U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27032763

Date: JUL. 06, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, an applied engineering services company, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) and president under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary had been employed abroad, and would be employed in the United States, in a managerial or executive capacity. The Petitioner filed two consecutive combined motions to reopen and reconsider with additional evidence. The Director, after considering the Petitioner's legal arguments and new evidence on motion, issued two subsequent denials based on the same grounds of ineligibility. The matter is now before us on appeal. 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. LAW

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer

or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

The statute defines "managerial capacity" as 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, 8 U.S.C. § 1101(a)(44)(A).

"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.

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

The primary issue we will address is whether the Petitioner has established that the Beneficiary will be employed in a managerial or executive capacity in the United States. The Petitioner has claimed that the Beneficiary's offered position of CEO and president meets the requirements for executive capacity, and alternatively claims that the position is managerial in nature because it will involve supervision of managerial, supervisory, and professional staff.

To establish that a beneficiary is eligible for immigrant classification as a multinational manager or executive, a petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definitions at section 101(a)(44)(A) or (B) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in either statutory definition, the petitioner must then 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).

In determining whether the beneficiary's duties will be primarily managerial or executive, we consider the required description of the job duties, the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other personnel 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.

A. Job Duties

The regulation at 8 C.F.R. § 204.5(j)(5) requires that a petitioner "clearly describe the duties to be performed." At the time of filing, the Petitioner submitted a letter of support which listed the Beneficiary's proposed duties as CEO/president of its engineering design services business. This

description was quoted in its entirety in the Director's decision and will not be repeated here. Briefly, the Petitioner indicated that the Beneficiary would have nine different areas of responsibility with each requiring 5% to 20% of his working time. These responsibilities included: ensuring alignment of business strategies and plans with short- and long-term objectives; leading and motivating subordinates and developing a managerial team; overseeing all operations and business activities; making investment decisions; ensuring adherence to legal guidelines and in-house policies; reviewing financial and non-financial reports ; building trust with key partners; analyzing problematic situations to provide solutions; and maintaining deep industry and market knowledge.

In a request for evidence (RFE), the Director advised the Petitioner that its description of the Beneficiary's proposed position was overly broad and provided little insight into the nature of the actual day-to-day job duties he would perform. We agree with this assessment. Many of the responsibilities attributed to the position generally paraphrased the statutory definition of executive capacity by focusing on the Beneficiary's responsibility for establishing the company's policies, strategies and objectives, his responsibility for directing the overall management of the company, and his discretionary decision-making authority. However, reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial 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). Here, the position description was so vague it could have applied to any senior-level position at any company; it contained no references specific to the Petitioner's engineering design business, nor did it otherwise provide a probative explanation of the Beneficiary's expected day-to-day tasks even though the Petitioner had already employed him in the position since 2017.

Further, the Petitioner's submission of a vague job description was compounded by the fact it did not submit a current organizational chart or otherwise describe the company's structure or staffing. The Petitioner indicated on the Form I-140 that it had five employees at the time of filing in January 2021, but provided an organizational chart dated February 2020, which listed nine full- and part-time positions, with three more expected to be hired in 2020. Overall, the Petitioner's initial submission did not contain the necessary detail or an adequate explanation of the Beneficiary's expected day-to-day activities within the context of its business and staffing structure.

The Director provided the Petitioner with notice of these deficiencies in a request for evidence (RFE). In its response, the Petitioner submitted a new letter with a lengthier description of the Beneficiary's duties that included additional information under each area of responsibility. However, it did not address or overcome the deficiencies in the initial job description addressed above, and it lacked the specific information the Director requested regarding the Beneficiary's actual job duties within the context of its business. For example, the Petitioner repeated its initial statement that the Beneficiary would spend 12% of his time "to ensure alignment of the developed high quality business strategies and plans with short-term and long-term objectives." The Petitioner added that this area of responsibility would involve developing long- and short-term strategies, identifying markets and major competitors, and formulating policies. Much of the supplemental information added to the initial job description was similarly broad and therefore did not shed further light on the Beneficiary's actual tasks. For example, the Petitioner added that the Beneficiary will "manage overall operations and make major decisions," "oversee operations of the company and conduct day-to-day management

decisions," "take responsibility for the financial fate of the company," "demonstrate track record of financial success," "make independent decisions when circumstances warrant," "manage the Company's resources to steer the Company accordingly," and balance "day-to-day operational issues and strategic development initiatives."

Overall, the job description was general and repetitive and therefore did not adequately explain the Beneficiary's specific tasks and how much time he spends on them. While the Petitioner filed two subsequent combined motions to reopen and reconsider, it did supplemented the record with additional details regarding the Beneficiary's responsibilities as CEO and president, despite the Director's determination that the duty description was inadequate.

The fact that the Beneficiary has the authority to manage or direct a company and holds the senior position in the company's organizational chart does not necessarily establish eligibility for classification as multinational manager or executive as defined in the statute. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial or executive. Although the Petitioner asserts that the Beneficiary would primarily perform the high-level duties described at sections 101(a)(44)(A) or (B) of the Act, it has not met its burden to support this claim with a detailed job description and other relevant supporting evidence.

B. Staffing and Structure

The Petitioner asserts that the Beneficiary directs and manages the company through subordinate managers and other staff, and that it has sufficient staff to relieve him from significant involvement in non-executive and non-managerial duties. However, as discussed further below, it has not provided sufficient evidence of its staffing and structure from the time of filing. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

As noted, the Petitioner stated on the Form I-140 that it had five employees as of January 2021 but submitted an organizational chart depicting its staffing as of February 2020, at which time it claimed two full-time positions (including the Beneficiary and a chief technology officer), seven part-time positions, three positions that were to be filled in 2020, and an outsourced accountant. In the RFE, the Director requested a new organizational chart and information regarding all employees and contractors employed by the Petitioner, including their position titles, a summary of their duties, and whether they work on a full-time or part-time basis. The Director also asked the Petitioner to provide evidence of their employment in the form of payroll summaries and tax documents such as IRS Forms 941, W-2 and 1099. The Director emphasized that the RFE response should explain the administrative and productive tasks necessary for the operation of the company and identify who performs these tasks.

The Petitioner responded to the RFE in February 2022. In a supporting letter, the Beneficiary stated (on behalf of the Petitioner) that "there are 2 full time senior managers as well as administrative staff reporting directly to me." The Petitioner provided an organizational chart dated October 2020 which identified a staff of 14, including the Beneficiary, the CTO and a project manager (all identified as full-time employees); an office manager, a CAD designer and a mechanical engineer (all identified as part-time employees); seven "individual contractors" (including two consultants, two engineers, a technician and a system administrator); and a draftsman who is identified as "shortlisted staff to be

hired in 2020." The record does not contain an organizational chart depicting the Petitioner's structure at the time of filing or at the time of the RFE response.

The Petitioner provided a separate "List of employees in CEO's immediate supervision." The Petitioner explained that the company operates through four divisions – technology, project, administrative, and consultants - and noted that the beneficiary has "overall control for all four divisions." This statement provided information regarding the duties, wages, and educational and professional background of the CTO (hired February 2017) and project manager (hired October 2020). The Petitioner indicated that they are both full-time employees who report directly to the Beneficiary, while the administrative division provides "backup office support" and is staffed by a part-time office and procurement manager, a CPA/accountant who is on a fixed cost outsource contract, and a system administrator who is paid on an hourly basis.

As evidence of wages paid to employees, the Petitioner provided copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first, second and fourth quarters of 2020 and the first quarter of 2021. The Petitioner reported two employees in the first quarter of 2021 and one or two employees throughout 2020. The Petitioner's RFE response also included copies of three 2021 IRS Forms W-2 issued to the Beneficiary, the CTO, and to the individual identified as the full-time project manager.[1] Finally, the Petitioner submitted its payroll journal for December 2021, which indicates that the Petitioner paid the Beneficiary, the CTO and the project manager on an hourly basis, and that they worked 84 hours, 88 hours and 48 hours, respectively, during that month, despite the Petitioner's claim that all three are full-time employees. The Petitioner did not provide evidence of payments made to any of the individuals identified in the record as contractors or part-time employees, document that it had five employees at the time of filing (as stated on the Form I-140), or corroborate that it maintained the staffing levels depicted on either of its submitted organizational charts from 2020.

In the initial decision issued on March 15, 2022, the Director emphasized that there were unresolved ambiguities in the record regarding the Petitioner's staffing levels and that the Petitioner had not met its burden to establish that it had sufficient subordinate staff or contractors to relieve the Beneficiary from significant involvement in the day-to-day activities of the company, or the organizational complexity to support an executive position. In its subsequent motions, the Petitioner supplemented the record with some additional evidence related to its staffing levels. We have reviewed this documentation and the Petitioner's explanations regarding its personnel structure; however, the record continues to lack sufficient evidence of the company's staffing levels from the date of filing.

The additional evidence submitted on motion included copies of the Petitioner's contracts with the three individuals identified by the Petitioner as its office manager, CAD design specialist, and data engineer, along with copies of IRS Forms 1099 issued to these individuals for 2020. The office manager had a one-year contract with a starting date in February 2020 and an hourly wage of $25. Her Form 1099 indicates that she earned $4400, which reflects that she was paid for 176 hours of work. The CAD design specialist had a six-month contract indicating that she would work on a part-time basis at an hourly rate of $32, with a start date of February 1, 2020. According to her 2020 Form

[1] Although claimed to be a full-time employee, the project manager earned only $11,793. Based on this individual's hourly wage of $49.12, it appears he worked approximately 240 hours in 2021.

1099, she was paid $3,072, which reflects that she was paid for 96 hours of work during 2020. Finally, the data engineer had a one-year contract commencing in April 2020 and a $35 hourly wage. He earned $15,260 in 2020, which equates to 436 hours of work. The record does not contain evidence that these part-time employees remained with the company for the duration of their contracts, that they signed new contracts, or that the Petitioner made any payments to them in 2021 and beyond. Based on the evidence provided, we cannot determine whether any of these employees remained with the company at the time of filing in January 2021.

The Petitioner also provided evidence that it had filed three H-1B nonimmigrant petitions between June and September 2021. These petitions were approved with validity dates commencing in March 2022, more than one year after the petition was filed. However, a petitioner must establish eligibility for a requested benefit "at the time of filing the benefit request." 8 C.F.R. § 103.2(b)(l); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). While such evidence may support the Petitioner's claim that the company is poised for growth, it does not assist in establishing that the company had sufficient staff in place at the time of filing to relieve the Beneficiary from involvement in operational, technical, and administrative tasks that fall outside the scope of the definitions of managerial and executive capacity.

Based on the evidence provided, the Petitioner has not corroborated its initial claim that it had five employees at the time of filing in January 2021. Although the Petitioner indicates on appeal that the "actual number of employees can be extracted from payroll records and 1099s filed," it provided Forms 1099 for 2020 only, and provided minimal evidence of its staffing for 2021. The Petitioner reported only two employees on its IRS Form 941 for the first quarter of 2021 and therefore did not document that the Beneficiary and both of his claimed direct subordinates (the CTO and the project manager) were all on the payroll at that time. As discussed, while it appears that two of the company's part-time staff paid on Form 1099 may have remained under contract at the time of filing, the record lacks evidence of any payments made to them in 2021. The only staff clearly engaged at the time of filing, based on the supporting evidence, are the Beneficiary, the chief technology officer, and the outsourced accountant. While the Petitioner submitted organizational charts from 2020 showing a more complex structure, it has not demonstrated that this structure was in place when the petition was filed. The Petitioner's claim that it operates through four staffed departments is not supported by the record.

The Petitioner has consistently claimed, on motion and on appeal, that the Director improperly inferred an "organizational complexity" requirement from the statutory definition of executive capacity at section 101(a)(44)(B) of the Act and placed undue emphasis on the size of the company. If staffing levels are used to determine whether a beneficiary's job capacity is primarily executive or managerial in nature, USCIS considers the reasonable needs of the business enterprise in light of its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act. It is the petitioner's burden to demonstrate the company's reasonable needs with respect to organization's staffing and structure. While the statutory definitions of managerial and executive capacity do not expressly require a certain level of organizational complexity, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner contends that regardless of the number of employees at any given time and the number of hours they work, the Beneficiary is "completely relieved" from involvement in operational and administrative tasks and performs only executive or managerial functions. It explains the project-focused nature of its business activities, emphasizing that it provides its services as a contractor or subcontractor on government-funded projects with set budgets, tasks, and limitations on employee hours. The Petitioner states that its need to work within these confines justifies its employment of a smaller permanent staff and explains any perceived discrepancies in the company's staffing levels, noting that some employees may have varying dates of service and employment status depending on the project assignment. The Petitioner also notes that while its role is limited to the engineering design phase of such projects, some related tasks may be assigned to and performed in cooperation with the primary grant recipient while others may be performed by organizations that work under the Petitioner's guidance.

While we acknowledge the project-based nature of the Petitioner's activities, it remains the Petitioner's burden to document its actual staffing levels and organizational structure from the date of filing. As discussed, the Petitioner has not met this burden, nor has it submitted sufficient objective evidence to resolve the inconsistencies in the record surrounding its staffing. Further, while the Petitioner appears to claim that its staffing needs are minimal at times depending on the number of active projects or the phase of each project, the record contains little information regarding the projects active at the time of filing or their staffing requirements. In its letter in response to the RFE, the Petitioner indicated that it was engaged as a "major technology developer" for two ongoing California Energy Commission (CEC) projects with expected completion dates in 2024, and as a "technology verification partner" for three additional active CEC projects expected to continue through 2023 or 2024. Due to the deficiencies in the evidence relating to the Petitioner's staffing at the time of filing through adjudication, the Petitioner has not supported its claim that the Beneficiary is and would be "consistently relieved" from performing any non-managerial or non-executive duties related to the company's daily operations and these multiple ongoing projects. Although the Petitioner indicates that some project-related tasks are performed by other contractors assigned to work under its supervision, it has not submitted evidence to support that claim.

Finally, while the Petitioner claims that the Beneficiary's position satisfies the definition of managerial capacity based on his supervision of managerial, supervisory or professional subordinates, the record does not establish that he primarily performs duties consistent with the statutory definition at section 101(a)(44)(A) of the Act. The record reflects that the Petitioner's CTO and project manager are professionals with advanced degrees and may perform supervisory duties at times, but does not establish that the Beneficiary would spend a significant portion of his time supervising and controlling their work; in fact, it is unclear whether both of these employees were on the Petitioner's payroll at the time of filing. Further, as noted by the Director, the job description submitted for the Beneficiary, despite lacking the required specificity, broadly describes responsibilities that would typically fall within the definition of executive capacity at section 101(a)(44)(B) of the Act.

Regardless of whether the Beneficiary is claimed to be managerial capacity or an executive capacity, the Petitioner must establish how he would be relieved from significant involvement in the company's day-to-day administrative and operational tasks; it is not sufficient for the Petitioner to rely on an overly broad position description and an organizational chart depicting the Beneficiary in a senior position. Here, the Petitioner did not provide the required detailed description of the Beneficiary's

proposed job duties in the United States, probative evidence corroborating its staffing levels and structure in the United States at the time of filing through adjudication, or sufficient probative evidence to establish how the Beneficiary is otherwise relieved from involvement in the day-to-day operations of company, based on its reasonable needs. All this evidence is critical in evaluating the Petitioner's claim that the Beneficiary will be employed in a managerial or executive capacity in the United States, and we cannot reach a favorable determination on this issue in its absence.

For the reasons discussed, the Petitioner has not established that the Beneficiary would be employed in the United States in a managerial or executive capacity.

III. RESERVED ISSUE

As noted, the Director also concluded that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity. Because the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding this remaining ground for denial. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

IV. PRIOR APPROVALS

The Petitioner notes that USCIS has approved L-1A nonimmigrant intracompany transferee petitions that had been previously filed on behalf of Beneficiary. The L-1A nonimmigrant classification relies on the same statutory definitions of managerial capacity and executive capacity at section 101(a)(44) of the Act.

Eligibility as an L-1A nonimmigrant does not automatically establish eligibility under the criteria for an immigrant visa classification for a multinational executive or manager. Each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions. Therefore, the fact that a beneficiary was previously approved for L-1A classification is not binding if the facts do not support approval of the immigrant petition. For the reasons discussed above, the Petitioner has not met its burden to establish the Beneficiary's eligibility for classification as a multinational executive or manager. Further, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

V. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in a managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.