U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19413603

Date: OCT. 4, 2021

Appeal of California Service Center Decision

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

The Petitioner, a manufacturer and installer of stone veneer, seeks to continue the Beneficiary's temporary employment as its 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.[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

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a one-year period from June 18, 2019, until June 17, 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.

describing the staffing of the new operation and evidence of the numbers and types of positions held; 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 AN 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 an executive capacity.[2]

"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.*

When examining the 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 that such duties are in an 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.

[2] The Petitioner does not claim that the Beneficiary's proposed employment would be in a managerial capacity. Therefore, we will apply the definition of executive capacity when analyzing the facts and evidence presented.

A. Supporting Evidence

The petition form indicates that at the time of filing the Petitioner claimed two employees and zero gross or net income. In a supporting cover letter, the Beneficiary, in his capacity as the Petitioner's president, stated that he "manages all aspects of the company, including oversight of sales contracts, financial review, management, and budgeting, hiring and firing decisions, and retention of subcontractors." The Beneficiary stated that he would continue to perform "the same job duties" he performed over the past year and claimed that he would not perform the Petitioner's "routine daily tasks" because he would delegate such tasks to the factory engineer, construction budget and cost estimator, office administrator, and "various subcontractors."

The Petitioner also provided an organizational chart listing a total of seven positions. Only the Beneficiary was named in the chart and his position as president was depicted at the top of the organizational hierarchy. The remainder of the chart is divided into two sides with two positions – a "factory engineer" on top and "factory labor" directly below – listed on the left side and four other positions – an "Office, showroom administrator," a project manager, "subcontractors for stone installation," and "building supplies stone sales" – listed from top to bottom on the right side. A construction budget and cost estimator position was not included in the chart and the Petitioner did not indicate whether the vertical depiction of the remaining positions represents a staffing hierarchy.

In a request for evidence (RFE), the Director asked the Petitioner to provide a more detailed description of the duties the Beneficiary performed over the past year and duties he would perform under an extended petition pursuant the applicable regulations for a new office extension. The Director instructed the Petitioner to list the Beneficiary's "typical executive duties" and the percentage of time the Beneficiary would allocate to each duty. The Director also identified and asked the Petitioner to address various deficiencies in its organizational chart.

In response, the Petitioner provided two letters, each containing information about the Beneficiary's proposed U.S. employment. One letter states that the Beneficiary performs executive duties and "has been managing all aspects of the U.S. company since its inception in 2019." The letter includes the following job duty breakdown:

> Sales
> - Establishing and managing sales targets;
> - Adoption of sales strategies;
> - Negotiating and entering into contracts with clients for the sale of goods and services.
>
> Operations
> - Confer with factor employees regarding maintenance of adequate supply lines, production output, and to ensure labor needs are met;
> - Review productivity and performance of all direct reports . . . ;
> - Final decision making [*sic*] authority on all matters, including personnel, sales, company contracts, and financial decisions;

- Responsible for obtaining and maintaining adequate insurance in accordance with the law and health and safety regulations;
- Establishing company goals and policies at all levels.

Finance and Human Resources
- Establish company personnel needs, including creation of job descriptions and responsibilities;
- Participate in new hire interviews, as necessary;
- Complete authority to hire and fire personnel at all levels;
- Oversee payroll operations;
- Set, plan, and approve [b]udgets for all departments;
- Work with accountants and banks to manage cashflow and ensure suitable financial resources are available to support business initiatives at all times.

Office and facilities planning
- Ensure that suitable work environments and tools are provided to all staff and are sufficient to support growth plans and strategies;
- Negotiation of lease agreements, as necessary, suitable for office, showroom, factory, and product delivery needs.

Project Management
- Negotiate and enter into contracts with subcontractors for construction and other needs, as necessary;
- Confer with project manager to ensure sufficient staff, subcontractors, and supplies are available to fulfill sales contracts on time;
- With assistance of [p]roject [m]anager, monitor supply delivery methods and times to ensure timely completion and customer satisfaction; [*sic*]

The Petitioner added that "[r]outine daily tasks, such as product creation, supply orders, physical labor, invoicing, and general office administration are delegated to the company's factory employee, sales personnel, office administrator, and various subcontractors." In the meantime, the Petitioner stated that the Beneficiary's primary concern will be "implementation of company policies and procedures, entering into contracts which will impact the company's operations, and ensuring sales goals are being met for business success."

In the second letter, the Petitioner stated that the Beneficiary will be responsible for developing a "strategic plan," creating and controlling the implementation of an annual budget, communicating with "leadership of line associations" and "VIP clients," training personnel and ensure they carry out their duties, approving price quotes and invoices, and ensuring the company's promotion on the internet. The Petitioner stated that the Beneficiary's time would be divided among "general management" duties, to which he will allocate 70% of his time, and "resolving production issues," to which he would allocate the remaining 30% of his time. In the same letter, the Petitioner provided job descriptions for

two employees – a sales representative and a plant employee – and explained that it outsources the services of an accountant. The Petitioner also resubmitted the original organizational chart.

In denying the petition, the Director noted that the Petitioner did not state what percentage of time the Beneficiary would allocate to each of his assigned tasks. The Director also pointed out that the Petitioner did not provide a name or job description for the project manager, a position that was referenced as a subordinate in the Beneficiary's job description. In addition, the Director observed that even though the Petitioner submitted evidence of its engagement in various business transactions, no evidence was submitted to show that the sales representative and plant employee were involved in those transactions.

On appeal, the Petitioner challenges the Director's decision and refers to the above-referenced letters "detailing the Beneficiary's job duties." The Petitioner argues that it provided "unambiguous evidence" that the Beneficiary would be employed in an executive capacity.

B. Analysis

In light of the various evidentiary deficiencies to be discussed below, we disagree with the Petitioner's assertions and find that the Petitioner has not provided sufficient evidence demonstrating that the Beneficiary will be employed in an executive capacity as claimed.

As noted earlier, the job description is a critical element in helping us to determine whether the Beneficiary will be employed in a managerial or executive capacity, as the actual duties themselves reveal the true nature of the employment. *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). After reviewing the record, we agree with the Director's determination that the Petitioner did not provide an adequately detailed job description that clearly delineates the Beneficiary's role and job duties within the context of the Petitioner's business operation and is consistent with the staffing structure illustrated in the Petitioner's organizational chart. The Petitioner also did not demonstrate that at the time of filing, its operation had progressed beyond the new office phase and was able to support the Beneficiary in a position where the primary portion of his time would be attributed to job duties of an executive nature.

As a preliminary matter, we will address a claim made in the Petitioner's original support letter where the Petitioner stated that the Beneficiary "will continue these same job duties in the United States as he has done for the past year under the previously approved L visa," thereby effectively indicating 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 if the current petition were to be approved. 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 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).

On appeal, the Petitioner contends that the Beneficiary would not primarily perform "physical labor" at its manufacturing plant or construction site, explaining that such work would be performed by subcontractors. However, the Petitioner has not provided sufficient evidence establishing that the duties comprising the Beneficiary's position would be primarily executive in nature. For instance, one of the Petitioner's RFE response letters states that the Beneficiary establishes sales targets. Although the Beneficiary's authority and discretionary decision-making is inherent to this responsibility, the Petitioner has not described how sales targets are set or how frequently they are adjusted within the context of the Petitioner's operation. The same job duty breakdown states that the Beneficiary is responsible for "adoption of sales strategies." However, the Petitioner did not discuss the underlying tasks involved in the strategy-setting process or establish that changing strategies is a duty that the Beneficiary would perform on a daily or weekly basis, as opposed to intermittently as the need for such change arises. The Petitioner also did not provide a sampling of sales strategies that the Beneficiary has "adopted" thus far or elaborated on sales strategies he seeks to implement within the organization going forward. Likewise, although the job duty breakdown states that the Beneficiary would establish goals and policies "at all levels," the Petitioner did not elaborate on the goals and policies the Beneficiary has and looks to establish, nor did it explain what is meant by "all levels" within the context of an organization that claimed only two employees at the time of filing.

Another deficiency in this job duty breakdown is the Petitioner's use of vague job responsibilities in lieu of specific job duties. Namely, the Petitioner stated that the Beneficiary would allocate an unspecified amount of time to making decisions with respect to "all matters," establishing the Petitioner's personnel needs, working with accountants and banks to "manage cash flow and ensure that suitable financial resources are available," and "ensur[ing] that suitable work environments and tools are provided." However, these statements are vague and do not convey a meaningful understanding of the specific executive tasks the Beneficiary would perform in the regular course of a stone veneer manufacturing business. Further, activities such as addressing personnel needs and ensuring availability of "suitable financial resources" and "suitable work environments and tools" do not represent daily or weekly tasks that the Beneficiary would perform daily or weekly in the course of the Petitioner's routine business operation. The Petitioner's reference to "all matters" in discussing the Beneficiary's decision-making authority is also vague, as no specifics were provided to explain what encompasses "all matters."

In addition, although the Petitioner stated that the Beneficiary will "[c]onfer with the project manager" on matters associated with staffing and supplies and rely on the project manager for assistance with monitoring "supply delivery methods and times," the Petitioner did not provide evidence showing that it employed a project manager at the time of filing, despite including this position in its organizational chart. In fact, the second RFE response letter identified and provided job duty descriptions for only two positions – a sales representative and a "plant employee." The Petitioner has not submitted any job description for the project manager, nor any evidence that it employs anyone in that position. Likewise, although the Petitioner makes multiple reference to its hiring of subcontractors, it did not provide evidence establishing who these subcontractors are, what services they were contracted to provide, or the terms under which they were contracted to provide the unidentified services. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of*

Chawathe, 25 I&N Dec. 369, 376 (AAO 2010). Further, as noted earlier, although the Petitioner referred to a construction budget and cost estimator in its original supporting statement, this position was not included in the organizational chart nor was this position mentioned in follow-up supporting evidence that was submitted in response to the RFE. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Not only do the unresolved inconsistencies undermine the information provided in the Beneficiary's job duty breakdown and in the Petitioner's organizational chart, but they also lead us to question who, if not the Beneficiary, would perform the duties that would otherwise be assigned to a project manager. Likewise, we question who, if not the Beneficiary, would perform the job duties of the "Office, showroom administrator," given that this position was included in the organizational chart but appears to have been vacant at the time of filing, since it was not included in the Petitioner's employee list. Further, although the Petitioner refers to a "sales team" in the appeal brief, it has provided no evidence to show that it in fact employed such a team, as it listed only a single sales position in its list of employees. In similar fashion, although the Beneficiary's job duty breakdown refers to the Beneficiary's discretion over budgetary matters "for all departments," the Petitioner's organizational does not identify specific departments, nor has the Petitioner established a need for departmental subdivisions within an organization that claimed two employees at the time of filing. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

It is also worth noting that the organizational chart listed two factory-based positions – a "factory engineer" and a "factory labor" position – but neither position was included in the employee list, which named the Beneficiary's two subordinates and provided their respective job duties and position titles, thus resulting in another inconsistency in the supporting evidence. The Petitioner did not state which duties would be assigned to a "factory engineer" or to the "factory labor" position. Even if we were to assume that there is some overlap of duties among the "factory engineer," the "factory labor" position, and the "plant employee," we cannot conclude that a single "plant employee" would adequately replace the other two positions.

Although the Petitioner claims on appeal that it provided two letters "detailing the Beneficiary's job duties," the above discussion describes a number of deficiencies thus indicating that the evidence provided is not sufficient to show what actual duties the Beneficiary has been and would be performing. Despite attempting to comply with the Director's request for a percentage breakdown of the Beneficiary's executive tasks, the Petitioner only stated that 70% of the Beneficiary's time would be allocated to "general management" duties and that 30% of his time would be allocated to "resolving production issues." However, the Petitioner did not state which specific job duties fall within these general categories. On appeal, the Petitioner contends that above referenced RFE response letter listed 19 "distinct job functions," thus providing an "unambiguous" job description. However, we disagree with the Petitioner's focus on the quantitative element and instead focus on the substance of the information provided.

Although the Petitioner highlights the Beneficiary's discretionary authority over all business matters and states that the Beneficiary will "direct" the organization as the Petitioner's sole owner, these factors do 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.* 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. To make this determination, we rely on specific information about a beneficiary's actual daily tasks as an important indication as to the nature of the tasks being performed; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As previously discussed, the job descriptions provided in support of this petition contain generalities about the Beneficiary's overall job responsibilities and say little of the actual tasks the Beneficiary would perform within the context of the Petitioner's business.

Lastly, we note that in support of the prior "new office" petition, the Petitioner was expected to demonstrate a realistic expectation that its enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform managerial or executive duties. Those new office regulations allow the intended U.S. operation one year within the date of approval of the petition to support an executive or managerial position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). There is no regulatory provision allowing for an extension of this one-year period. Therefore, if the business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension.

In light of the discussion above, the record contains evidentiary deficiencies that undermined the Petitioner's claim and indicate that the Petitioner has not adequately progressed beyond the new office phase of its operation. Therefore, we cannot conclude that the Beneficiary would be employed in an executive capacity under an approved petition.

ORDER: The appeal is dismissed.