U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11876684

DATE: OCT. 19, 2020

Appeal of California Service Center Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a satellite TV provider, seeks to temporarily employ the Beneficiary as the "executive manager" of its new office[1] 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 that the Beneficiary was employed abroad in an executive or managerial capacity or that the new office in the United States would support an executive or managerial position within one year after the approval of the petition. On appeal the Petitioner asserts that the evidence of record establishes that the Beneficiary has been employed abroad in an executive capacity and will also be employed in the United States in an executive capacity. The Petitioner does not claim on appeal that the Beneficiary has been, or will be, employed in a managerial capacity.

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 was employed abroad in an executive capacity for at least one year in the three years before his application for admission to the United States. As this is a fundamental element of eligibility which the Petitioner has not satisfied, we will reserve the remaining issue of the Beneficiary's qualifying employment 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 managerial, executive, or specialized knowledge

[1] The term "new office" refers to an organization which has been doing business in the United States 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 no more than one year from the date of approval of the petition to support an executive or managerial position.

capacity. *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)(iv).

The petitioner must submit evidence to demonstrate that the new office in the United States will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

"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.

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

In examining the managerial or executive capacity of a given beneficiary we look to the petitioner's description of the job duties, which must clearly describe the beneficiary's duties and indicate whether such duties are in a managerial or 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.

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

II. ANALYSIS

The Petitioner, established in 2016, is the affiliate of [redacted], a satellite TV provider located in [redacted] The Beneficiary is the co-owner (along with his wife) of both [redacted] and the Petitioner, holding a 60% share of the companies (with his wife owning the remaining 40% share of each company).[2] The Beneficiary serves as [redacted]'s "executive manager" and seeks to transfer himself to the United States to assume the same position with the Petitioner.

A. Employment Abroad

As previously stated, the Beneficiary must have been employed in a managerial or executive capacity for one continuous year during the three years before his application for admission to the United States to be eligible for the L-1A nonimmigrant visa classification. The I-129 petition, filed in October 2019, was accompanied by a letter from the Beneficiary on the letterhead of [redacted], dated June 29, 2019, stating that his prospective job duties with the Petitioner were the same as the duties he already performed as "general manager" of [redacted] since June 2016, which were listed as follows:

1. Have knowledge of area market including all competitive pay TV provider[s] and market demand.
2. Maintain relationship with content owner, report subscribers count to content owner.
3. Supervise call center operations, handle subscriber complaints.
4. Anti-piracy combat and surveillance.
5. Enforce all quests requirements.
6. Establish an effective working relationship with all vendors, resellers, specialty guests, to drive sales.
7. Coordinate sponsorship, bookings, social media and marketing for regular and special events.
8. Oversee improvement projects related to capital expenditures.
9. Fulfill Manager-on-Duty rotation and manage day-to-day activities as necessary.
10. Management [*sic*] all financial report[ing] of the company.

The I-129 petition was also accompanied by a letter from the Petitioner's attorney who characterized the Beneficiary's duties with [redacted] (as well as with the Petitioner) as executive in nature, in which the Beneficiary had the authority to make decisions of wide latitude without any oversight; controlled the work of all employees, departments, subdivisions, functions and components of [redacted] and was not supervised by anyone.

The Director issued a request for evidence (RFE) stating that the Petitioner's initial evidence was insufficient to establish that the Beneficiary's duties were primarily executive in nature. In particular, the Director indicated that the foregoing list of job duties was not detailed enough to demonstrate what

[2] The Beneficiary and his wife also co-own two other affiliates in the same line of business located in [redacted] and the [redacted]

the Beneficiary does on a day-to-day basis. Nor did the Petitioner submit documentary evidence about the Beneficiary's subordinate personnel at [redacted] their specific job duties, and whether the subordinate positions include any professional, supervisory, or managerial employees. The Director suggested the types of evidence the Petitioner could submit to establish that the Beneficiary was employed abroad in an executive capacity, such as an organizational chart of [redacted], a list of its employees with their job duties, educational levels, and salaries; and another letter from an authorized representative of [redacted] describing the Beneficiary's job duties in detail and showing how they are primarily executive in nature.

In response to the RFE the only evidence the Petitioner submitted with respect to the Beneficiary's employment abroad was another letter from the Beneficiary on the letterhead of [redacted], dated December 5, 2019, which assigned percentages of time to the same job duties listed in the Beneficiary's previous letter submitted with the petition. We note that the figures assigned to six duties alone (numbers 1, 2, 4, 6, 7, and 8) add up to 110%, which exceeds the percentage of time the Beneficiary could actually expend on all of his duties (100%), without even figuring in the time required to perform the remaining four duties, which were either omitted, acknowledged to be minimal, or labeled hard to quantify.

In denying the petition the Director indicated that the Petitioner's response to the RFE did not establish that the Beneficiary's employment with [redacted] was primarily executive in nature. The Director noted that a list of employees submitted in response to the RFE did not apply to [redacted], but rather to [redacted]s affiliate in [redacted]. Thus, there was still no list of [redacted]'s employees in the [redacted]West Indies, nor any associated evidence about their job duties, how they interact with the Beneficiary, and whether [redacted] has an organizational structure sufficient to elevate the Beneficiary into a position requiring the exercise of primarily executive duties. Based on the evidence of record the Director concluded that the Beneficiary's position with [redacted] primarily involved the performance of day-to-day operational tasks of the business, which precluded it from being considered as employment in an executive capacity. The Director also stated that, although the Petitioner did not appear to claim that the Beneficiary was employed in a "managerial capacity" by [redacted] the evidence of record did not establish in any case that the position was primarily managerial in nature.

On appeal the Petitioner's attorney makes a brief statement on the Form I-290B which reads as follows:

> The appeal is based on the fact that business owners that are remunerated with profits also qualify as employees. Business owners who own the majority of shares and lead the business are de facto executives.

The Petitioner also indicated on the Form I-290B that a brief and/or additional evidence would be submitted within 30 calendar days. Since the filing of the appeal on March 23, 2020, however, no brief or additional evidence has been received from the Petitioner.

Thus, the only support for the appeal is the assertion of the Petitioner's attorney that the Beneficiary is an "executive" simply because he owns and operates [redacted] (and its affiliates). Assertions of

counsel, however, do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). More importantly, the Petitioner has not submitted any new materials to overcome the evidentiary shortcomings discussed in the Director's decision. While claiming that the Beneficiary is a de facto executive because he is the majority owner and chief operator of [redacted] (and its affiliates), the Petitioner's attorney does not address the four definitional elements of "executive capacity" in section 101(a)(44)(B) of the Act with documentary evidence showing how the Beneficiary's position at [redacted] meets each of those elements. In the RFE the Director specifically requested an organizational chart of [redacted] a list of its employees with their job duties, educational levels, and salaries; and a letter from an authorized representative of [redacted] describing the Beneficiary's job duties in detail and showing how they are primarily executive in nature. None of these materials was submitted in response to the RFE, or in support of the appeal. The failure to submit requested evidence which precludes a material line of inquiry is a ground for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In accord with the foregoing analysis, we conclude that the Petitioner has not established that the Beneficiary has been employed abroad in an executive capacity by [redacted]

B. Employment in the United States

As previously indicated, because the Petitioner has failed to establish the Beneficiary's employment abroad in an executive capacity, which is a fundamental element of eligibility for the immigration benefit sought in this proceeding, we reserve the issue of the Beneficiary's employment in the United States in an executive capacity.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had one year of employment abroad in an executive capacity during the three years preceding his application for admission to the United States, as required in section 101(a)(15)(L) of the Act. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.