U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11853029

DATE: NOV. 27, 2020

Appeal of California Service Center Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a daycare business, seeks to continue the Beneficiary's temporary employment 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 (1) that the Beneficiary would be employed in a managerial or executive capacity in the United States or (2) that the Petitioner had been and still was doing business.

On appeal the Petitioner submits additional evidence and asserts that the record establishes that the Beneficiary will continue to be employed in an executive capacity[1] in the United States and that the Petitioner is still doing business in the United States.

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 an executive 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 Petitioner is still doing business in the United States.

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

[1] The Petitioner does not assert that the Beneficiary will be employed in a managerial capacity the United States.

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. Also, it is the duties actually performed, not the job title, which determine the nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F.Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d. 41 (2d. Cir. 1990).

II. ANALYSIS

The Petitioner, incorporated in [redacted] 2016, is the wholly owned subsidiary of [redacted] located in [redacted], Philippines. The record indicates that the Beneficiary was a founding member of the Philippine organization in 1998, served in two high-level positions until March 2018, and then transferred to the United States with an L-1A visa to serve as the Petitioner's president/CEO following the approval of the Petitioner's initial Form I-129 ("new office") petition.[2] In March 2019 the instant petition was filed seeking to continue the Beneficiary's temporary employment in the United States based on his alleged "executive capacity" as the Petitioner's president/CEO.

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:

> [The Petitioner] continues to require the full-time services of a President/Chief Executive Officer (CEO) in order to guide, oversee and control the entity's overall operations, specifically, the U.S. marketing and business side. The President/CEO will be responsible for the essential functions of the Company, such as proactively developing and executing marketing pitches, managing the organization and creating plans for business growth and productivity.

With its initial evidence and in response to the Director's request for evidence (RFE) the Petitioner provided a more expansive description of the president/CEO position, seeking to link specific job duties and the percentage of time spent on each to the four definitional elements of "executive capacity" in section 101(a)(44)(B) of the Act. Thus, the Beneficiary's job duties were presented as follows:

[2] 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.

1. Directs the management of the organization or a major component or function of the organization (60%)

   - Serve as the face and voice of the company in dealing with vendors and parents (12%)
   - Streamline operations for maximum efficiency while upholding customer satisfaction and maintaining an excellent standard of quality (14%)
   - Develop relationship with the community in order to build a customer base and ensure the profitability of the organization (10%)
   - Analyze operations to evaluate performance of the organization and its staff in meeting objectives and determine areas of potential cost reduction, program improvement, or policy change (16%)
   - Establish budgets and marketing objectives (8%)

   As an example of the Beneficiary directing the management of the daycare business, the Petitioner cited the Beneficiary's hiring of a child care director, who must be a licensed professional under Texas law.

2. Establish the goals and policies of the organization, component or function of the organization (20%)

   - Maintain total customer contentment by focusing on their requirements and preferences above all else (100%)
   - Oversee operations enduring [*sic*] employees provide clients with close personal attention and quality child care services (100%)
   - Hiring, and if necessary, firing of managers and upper level managements [*sic*] (5%)
   - Oversee director and examine sales reports frequently and make decisions accordingly based on the performance of the company against its pro-forma sales and profit & loss projections (15%)

   As examples of establishing the goals and policies of the daycare business the Petitioner asserted that the Beneficiary "attends meetings with banks, potential investors, vendors, and other strategic partners," in which the Beneficiary "negotiates terms, decides whether to execute agreements and partnerships, accept or reject business proposals, and take investment risks." The Beneficiary has sole authority to purchase or lease property and sign financial documents on behalf of the Petitioner. He oversees company operations with the help of "reports from his management team" and determines "how to improve sales through marketing."

3. Exercise wide latitude in discretionary decision-making (10%)

   - Report only to foreign parent company board of trustees (10%)
   - Exercise all powers given by the corporate bylaws in acting on behalf of the parent company (100%)

   The Petitioner stated that the Beneficiary's broad decision-making authority as president and CEO is enshrined in the company bylaws as well as state law in Texas.

4. Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization (10%)

    - Develop and implement management reporting systems and processes (4%)
    - Oversee preparation and communication of monthly and annual reporting (2%)
    - Periodically review and check the performance of upper level management team and recommend remedial action and improvements where necessary (2%)
    - Develop, in coordination with the upper level management team, an integrated business plan that optimizes operational activities, and efficiency and profitability of existing and new property management operations (2%)
    - Ensure development of an effective organizational structure and promotion of a positive internal climate in which management development for succession is nurtured (100%)

    The Petitioner stated that the Beneficiary has complete authority in personnel matters and broad authority from the parent company's board of trustees to operate the U.S. business.

We note that the total percentages of time assigned to the job duties listed under the second, third, and fourth elements of "executive capacity" far exceed the percentages of time the Beneficiary allegedly spends overall on those respective elements of "executive capacity." It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.* The Petitioner has provided no explanation for the inconsistencies discussed above concerning the percentages of time spent by the Beneficiary on his various job duties. The inconsistent allocation of timeframes makes it difficult to understand the true nature of the duties and to determine the extent to which they may, or may not, demonstrate that the position is executive in nature.

The Petitioner also provided organizational charts of the U.S. company, which at the time of the RFE response in November 2019 identified eight employees including the Beneficiary. The chart shows two positions directly subordinate to the president/CEO, including an assistant administrator and a child care director. Directly subordinate to the child care director are an assistant director and a "head teacher/coordinator," and beneath this latter position are a caregiver and two teachers.

The job duties of the Petitioner's staff positions, along with applicable educational and experience requirements, were described as follows in the RFE response:

Child Care Director –

> Responsible for managing the curriculum, overseeing the physical facility, hiring staff and managing the overall image of the center. She will ensure compliance with all local and federal laws governing child care facilities, both regarding the physical environment and the staff on a daily basis, interact with the surrounding community, as well as teachers, students and current and interested families.

By law must have at least a bachelor's degree, two years of experience, and proper certification from the State of Texas.

Assistant Director –

Responsible for a variety of front office responsibilities, including managing the staff, working with parents and interacting with children. She will assist in the hiring of new staff, provide training, and constantly monitor staff members to ensure they are performing assigned duties and responsibilities. She will constantly interact with parents, making themselves [*sic*] readily available to listen to their comments and/or concerns, and keep them informed of any new developments within the school. She will ensure that all children have appropriate paperwork on file, as required by the state, including health insurance information, allergies, medical details, and authorization from parents to administer any medicines and who may pick up their child from school. She will be in charge of giving tours to prospective clients, and hosting open houses for the current students and parents. The Assistant Director will be the "right hand" of the Child Care Director and will assist in creating budgets for the facility, submitting payroll and making sure the school has the necessary inventory or places an order when needed for school supplies (i.e. crayons, paper, glitter, paint, etc.), cleaning supplies, food, etc.

Should have at least an associate's degree in applied science in child development or a closely related field.

Teachers and Care Staff –

Responsible for implementing the already designed curriculum for their appropriate age group and following a full schedule of activities. They will balance their time between logical and social exercises. They will provide basic care and caregiving activities. They will evaluate children's performance to make sure they are on the right learning track. They will remain in constant communication with parents and update them on the progress of their child. They will observe children's interaction and promote "spirit of concord." The Teachers and Care Staff will identify behavioral problems and determine the right course of action to discipline. They will adhere with teaching standards and safety regulations as established by the school.

In denying the petition the Director noted the Petitioner's contention that 60% of the Beneficiary's time is spent on activities that involve "directing the management" of the organization – the first element of "executive capacity" – but indicated that the job duties were too vaguely described, insufficiently explained, and devoid of documentary evidence to support a finding that these activities were primarily executive in nature. Nor did the Beneficiary's hiring of the child care director, in and of itself, indicate that he was directing the management of the organization. As for the job duties categorized under the other three elements of "executive capacity," the Director determined that they were likewise too vague, short on details, and lacking in documentary evidence to show that these activities were primarily executive in nature. The Director also noted that pay records submitted by

the Petitioner indicated that the daycare business suffered from frequent turnover, did not have as many employees as intended when the Petitioner filed its initial "new office" petition, and did not appear to have retained even the eight employees identified on the organizational chart submitted with the RFE response.[3] In the Director's view the staffing shortfall suggested that the Beneficiary would be required to perform non-executive duties to keep the child care business in operation, and thus, would not primarily be engaged in an executive capacity. For all of these reasons the Director concluded that Petitioner did not establish that the Beneficiary would be employed in an executive (or managerial)[4] capacity in the United States.

On appeal the Petitioner submits an "expert opinion evaluation" from a professor at the Stern School of Business at New York University (NYU evaluation), who asserts that the Beneficiary's position of president/CEO with the Petitioner is "one of executive nature." The evaluation lists the job duties exactly as presented by the Petitioner in this proceeding and concludes that:

> By performing the above-mentioned duties, [the Beneficiary] would be acting in an executive capacity, as his responsibilities would require him to direct the functions of major business efforts and to formulate and oversee the implementation by management of company-wide strategic planning and long-term and short-term business objectives. [The Beneficiary] will be fully responsible for duties that are executive in nature and involve setting company-wide policies and goals. Specifically, [the Beneficiary] will direct the management of the organization, oversee operations, oversee the Director position, and examine sales reports frequently. His duties, as detailed above, in conjunction with his advanced standing in the company's hierarchy, attest to the fact that [the Beneficiary's] role as President/CEO most definitely involves executive-level responsibilities and expectations.

The NYU evaluation offers even less detail and analysis of the Beneficiary's job duties than the Petitioner did in its previous submissions. Thus, the evaluation provides no concrete examples of specific policies and goals established by the Beneficiary or of the Beneficiary's strategic and business planning. Nor does the evaluation provide any concrete examples of how the Beneficiary oversees the Director's position and business operations generally, except to state that he frequently examines sales reports (without even explaining what such reports entail for a daycare operation). Furthermore, the evaluation does not address the Petitioner's thin staffing level and does not explain how the staffing would be sufficient to allow the Beneficiary to focus primarily on executive duties. In short, the NYU evaluation has little evidentiary weight in support of the Petitioner's claim that the Beneficiary is employed in an "executive capacity."

The Petitioner asserts that the regulations of the Texas Department of Family and Protective Services prescribe that the Beneficiary, as the daycare center's permit holder, has the following responsibilities under 40 TAC (Texas Administrative Code) § 746/20-1:

> (1) Developing and implementing your child-care center's operational policies, which must comply with or exceed the minimum standards specified in this subchapter;

[3] The Petitioner's federal income tax return for 2019 recorded a total expenditure of $74,947 for salaries and wages that year. (Form 1120, page 1, line 13.) The total wages paid would not seem to reflect eight full-time employees.
[4] The Petitioner does not assert that the Beneficiary was or will be employed in a managerial capacity.

(2) Developing written personnel policies, including job descriptions, job responsibilities, and requirements; . . .
(3) Designating a child-care center director who meets minimum standard qualifications; . . .
(9) Complying with the child-care licensing law found in Chapter 42 of the Human Resources Code, the applicable minimum standards, and other applicable rules in the Texas Administrative Code.

According to the Petitioner these duties are similar to the four elements of "executive capacity" in section 101(a)(44)(B) of the Act. The Petitioner also claims that the four elements of "executive capacity" are reflected in the TAC's definition of a child care operation's "controlling person" which 40 TAC § 745.901 states is any person who:

(1) Is the owner of the operation or member of the governing body of the operation, including, as applicable, an executive, an officer, a board member, a partner, a sole proprietor and the sole proprietor's spouse, or the primary caregiver at a child-care home and the primary caregiver's spouse;
(2) Manages, administers, or directs the operation or its governing body, including a child care director or a licensed administrator; or
(3) Either alone or in connection with others has the ability to influence or direct the management, expenditures, or policies of the operation. For example, a person may have influence over the operation because of a personal, familial, or other relationship with the governing body, manager, or other controlling person of the operation.

As the Beneficiary is recognized as the "controlling person" of the Petitioner's day care business with the authority to manage, administer or "direct the operation" or the ability to influence or "direct the management, expenditures, and policies of the operation," the Petitioner contends that the Beneficiary is employed in an "executive capacity" under Texas law, consistent with the definition of "executive capacity" under section 101(a)(44)(B) of the Act. The Petitioner also asserts that the Beneficiary is relieved of performing day-to-day operational tasks by his immediate subordinate, the child care director. As prescribed at 40 TAC § 745.1003, a child care director must ensure:

(1) The child-care center's daily operation is administered in compliance with the minimum standards specified in the chapter;
(2) All employees comply with the minimum standards;
(3) All employees have assignments that match their skills, abilities, and training;
(4) All employees are supervised. Supervision includes, but is not limited to, knowing what the employees are doing and ensuring that they fulfill their assignments and responsibilities.

Since the child care director allegedly relieves the Beneficiary of performing the operational duties listed in the above regulation and, according to the Petitioner, must have a bachelor's degree under Texas law, the Petitioner asserts that the Beneficiary directs the work of a degreed professional. The Petitioner's claim that under Texas law a child care director must have at least a bachelor's degree is not correct. The pertinent regulation at 26 TAC § 746.1015 provides that "the director of a child-care center licensed for 13 or more children must be at least 21 years of age, have a high school diploma or its equivalent, and meet one of the following combinations of education and experience ...." An

attached graphic lists seven different combinations of education and experience, the first of which is a bachelor's degree with at least one year of experience and the next six of which specify various educational credentials that are less than a bachelor's degree with experience of two or three years.[5] Thus, an individual in Texas may qualify for a position as child care director with educational credentials of less than a bachelor's degree. Since the minimum educational requirement for a professional is generally a bachelor's degree, a child care director in Texas is not a professional position, regardless of whether a given day care employer may require such a degree. Thus, in overseeing the work of his direct subordinate, the child care director, the Beneficiary is not directing the work of a professional, as claimed by the Petitioner.

Nor does the record show that any of the subordinate positions are primarily managerial or supervisory in nature. 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.

The teachers and care staff positions, as described by the Petitioner, are exclusively devoted to providing the daily services of child care. The duties of the Beneficiary's assistant administrator are not specifically described, but there is no indication they include managerial or supervisory activities since the position has no subordinates and provides direct assistance to the president/CEO. As for the child care director, the duties of this position do appear to encompass some management or supervisory activities with respect to staff and curriculum oversight, but the bulk of the duties, as described by the Petitioner, involve day-to-day tasks of running the daycare operation. Finally, the assistant director, subordinate to the child care director, has some staff management responsibilities but the vast majority of the duties of this position involve day-to-day operational tasks of the business. In sum, all seven positions subordinate to the Beneficiary are either exclusively or primarily involved with providing the daily services of the child care center and completing the day-to-day operational tasks of the business. Thus, whatever direction the Beneficiary provides to his subordinates does not involve any employees whose duties are primarily supervisory or managerial in nature to allow the beneficiary to *primarily* focus on executive duties.

The definition of "executive capacity" contains four elements, as previously indicated, and the Petitioner must show that the position of president/CEO meets each of the four elements. The evidence of record does not show that the Beneficiary meets the first definitional element of "executive capacity" at section 101(a)(44)(B)(i) of the Act, which requires that he "direct[] the management of [the daycare operation] or a major component or function of the organization." As discussed above, the evidence of record does not indicate that any of the Beneficiary's subordinates perform primarily managerial or supervisory tasks in the performance of their jobs. Since the record does not show that any positions subordinate to the Beneficiary are primarily managerial or supervisory in nature, the Petitioner has not demonstrated that the Beneficiary "directs the management" of the organization or

[5] *See* casetext.com/regulation/texas-administrative-code/title-26-health-and-human-services/part-1-health-and-human-services-commission/chapter-746-minimum-standards-for-child-care-centers/subchapter-6-personnel/division (last visited Oct. 21, 2020).

of any component or function of the daycare operation. In fact, the Petitioner has not explained how any of the five job duties listed for the Beneficiary under the category of "directs the management of the organization" – which allegedly comprise 60% of the Beneficiary's time – actually fit under that category since none of the five duties incorporates a discernible management direction component.

Executive capacity requires that the Petitioner show that the Beneficiary will perform certain high-level responsibilities, and 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). An individual will not be deemed a multinational executive under the statute simply because they have an executive title or because they direct the enterprise as a co-owner or senior management employee.

In this case the Petitioner has not established that the Beneficiary has an elevated position in an organization with subordinate management or supervisory level employees to allow the Beneficiary to focus *primarily* on executive functions. Therefore, the Petitioner has not established that the Beneficiary will "direct the management" of its organization, as required to meet the first definitional element of "executive capacity" at section 101(a)(44)(B)(i) of the Act. Since the Beneficiary does not meet all four elements of "executive capacity" he is not eligible for L-1A nonimmigrant visa classification as an intracompany transferee.

As previously indicated, the burden is on the petitioner in visa petition proceedings to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). To meet this burden, the petitioner must prove by a preponderance of the evidence that it and the beneficiary are qualified for that benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. In accord with the foregoing analysis, we conclude that the Petitioner has not met its burden of proof that the Beneficiary will be employed in an "executive capacity."

B. Doing Business in the United States

As previously indicated, we reserve the issue of whether the Petitioner is still doing business in the United States.

III. CONCLUSION

The Petitioner has not established that the Beneficiary will be employed in an "executive capacity" in the United States. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.