U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9869855

Date: SEPT. 3, 2020

Appeal of California Service Center Decision

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

The Petitioner seeks to employ the Beneficiary as an operations manager under the L-1A nonimmigrant visa classification for intracompany managers and executives. See Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition. The Director concluded that, contrary to the Act and Department of Homeland Security regulations, the Petitioner did not demonstrate the Beneficiary's employment abroad, or his proposed employment in the United States, in a qualifying capacity.

The Petitioner bears the burden of establishing 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. L-1A MANAGERS AND EXECUTIVES

An L-1A petitioner must establish that it, its parent, branch, affiliate, or subsidiary employed a beneficiary abroad in a capacity that was managerial, executive, or involved specialized knowledge for at least one, continuous year in the three years before the beneficiary's application for U.S. admission. Section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l)(ii)(A). The petitioner must also intend to employ the Beneficiary in the United States in a managerial or executive capacity. Id.

II. EMPLOYMENT ABROAD

The Petitioner states that its affiliate has continuously employed the Beneficiary in Brazil since February 2012. The record indicates that both the Petitioner and its affiliate are in the international import/export business, organizing shipments for individuals and companies to get goods and products to markets, customers, and distribution points.

The Petitioner did not clearly specify whether the Beneficiary worked abroad in a capacity that was managerial, executive, or involved specialized knowledge. Each of these categories has its own statutory or regulatory definition and requirements. Without specifying in which capacity the

Beneficiary worked in Brazil and seeks to rely on, the Petitioner makes it difficult to determine whether he meets any of the capacities' requirements.

A. Managerial Capacity

The term "managerial capacity" means employment that "primarily" involved: 1) managing an organization or a department, subdivision, function, or component of it; 2) supervising and controlling the work of other supervisory, professional, or managerial employees, or managing an essential function within the organization, department, or subdivision; 3) having authority to hire and fire or to recommend those and other personnel actions, or, if no other employee was supervised, functioning at a senior level within the organizational hierarchy or regarding the managed function; and 4) exercising discretion over daily operations of the activity or function for which the employee had authority. Section 101(a)(44)(A) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B). This definition recognizes both "personnel managers" and "function managers."

A petitioner must show that a foreign position met all four elements of the definition of "managerial capacity." A petitioner must also demonstrate that a beneficiary primarily engaged in managerial duties, as opposed to operational activities. See Family Inc. v. USCIS, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining the managerial nature of a position abroad, we consider descriptions of the job duties, a foreign entity's organizational structure and the nature of its business, the presence of other employees to relieve a beneficiary from performing operational duties, the duties of a beneficiary's subordinate employees, and any other factors indicating the nature of the position.

1. Personnel Manager

A personnel manager must primarily supervise and control the work of other supervisory, professional, or managerial employees. Section 101(a)(44)(A)(2) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). "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." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4).

As the Director found, the Petitioner's descriptions of the Beneficiary's foreign job duties did not establish that he primarily worked as a personnel manager. The descriptions included some managerial job duties, such as "[s]upervision . . . of import/export staff in sales generation." But the descriptions stated other duties - such as "[b]uilding new customer base," "negotiating contracts and proposals," and purchasing sea and air freight - that the record does not establish as entailing the supervision and control of others' work. The Petitioner did not specify the amount of time the Beneficiary spent on each of his duties. The descriptions of the Beneficiary's job duties therefore do not establish that he primarily supervised and controlled the work of others as a personnel manager.

On appeal, counsel asserts that the Beneficiary spent 30% of his time negotiating freight and other service values, 20% of his time monitoring and tracking "freight forwarding practices changes," and 20% of his time overseeing strategic pricing analysis. Counsel's assertions, however, do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980)). Even if we considered counsel's assertions, the record

would not establish that the Beneficiary's claimed duties primarily involved supervision and control of others' work.

The record also contains inconsistencies regarding the Beneficiary's position title and job duties abroad. The Brazilian affiliate initially stated that the Beneficiary began working as a "Senior Import/Export Specialist" in August 2014, "responsible for the management of the import-export operations, and to provide leadership to position the company at the forefront of the industry." In response to the Director's written request for additional evidence (RFE), however, the Petitioner described the Beneficiary's position as a "Procurement, Pricing and Inside Sales Manager," "responsible for the general purchase concerning forwarding, as well as purchase and sales for allocated customers." The description in the RFE response contained job duties omitted from the initial description, such as purchasing sea and air freight, and "[b]eing responsible for the complete and up to date freight databank." A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988). The unresolved discrepancies in the Beneficiary's foreign position title and job duties cast doubt on whether the Petitioner and its affiliate accurately described his activities in Brazil during a continuous one-year period before the petition's filing.

In addition, as the Director found, the Petitioner has not demonstrated the Beneficiary's supervision and control of the work of other supervisory, professional, or managerial employees in Brazil. See section 101(a)(44)(A)(2) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Petitioner's RFE response included job descriptions of the Beneficiary's foreign subordinates, including for the positions of: pricing and inside sales support; procurement and inside sales support; and customer service support. The job descriptions do not indicate that these positions involved managing or supervising others. All three descriptions also state that the positions required a "Bachelor student or similar through experience." The record therefore indicates that the positions of the Beneficiary's foreign subordinates did not require bachelor's degrees and therefore were not "professional" in nature. See 8 C.F.R. § 204.5(k)(2) (defining the term "profession" as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). The record does not demonstrate the Beneficiary's supervision and control of the work of supervisory, professional, or managerial employees in Brazil. The record therefore does not establish that the Beneficiary worked abroad as a personnel manager.

2. Function Manager

To establish a beneficiary's employment as a function manager, a petitioner must demonstrate that: (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily manage, as opposed to perform, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations. Matter of G-Inc., Adopted Decision 2017-05, 4 (AAO Nov. 8, 2017).[1] A beneficiary that supervises others may also qualify as a function manager. Id.

[1] Matter of G- involved an immigrant petition for a multinational manager under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). Both multinational managers and L-1A managers, however, must meet the same definition of the term "managerial capacity." Compare 8 C.F.R. § 204.5(j)(2) with 8 C.F.R. § 214.2(l)(1)(ii)(B) (defining "managerial capacity").

The Director concluded that the Petitioner did not demonstrate the Beneficiary's management of an essential function abroad. The Director found that the Petitioner did not: describe a managed function; demonstrate the Beneficiary's activity at a senior level within the organizational hierarchy; or show that sufficient staffing existed to support the Beneficiary as a function manager.

On appeal, the Petitioner submits evidence regarding the Beneficiary's purported management of an essential function abroad. The Director's RFE, however, notified the Petitioner that it could submit additional evidence of the Beneficiary's management of an essential function abroad, but the Petitioner did not do so at that time. We therefore decline to consider the Petitioner's evidence on appeal. See Matter of Soriano, 19 I&N Dec. 764, 766 (BIA 1988) (holding that evidence on appeal will not be considered if a petitioner received prior notice and a reasonable opportunity to provide it).

Counsel argues on appeal that, in Brazil, the Beneficiary managed the affiliate's pricing strategy, claiming that it is an essential function of the company. Again, however, counsel's assertions do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. at 534 n.2 (citing Matter of Ramirez-Sanchez, 17 I&N Dec. at 506). Thus, as the Director found, the record does not sufficiently describe the pricing function of the affiliate or establish its purported essential nature. Also, the affiliate's initial description of the Beneficiary's job duties did not mention his involvement in the formulation of the company's pricing. This discrepancy in the job descriptions casts doubt on the Beneficiary's purported pricing duties abroad. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record). The record therefore does not establish the Beneficiary's management of an essential function in Brazil.

B. Executive Capacity

The term "executive capacity" means employment that "primarily" involved: 1) directing the management of an organization or a major component or function of it; 2) establishing the goals and policies of the organization, component, or function; 3) exercising wide latitude in discretionary decision-making; and 4) receiving only general supervision or direction from higher-level executives, board of directors, or stockholders of an organization. Section 101(a)(44)(B) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(C).

A petitioner claiming that a beneficiary performed as a "hybrid" manager/executive will not meet its burden of proof unless it demonstrates the beneficiary's primary engagement in either managerial or executive duties. See section 101(a)(44)(A)-(B) of the Act. While duties may qualify as both managerial and executive in nature, a petitioner must establish that a beneficiary's duties meet the criteria set forth in the definitions of either managerial or executive capacity. A beneficiary must have primarily worked in either a managerial or executive capacity.

As in our discussion of managerial capacity, the Petitioner's descriptions of the Beneficiary's foreign job duties do not establish that he primarily worked in an executive capacity. The descriptions include some duties - such as "[s]etting up general procedures" - that appear to be executive in nature. But the record does not establish that other described duties - such as purchasing sea freight and air freight – meet the definition of "executive capacity." The Petitioner did not specify how much time the Beneficiary spent on each of his duties abroad. Thus, the record does not establish that he primarily worked in an executive capacity in Brazil. Also as previously discussed, unresolved inconsistencies

in the Beneficiary's position title and job duties cast doubt on his true activities abroad. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

For the foregoing reasons, the record does not establish the Beneficiary's employment abroad in an executive capacity.

C. Specialized Knowledge

The term "specialized knowledge" means "special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures." 8 C.F.R. § 214.2(l)(1)(ii)(D).

The record does not demonstrate the Beneficiary's employment abroad in a specialized knowledge position. The Petitioner has not identified aspects of his position that involved special knowledge of the organization's product, service, research, equipment, techniques, management, or other interests. The Petitioner also has not submitted sufficient evidence of required knowledge and expertise that differentiates the job from similar positions in the import/export industry. For the foregoing reasons, the record does not establish the Beneficiary's foreign employment in a capacity involving specialized knowledge.

The Petitioner has not demonstrated that the Beneficiary worked abroad in a capacity that was managerial, executive, or involved specialized knowledge. We will therefore affirm the petition's denial.

III. PROPOSED U.S. EMPLOYMENT

The Petitioner did not clearly specify whether the Beneficiary would work in a managerial or executive capacity in the United States. As previously indicated, each of these categories has its own statutory definition and requirements. The Petitioner bears the burden of establishing its proposed employment of the Beneficiary in one capacity or the other. See section 291 of the Act.

A. Managerial Capacity

1. Personnel Manager

As the Director found, the record does not establish that, in the offered U.S. position of operations manager, the Beneficiary would supervise and control the work of other supervisory, professional, or managerial employees. See section 101(a)(44)(A)(2) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Petitioner's initial organizational chart indicated that the Beneficiary would supervise four "Import Specialists." In response to the Director's RFE, however, the Petitioner submitted a second chart indicating the Beneficiary's proposed supervision of five employees: two "Sales Executives"; and three "Operations Specialists." The Petitioner has not explained the changes in the number and position titles of the Beneficiary's proposed subordinates. See Matter of Ho, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record).

Moreover, the organizational charts and job descriptions of the positions of sales executive and operations specialist do not indicate that the Beneficiary's subordinates would manage or supervise other employees. The job descriptions also do not indicate that the position of sales executive or operations specialist requires a person with a bachelor's degree. The description of operations specialist indicates that the position requires "[k]nowledge of import/export laws and procedures." But the description does not list a bachelor's degree as a requirement. Thus, the record does not establish that the Beneficiary would supervise and control the work of other supervisory, professional, or managerial employees.

2. Function Manager

The record also does not demonstrate the Beneficiary's proposed management of an essential function in the United States. The Petitioner did not sufficiently describe a proposed managed function or its significance.

On appeal, the Petitioner submits evidence regarding the Beneficiary's proposed management of a function. The Petitioner, however, could have submitted evidence of the Beneficiary's proposed management of an essential function in response to the Director's RFE. We therefore decline to consider the Petitioner's evidence on appeal. See Matter of Soriano, 19 I&N Dec. at 766.

Counsel argues that the Beneficiary would manage the Petitioner's pricing strategy, claiming that it constitutes an essential function of the company. Again, however, counsel's assertions do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. at 534 n.2 (citing Matter of Ramirez-Sanchez, 17 I&N Dec. at 506). Thus, the record does not sufficiently describe the Petitioner's pricing function or establish its purported essential nature.

B. Executive Capacity

The Petitioner's descriptions of the Beneficiary's U.S. job duties do not establish that he would primarily work in an executive capacity. The descriptions include some duties - such as being "[r]esponsible for the implementation of policies and procedures" and "[d]evelop[ing] and implement[ing] new working procedures for all operational activities" - that appear to be executive in nature. But the record does not establish that other described duties - such as "[f]org[ing] [a] new client base" and "[c]ommuicat[ing] with export & import" authorities - meet the definition of "executive capacity." The Petitioner did not specify how much time the Beneficiary would spend on each of his duties. Thus, the record does not establish that he would primarily work in an executive capacity in the United States.

On appeal, counsel asserts percentages of time that the Beneficiary would spend on his duties. Counsel's assertions, however, do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. at 534 n.2 (citing Matter of Ramirez-Sanchez, 17 I&N Dec. at 506). The Petitioner therefore has not demonstrated that the Beneficiary would primarily work in an executive capacity in the United States. We will therefore also affirm the petition's denial on this ground.

IV. QUALIFYING RELATIONSHIP

Although unaddressed by the Director, the record also does not establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. A petitioner must demonstrate that it and a beneficiary's foreign employer are "qualifying organizations." 8 C.F.R. § 214.2(l)(3)(i). A qualifying organization must meet "exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary." 8 C.F.R. § 214.2(l)(1)(ii)(G).

The Petitioner contends that it and the Beneficiary's foreign employer in Brazil are affiliates. The term "affiliate" means "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). An affiliate may also be "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).[2]

As the regulations indicate, an L-1 petitioner must demonstrate both the ownership and control of each affiliate. Ownership means "the direct or indirect legal right of possession of the assets of an entity with full power and authority to control." Matter of Church Scientology Int'l, 19 I&N Dec. 593, 595 (Comm'r 1988). Control means "the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity." Id.

The Petitioner submitted evidence that a Brazilian company wholly owns it. The record demonstrates that a Dutch company owns 75% of the Beneficiary's foreign employer, with the Petitioner's managing director/president owning the remaining 25%. Thus, the record indicates that the Brazilian company owns and controls the Petitioner, while the Dutch company owns and controls the Beneficiary's foreign employer. Because the Petitioner and the Beneficiary's foreign employer are not owned and controlled by the same parent or individual, they do not meet the definition of "affiliates."

The Petitioner and the Beneficiary's former employer also do not qualify as affiliates owned and controlled by the same group of individuals. See 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Each entity has a different group of owners. The Dutch company and the Petitioner's managing director/president own the Beneficiary's foreign employer, while the Brazilian company owns the Petitioner.

The Petitioner demonstrated that its managing director/president also owns 1% of its Brazilian parent company. The Petitioner therefore argued that it and the Beneficiary's foreign employer share a common owner. But the record shows that the Petitioner's managing director/president holds minority ownership interests in both entities: 25% in the Beneficiary's foreign employer; and 1% in the Petitioner's parent. Thus, the record indicates that the managing director/president lacks controlling shares in both entities. The Petitioner has not established that he otherwise controls the companies, such as through voting share agreements. The Petitioner's common ownership therefore does not

[2] Certain partnerships that provide accounting and consulting services may also constitute affiliates. 8 C.F.R. § 214.2(l)(1)(ii)(L)(3). Because neither the Petitioner nor the Beneficiary's foreign employer are partnerships that provide accounting and consulting services, however, that portion of the definition does not apply in this matter.

establish the claimed affiliate relationship between the Petitioner and the Beneficiary's foreign employer.

In any future filings in this matter, the Petitioner must establish the claimed affiliation between it and the Beneficiary's foreign employer.

V. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's employment abroad, or proposed employment in the United States, in a qualifying capacity. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.