U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19101169

Date: OCT. 4, 2021

Appeal of California Service Center Decision

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

The Petitioner, the U.S. office of a company that manufactures cabinets and related furniture in Brazil, seeks to continue the Beneficiary's temporary employment as its chief executive officer (COO) under the L-1A nonimmigrant classification for intracompany transferees.[1] 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 record did not establish, as required, that the Petitioner seeks to employ the Beneficiary in a primarily 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. LAW

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity 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)(3)(v)(B). 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. *Id.*

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 from July 2, 2019 until July 1, 2020. 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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director determined that the Petitioner did not establish that it seeks to employ the Beneficiary in a primarily executive capacity. We agree, as explained below.

"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.

To show that a beneficiary is eligible for L-1A nonimmigrant visa classification as an executive, the petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition, the petitioner must then 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). In determining whether the beneficiary's duties will be primarily executive, we consider the 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.

If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, we must 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.

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

In the initial filing of the petition, the Petitioner states that its parent company's "factory in Brazil employs 387 full-time workers and contracts 2000 indirect workers," and that the company "entered the U.S. market in 2015 by selling its products directly to U.S. distributors. To date, the Company has opened nine (9) showrooms in the United States[2] and continues its plans for expansion." The company sells its products in North America and elsewhere through "exclusive resellers as well as in its standalone stores." The parent company "incorporated [the petitioning] U.S. affiliate . . . to represent its brands and to supervise the development and expansion of . . . show rooms throughout the United States." The company sells the [redacted] brand worldwide, and developed "a new brand," Closets & Co., "for e-commerce and large wholesalers in the U.S. and in Canada."

[2] The accompanying list of locations includes eight U.S. cities and [redacted] Canada.

The Director determined that the Petitioner did not show that the Beneficiary primarily directs the management of the organization.

The Petitioner asserts:

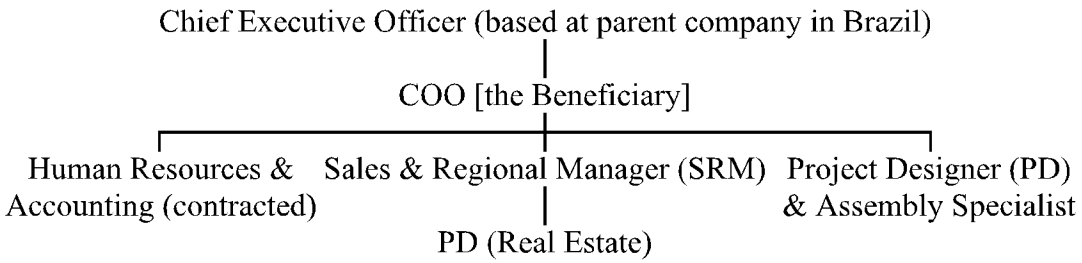
> [T]he Beneficiary] will continue to be responsible for directing all the major functions of [the petitioning U.S. employer], developing the Company's brand and maximizing its sales in the United States. The COO will continue to autonomously direct and have complete, sole discretionary authority over [the Petitioner's] strategic and operational activities, financial decisions, marketing decisions, personnel decisions and the establishment of internal policies in the U.S. [The Beneficiary] will continue to direct the activities of [the Petitioner's] employees, outside support personnel, independent contractors and outside service providers like the Company's attorneys and accountants. He has full authority to hire, discipline, and fire staff.

A three-page job description includes the approximate percentages of the time the Beneficiary will devote to various elements of the statutory definition of an executive capacity:

- Direct the management of the organization or a major component or function (40%);
- Establish the goals and policies of the organization, component or function (35%);
- Exercise wide latitude in discretionary decision-making (20%); and
- Receive only general direction or supervision from higher level executives, the board of directors or stockholders (5%).

We will focus on the "directing the management" element of an executive capacity, because the Director emphasized this same element. The Petitioner's initial statement indicates that the Beneficiary "serves as [the Petitioner's] top executive and head of [its] senior management team," and that that the Beneficiary will direct the management of the petitioning company by developing the company's showroom network, distribution channels, and "e-commerce channel," and "by overseeing the company's management team."

The Petitioner also asserts that the Beneficiary "serves as [the Petitioner's] top executive and head of [its] senior management team," a claim that necessarily implies that there are no executives higher than the Beneficiary, and that there is a subordinate "senior management team" under his direction. An organizational chart shows "the full-time employees and 3rd party contractor that [the Beneficiary] directs":



The Petitioner does not specify which of the three subordinate employees comprise the "senior management team."

The Petitioner provides job descriptions for the three subordinate employees. The job descriptions include several elements that appear to derive from generic lists of tasks, rather than the actual duties specific to the job. For instance, the description indicates that the SRM will "[d]irect and coordinate activities involving sales of manufactured products, services, commodities, real estate or other subjects of sale." This phrase appears, verbatim, in the generic listing for sales managers on O*NET, the employment database sponsored by the U.S. Department of Labor.[3] The language implies that the company will be involved in the sale of "services, commodities, [and] real estate," none of which appear to readily apply to a furniture company. The description also includes several references to an unspecified "store," such as: "Perform opening and closing duties on a daily basis such as locking/unlocking store and turning on/off the computer system," and "Provide sufficient staffing for store needs at all times." The job description also refers to "Assemblers" and "operators" who do not appear on the organizational chart.

The duties of the PD (real estate) include generic tasks from the O*NET listing for architects, such as "Plan or design structures such as residences, office buildings, theatres, factories, or other structural properties"[4] and "Direct activities of technicians engaged in preparing drawings," although the organizational chart shows no subordinate technicians to be directed in this way. The job description for the PD and assembly specialist includes these same architectural tasks, along with construction and carpentry tasks such as cutting timber, assembling parts, and "[m]atch[ing] materials for color, grain, and texture, giving attention to knots and other features of the wood" found in O*NET's listing for cabinetmakers.[5]

Because the duties are generic and, in several instances, apparently inapplicable, these job descriptions do not persuasively establish the actual duties of the subordinate staff.

Raising further questions, the Petitioner's job offer letter to the individual identified as the PD and assembly specialist identifies her position as "sales associate." Printouts in the record show that all three identified subordinates have sent sales-related emails to clients.

The organizational chart refers to a contract service that provides "human resources and accounting," but the Petitioner does not further document the nature or extent of the services provided by that company, or the extent of the Beneficiary's authority over those services. Contracts show that the Petitioner has arrangements with a staffing company that refers potential employees, and with a provider of "consulting services for prospecting business and customers." The agreements in the record do not state that the Beneficiary has executive authority over these contractors.

The Director issued a request for evidence (RFE), asking for further evidence and information about the management of the petitioning entity. The Petitioner's response includes printouts of email

[3] *See* "Sales Managers" on O*NET, https://www.onetonline.org/link/summary/11-2022.00 (last visited Sept. 28, 2021).
[4] *See* "Architects, Except Landscape and Naval" on O*NET, https://www.onetonline.org/link/summary/17-1011.00 (last visited Sept. 28, 2021).
[5] *See* "Cabinetmakers and Bench Carpenters" on O*NET, https://www.onetonline.org/link/summary/51-7011.00 (last visited Sept. 28, 2021)

messages regarding various aspects of the Petitioner's business. The messages are consistent with the Beneficiary's discretionary authority, which the Director did not dispute. But they do not establish that the Beneficiary's subordinates comprise the management of the petitioning entity. Rather, they indicate that these employees directly perform the company's operational tasks. For instance, in one message, the Beneficiary refers to the two PDs as "our draftsmen." In another, the Beneficiary states that the SRM will "provide the product training." The Beneficiary also named the SRM when a prospective distributor asked for the name of "a sales rep." The messages also indicate that the showrooms are operated by third parties rather than employees of the petitioning company, and do not show that the Beneficiary has authority over the operation of those showrooms apart from their access to products from the parent company in Brazil. The showrooms appear, in this respect, to be comparable to franchisees.

A distribution agreement in the record identifies the parties as the distributor and the Petitioner's parent company in Brazil, rather than the petitioning U.S. entity. The agreement identifies the Beneficiary as the Brazilian company's point of contact, but the contract predates the Beneficiary's entry into the United States. The document does not establish that the Petitioner in general, or the Beneficiary in particular, has executive authority over the distributor.

The Petitioner's response to the RFE includes a revised organizational chart showing several additional positions (some of them unfilled) and contractors. A spreadsheet indicates that, by 2023, the Petitioner anticipates adding 12 employees, including an installation and after sales manager; eight more PDs; and two business developers. But this business structure did not exist when the Petitioner filed the extension petition in June 2020. The Petitioner must meet all eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). While a new office petition can rely to some extent on the Petitioner's projections regarding the new office's first year of operations, changes made after that year, and forecasts of changes that have not yet occurred, cannot show that the new office *extension* petition was approvable at the time of its filing.

The Petitioner's response to the RFE also includes new job descriptions for the subordinate employees. These revised descriptions include some of the same elements as the earlier versions (such as the assertion that the SRM oversees "sales of manufactured products, services, commodities, real estate or other subjects of sale"), omit some of those elements, and add others. The Petitioner does not explain the changes. Although the organizational chart indicates that the SRM supervises the PD (Real Estate), the SRM's revised job description does not include such supervision. Instead, the SRM's revised job description indicates that he "[o]versee[s] regional and local sales managers and their staffs," although the Petitioner does not employ any such staff.

Copies of email messages show that the SRM provided sales quotes to several prospective customers. These messages do not show the involvement of other sales personnel, and therefore appear to indicate that the SRM was effectively performing, rather than overseeing, the sales function.

In the denial notice, the Director concluded that, while the Petitioner had established the Beneficiary's discretionary authority over the company, the Petitioner had not shown that the Beneficiary's duties have been, and will be, *primarily* executive. The Director also concluded that the Petitioner had not established the existence of a layer of management subordinate to the Beneficiary. The Director acknowledged the Petitioner's employment of an individual with the title "Sales Manager," but

determined that this employee "is directly performing marketing and sales activities as opposed to managing" those activities.

On appeal, the Petitioner cites recent revisions to the *USCIS Policy Manual*, requiring deference to prior approvals when adjudicating extension petitions. The Petitioner, however, acknowledges that the *Manual* specifies that "[o]fficers should not defer to prior approvals in cases where . . . [t]here has been a material change in circumstances or eligibility requirements." A footnote in the *Manual* specifies that the "material change" clause applies to new office petitions and other "situations in which the regulations require criteria to be met after approval."[6] New office petitions are subject to different conditions than other L-1 petitions (including extension petitions), and the approval of a new office petition does not imply a presumption of eligibility at the extension stage.

The Petitioner cites *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), which stated that adjudicators must "weigh all relevant factors including . . . evidence of the beneficiary's role within the wider qualifying international organization." *Id.* The Petitioner asserts that the same reasoning applies, because it is part of a multinational organization "with numerous tiers of employees throughout the world." But there are distinguishing factors.

Z-A- involved a beneficiary's managerial authority over the foreign "parent company's International Department, which employs technical, sales, and administrative staff who are dedicated exclusively to supporting the growth of the group's business in the Americas." *Id.* at 6. The Petitioner asserts, on appeal, that the parent company's hundreds of employees and contractors "support the U.S. Operations." This appears to be a mischaracterization of the foreign entity's relationship to the petitioning U.S. employer. The foreign parent company has existed for years, and recently established the U.S. entity essentially as a sales office to expand the brand into North America. In this way, the Petitioner exists for the benefit of the parent company, not vice versa; the factory employees in Brazil are not "dedicated exclusively to supporting" the Petitioner's U.S. operations, as was the case in *Z-A-*. The existence of a large organization abroad does not establish that the Beneficiary's authority over the U.S. operation qualifies as a primarily executive capacity.

The Petitioner contends that the Director placed too much emphasis on the small size of the new office's staff. The Petitioner adds: "it can be easily argued that [the Beneficiary] was developing a *component* of the organization, the U.S. operations for [the foreign entity]. This component or function is an extension of his job duties as *Manager of Exportation and Corporate Business* in Brazil." The Petitioner asserts that the Beneficiary "continues to exercise wide discretion in directing" the Brazilian entity's "Export Department, Commercial Department and International Logistics Department." Prior to the denial of the petition, the Petitioner had not indicated that the Beneficiary continued to have authority over any part of the company in Brazil, and the record does not adequately support this new claim.

The Petitioner asserts that the statute requires that, if a decision takes staffing into consideration, we must "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." The new office provisions are a means by which to take this development into account. This consideration does

[6] 2 *USCIS Policy Manual* A.4(B)(1), n.8, https://www.uscis.policymanual.

not relieve the Petitioner of the fundamental requirement to show that the Beneficiary's duties are primarily executive at the time of filing the extension petition. The Petitioner asserts:

> Congress created "new office" standards to allow new businesses to grow and establish themselves in the United States. . . . It is expected that a manager or executive who is required to open a new business or office will be more actively involved in day-to-day operations during the initial phases of the business.

We note that the "new office" provisions are regulatory, not statutory, and therefore do not reflect any Congressional mandate. Furthermore, those provisions create a more lenient standard only during the one-year new office period. The new office must be able to support qualifying managerial or executive employees after the first year.

The Petitioner states that the Beneficiary is "[d]irecting a managerial team," including the SRM and the two PDs, whom the Petitioner calls "[a]rchitects . . . with essential managerial duties." Earlier submissions indicate that these employees have significant operational responsibilities, such that their positions are not primarily managerial. The assertion that the PDs create designs which are then sent to Brazil for construction does not mean that the PDs "manage" the factory workers in Brazil who follow the plans.

The Petitioner emphasizes that the company has established a foothold and grown under the Beneficiary's leadership, even under the extraordinary challenges posed by the COVID-19 pandemic. These achievements, however, do not overrule or replace the statutory and regulatory requirements that the Petitioner must meet to show that the Beneficiary is employed in a primarily executive capacity.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it will employ the Beneficiary in a primarily executive capacity in the United States under the extended petition.

ORDER: The appeal is dismissed.