U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34549108

Date: OCT. 18, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner, a company owning and operating a restaurant, seeks to extend the temporary employment of the Beneficiary as an "executive/manager" under the L-1A nonimmigrant classification for intracompany transferees.[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity, including its affiliate or subsidiary, to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding the record did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. The matter is now before us on appeal under 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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 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.*

[1] The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for a one-year period ending on April 25, 2023. 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue we will analyze is whether the Petitioner established that it would employ the Beneficiary in a managerial or executive capacity in the United States. The Petitioner did not clearly indicate in support of the petition whether the Beneficiary would be employed in a managerial or an executive capacity, submitting the title of "executive/manager." In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary "will be employed in an executive position...considered to be the CEO [chief executive officer]." Now, on appeal, the Petitioner contends that "contrary to what the decision from the Director states, [the Beneficiary's] duties are in a managerial and executive capacity."

A petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary was primarily engaged in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary was primarily employed abroad in either a managerial or executive capacity. Therefore, as a preliminary matter, the Petitioner's shifting assertions as to the Beneficiary's employment in either a managerial or executive capacity leave uncertainty as to his actual qualifying role. The Petitioner must resolve inconsistencies and ambiguities 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). Regardless, we will analyze both whether the Beneficiary would be employed in a managerial and an executive capacity.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

"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 managerial or executive capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

A. Duties

To be eligible for L-1A nonimmigrant visa classification as a manager or executive, a petitioner must show that the beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A) and (B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying managerial or executive position.

If a petitioner establishes that the offered position meets all elements set forth in the statutory definition, it must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside its other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given 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 a 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 a beneficiary's actual duties and role in a business.

The Petitioner indicated in support of the petition, filed in late March 2023, that the prior L-1A intracompany transferee position was approved on behalf of the Beneficiary "with the vision to open a Lebanese grill." However, the Petitioner indicated a diner restaurant was already operating at this planned location, and that the Beneficiary decided to keep this concept. The Petitioner stated that the Beneficiary oversaw "the financial, human resources, and marketing of the company," noting that "it would like an extension of his visa so he has more time to grow the business and turn a profit." Later in response to the request for evidence (RFE) in November 2023, the Petitioner submitted the following duties for the Beneficiary:

> Every day, [the Beneficiary] spends about 15% of his time reviewing sales from the day before, checking customer surveys and complaints, and checking social media posts, like Facebook and Instagram. He meets with [the branch manager] every day to go over employee schedules and other issues that may come up over the weekend.
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> On Monday, [the Beneficiary] reviews payroll and trainings for employees. Oftentimes, he meets with [the branch manager] because [the branch manager] directly oversee the staff. [The Beneficiary] will review staffing and vacancies and has the sole discretion to hire and fire in the company. [The Beneficiary] does not perform the actual review of waitstaff and floor staff, he is apprised of [the branch manager's] findings the reviews are discussed. [The Beneficiary] spends 25% of his time with human resources matters.
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> Daily, [the Beneficiary] reviews costs and budgets for the company. He reviews vendor invoices and adjusts inventory accordingly. He engineers a cost effective menu based on the cost of goods and creates a budget for the cost of goods. Once a week, he produces a profit and loss report. [The Beneficiary] takes this time to review the financial goals of the company and adjust as he sees necessary, including updating forecasts and financial strategies. He also approves supplier payments and invoices.

> When needed, he meets with the accountants of the company. He spends about 30% of his time preparing and completing these functions.
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> In addition to his daily functions, on Wednesdays, [the Beneficiary] meets with [the branch manager] again to discuss the overall operation of the business. He reviews the profit and loss report that he prepared the day before and he addresses and other cost issues. He discussed customer feedback and how to improve the customer experience based on this review of social media and customer surveys. He informs supervisor(s) of promotions or events to improve sales and also reviews workplace safety and health standards. [The Beneficiary] spends about 30% of his time preparing and directing this meeting.
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> [The Beneficiary] also oversees the company's marketing. He reviews all marketing materials and reviews strategy and planning. Right now, he utilizes Facebook and Instagram to market the business. He develops marketing campaigns and implements them on those platforms to draw business to the company. He reviews all marketing materials to maintain consistency branding between written and electronic media. He collaborates with [the branch manager] to ensure staff are aware of any promotions that are advertised on social media to improve sales and brand awareness. [The Beneficiary] also reviews competition and performs reconnaissance on competition marketing strategies to maintain competitiveness. He spends approximately 20% of his time on this.

The Petitioner submitted a duty description reflecting his wide involvement in non-qualifying tasks related to the daily operation of the business. For instance, the duty description states that he would be responsible for reviewing sales daily, checking customer surveys and complaints, checking social media posts, and reviewing employees' schedules. Likewise, the duty description discusses the Beneficiary reviewing vendor invoices, adjusting inventory, creating cost effective menu items, and handling supplier payments and invoices. In addition, the Petitioner explained that the Beneficiary would be tasked with monitoring workplace safety and health standards, utilizing social media to market the business, and formulating and promulgating promotions. As such, the Beneficiary's duty description indicates his substantial involvement in performing a wide array of non-qualifying operational tasks, or at the very least, his performance of ordinary operational activities alongside his colleagues.

Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties were managerial or executive-level functions when the petition was filed and what proportion were non-qualifying operational tasks. The Petitioner submitted a duty description indicating that the Beneficiary's duties likely included several administrative or operational tasks, but it did not sufficiently quantify the time he spent on these duties as compared to qualifying managerial or executive-level duties. For this reason, we cannot determine whether the Beneficiary was primarily performing the duties of a manager or executive as of the date the petition was filed. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In contrast, the Petitioner did not sufficiently articulate or document what managerial or executive-level tasks he was performing when the petition was filed. The Petitioner did not detail or document the trainings he formulated, personnel decisions he made, and the financial strategies he implemented. Similarly, the Petitioner did not properly explain and document the workplace safety and health standards he set or the marketing campaigns and strategies he implemented. The Petitioner also indicated that the Beneficiary would devote 25% of his time to payroll and human resource matters, despite stating it had only one employee when the petition was filed. Further, the Petitioner submitted little supporting documentation to substantiate that he was primarily delegating the non-qualifying operational duties, prominently listed in his duty description, to his claimed subordinates, including the asserted branch manager. This lack of evidence leaves substantial question as to whether the Beneficiary was primarily performing qualifying managerial or executive duties when the petition was filed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily managerial or executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). The Petitioner must resolve inconsistencies and ambiguities 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).

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

B. Operations and Staffing

Pursuant to section 101(a)(44)(C) of the Act, 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 (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The Petitioner's statements in support of the petition leave substantial uncertainty as to whether it was sufficiently operational to support him in a managerial or executive capacity when the petition was filed in late March 2023. For example, the petition reflected that the Petitioner earned no revenue and had only one employee, stating that the Beneficiary would "assist in running the day-today operations *once the business is up and running* (emphasis added)." The Petitioner indicated elsewhere in support of the petition that it employed one supervisor, two to four waitstaff, and "around" four kitchen staff. In contrast, the Petitioner further stated in support of the petition that the restaurant was struggling at its current location since was in "a further suburb from [redacted] than he originally thought," noted it was looking to relocate the business, and "would like an extension of his visa so that [the Beneficiary] had more time to grow the business and turn a profit." The Petitioner explained that the Beneficiary's original stay "has not been enough time for him to get the new business up and running where it needs to be." By comparison, approximately eight months later in response to the Director's request for

evidence (RFE), the Petitioner submitted a materially revised petition reflecting that it had eight employees and earned nearly $400,000 in revenue.

Although we acknowledge that the Petitioner's business plans may have not gone exactly as projected during the first year, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require us to examine the organizational structure and staffing levels of the Petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations allowing for an extension of this one-year new office period. If a 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 by regulation for an extension. Here, the Petitioner's assertions suggest that it had no operations and support employees when the petition was filed leaving substantial uncertainty as to whether it was sufficiently operational to support the Beneficiary in a qualifying managerial or executive capacity when the petition was filed. Again, the Petitioner must resolve inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582, 591-92. For instance, it is noteworthy that the Petitioner provided little objective documentation to substantiate its asserted staffing when the petition was filed, such as state or federal quarterly income tax documentation or other similar objective evidence.

As previously discussed, the Petitioner did not clearly articulate whether the Beneficiary would be employed in a managerial or executive capacity; however, it did state that he we would oversee a subordinate supervisor. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers."[2] *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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." *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The Petitioner did not sufficiently demonstrate that the Beneficiary would qualify as a personnel manager under an extended petition. First, the Petitioner did not assert that the Beneficiary would qualify as a personnel manager based on his supervision of professional subordinates. As noted, the Petitioner indicated in support of the petition that the Beneficiary oversaw a supervisor, listed as a kitchen supervisor. However, later in support of the RFE when it claimed a more developed organizational chart, the Petitioner still submitted a duty description reflecting his likely wide involvement in the operational aspects of the business and it provided little documentation to corroborate that he was primarily delegating these non-qualifying tasks to a supervisory subordinate. Further, the Petitioner submitted no supporting evidence to substantiate his personnel authority or his oversight of a subordinate supervisor. In fact, as we have discussed, the Petitioner provided statements

[2] Since the Petitioner does not specifically assert that the Beneficiary would qualify as a function manager, we decline to analyze this issue.

in support of the petition leaving substantial question as to whether it was sufficiently operational to support him as a personnel manager when the petition was filed.

The Petitioner also suggests that the Beneficiary would have qualified as an executive under an approved extension. 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.*

The submitted evidence and statements of the Petitioner reflect that it had limited operations as of the time the petition was filed leaving uncertainty as to whether it could have supported the Beneficiary in an executive capacity. For example, the Petitioner indicated in support of the petition that it had not hired any subordinate employees and suggested that the business was not yet up and running when the petition was filed. There is also no supporting evidence reflecting the Beneficiary's direction of subordinates, and as discussed, little documentation to support his performance of qualifying executive-level duties. In fact, as discussed previously in this decision, the provided duty description suggests that the Beneficiary was involved in nearly all the operational aspects of company when the petition was filed. Therefore, it is questionable given the Petitioner's apparent operations when the petition was filed, his stated duties, and the nature of the business, that the Beneficiary would have acted in an elevated executive-level capacity where he would primarily focus on broad goals and policies rather than day-to-day operations.

For the foregoing reasons, the Petitioner has not sufficiently established that the Beneficiary would be employed in a managerial or executive capacity under an extended petition.

ORDER: The appeal is dismissed.