a project coordinator, because it is "crucial" that the Petitioner "find, train, and foster a project manager and project coordinator who can take care of its current and forthcoming projects." The Petitioner also stated that the Beneficiary will hire, coach, and position digital marketing supervisors in the U.S. entity, and estimates that he will hire 2-3 individuals for the digital marketing department, with one supervisor, by the end of 2020. The Petitioner also submitted a hiring plan, which indicates that the Petitioner intends to hire a sales manager and a sales representative, a digital ads manager and digital ads representative, a full stack programmer, and a content writer within the Beneficiary's first year of employment, with additional employees to be hired by the second year of his employment.[2]

[2] The Petitioner repeatedly refers to the U.S. entity as a "new office" and indicates that the Beneficiary will be tasked with overseeing the "initial hiring phase of the managerial staff." When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The Petitioner, however, was established in 2016, and

Although the Petitioner claims that it has sufficient lower-level staff to allow the Beneficiary to primarily focus on the broad policies and goals of the organization, and to remove him from significant involvement in the day-to-day operations of the company, the record does not support that claim. According to the Petitioner, it has "multiple clients on board" and "the company needs more people in right places so that clients can be served quickly and effectively." The Petitioner indicates, however, that it does not have sufficient staff available to meet its clients' needs. Although the Beneficiary had two documented subordinates at the time of filing, the Petitioner did not articulate to what extent, if any, the senior content specialist and trainer and content specialist serve clients or relieve the Beneficiary from performing non-qualifying duties such as the sales and marketing functions discussed above.[3]

Moreover, the Petitioner claims in its hiring plan that it intends to hire numerous employees within 12-18 months, and states that the majority of their training will be conducted remotely by employees of the foreign entity. No evidence to support this assertion was submitted, and we note that this claim directly contradicts the updated statement of duties submitted in response to the RFE where the Petitioner claims that the Beneficiary himself will train these new individuals. On appeal, the Petitioner asserts that the Director erroneously disregarded the statements set forth in the hiring plan, and claims that the hiring plan outlined how the foreign entity's employees "will fill in for necessary planning and administrative functions to alleviate [the Beneficiary] from performing the non-qualifying day-to-day duties." Again, the record contains no evidence to corroborate these claims. The Petitioner has not sufficiently established that the foreign staff assist the Petitioner with its day-to-day operations or remove the Beneficiary from involvement in non-executive duties, such as the training, client relations, and sales and marketing functions stated in his job description.

Here, the Petitioner has not explained how the Beneficiary is able to perform primarily executive duties with two subordinate employees, nor has it provided sufficient evidence of how the Petitioner was able to meet the needs of its clients with no subordinate operational or administrative staff based in the United States. As a result, there are a number of non-executive functions which were not clearly delegated to subordinate staff when the petition was filed.

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). Therefore, while we acknowledge that the Petitioner was engaged in recruitment efforts when the petition was filed, we find that the Director properly considered the company's actual staffing levels at the time of filing when evaluating the Beneficiary's employment capacity. We have interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also

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indicates on the L Classification Supplement to the petition that the Beneficiary is not coming to the United States to open a new office. The Petitioner, therefore, is not considered a "new office" as contemplated by the regulation at 8 C.F.R. § 214.2(l)(3)(v). The regulations applicable to new offices allow a newly established petitioner one year to develop to a point where it can support the employment of a beneficiary in a managerial or executive capacity. *See generally* 8 C.F.R. § 214.2(l)(3)(v)(C). The Petitioner, as an existing office that has been doing business for four years, 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).

[3] Although the Petitioner indicated in its RFE response that it hired a business development manager, the record reflects that this individual was hired subsequent to the filing of the petition. As noted above, 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).

consistently interpreted that Act to require petitioners to establish that the beneficiary's position "primarily" consists of executive duties, and that it has sufficient personnel to relieve a beneficiary from performing operational and administrative tasks. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Based on the nature of the company and its documented staffing levels, the Petitioner has not shown that it requires the Beneficiary to primarily perform the higher-level planning, policy-making, and business development duties attributed to him. Accordingly, the Petitioner has not established that he will be employed in an executive capacity.

III. CONCLUSION

The appeal will be dismissed because the Petitioner did not establish that it will employ the Beneficiary in an executive capacity.

ORDER: The appeal is dismissed