



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 20882690

Date: JUN. 10, 2022

Motion on Administrative Appeals Office Decision

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

The Petitioner, the U.S. office of a company that manufactures cabinets and related furniture in Brazil, seeks to continue the Beneficiary's temporary employment as its chief executive officer (COO) under the L-1A nonimmigrant classification for intracompany transferees.¹ 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 record did not establish, as required, that the Petitioner would employ the Beneficiary in a primarily executive capacity. We dismissed the Petitioner's subsequent appeal of that decision and the matter is now before us again on combined motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss both motions.

I. LAW

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 involved 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 or executive capacity. *Id.*

¹ The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period from July 2, 2019, until July 1, 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.

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

Further, we note that our decision here is not a new adjudication of the underlying petition, based on review of the complete record. Rather, our review is limited to specific errors that the Petitioner identifies on motion with respect to the preceding decision issued on October 4, 2021.

II. ANALYSIS

The issues in this matter are: (1) whether the Petitioner has established that our decision to dismiss its appeal was based on an incorrect application of law or USCIS policy based on the evidence in the record at the time of our decision, and (2) whether the Petitioner has submitted new facts that warrant reopening the appeal.

A. Background and Prior AAO Decision

As noted, the Director denied the L-1A extension petition, concluding that the Petitioner had not met its burden to establish that it would employ the Beneficiary in an executive capacity as defined at section 101(a)(44)(B) of the Act. We dismissed the Petitioner's appeal after reaching the same conclusion.

In dismissing the appeal, we considered the Petitioner's statements and evidence regarding the Beneficiary's job duties, the staffing and organizational structure of the petitioning entity, the nature of the business, and the Beneficiary's claimed role within the larger international organization, which includes the Petitioner's Brazilian parent company. This included evidence submitted both in support of the petition and in response to a request for evidence (RFE), as well as evidence submitted on appeal.

With respect to the Beneficiary's job duties and position within the company, we acknowledged the Petitioner's claim that the Beneficiary serves as its top executive and head of its senior management team, and noted that such a claim necessarily implies that there are no executives higher than the Beneficiary, and that there is a subordinate "senior management team" under his direction. Although we determined that the Petitioner demonstrated that the Beneficiary exercised discretionary authority within the company, we concluded that the Petitioner did not show that the Beneficiary primarily directs the management of the organization.

Specifically, with regard to the company's staffing and organizational structure, we acknowledged the Petitioner's claim that the Beneficiary directs a managerial team including a sales and regional manager (SRM) and two product designers ("PDs") whom the Petitioner refers to as "[a]rchitects . . . with essential managerial duties." Upon review of the stated duties of the subordinates, we determined that these job descriptions did not persuasively establish the actual duties of the subordinate staff because the duties were generic and, in several instances, apparently inapplicable. Specifically, we noted that the job descriptions included several elements that appeared to derive from generic lists of

tasks, rather than the actual duties specific to the job. For example, the description of the SRM's position indicated that he would "[d]irect and coordinate activities involving sales of manufactured products, services, commodities, real estate or other subjects of sale," a phrase implying that Petitioner would be engaged in the sale of "services, commodities, [and] real estate," which did not appear to readily apply to the operations of a furniture company. Moreover, we noted that the assertion that the PDs create designs which are then sent to Brazil for construction does not mean that the PDs "manage" the factory workers in Brazil who follow the plans, as the Petitioner asserted. We concurred with the Director's determination that the Petitioner had not established the existence of a layer of management subordinate to the Beneficiary, and concluded that the Petitioner did not establish that the Beneficiary would be primarily performing executive duties under the extended petition.

B. Motion to Reconsider

On motion, the Petitioner asserts that we did not consider the totality of the evidence and that we failed to apply the preponderance of the evidence standard to the facts presented. For the reasons discussed below, the Petitioner has not established that we incorrectly applied the law or USCIS policy in our decision dismissing the appeal.

The record demonstrates that the Beneficiary had two direct subordinate employees at the time of filing, one of which supervised an additional employee. On motion, the Petitioner asserts that we erred in relying on staffing levels when determining that the Beneficiary would not be employed in a primarily executive capacity. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in an executive (or managerial) capacity. *See* section 101(a)(44)(C) of the Act. However, 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-executive operations of the company or a company that does not conduct business in a regular and continuous manner. *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 size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15.

The Petitioner cites to *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act primarily in a managerial or executive capacity. Specifically, the Petitioner asserts on motion that the size of its staff is not a determining factor in establishing whether the Beneficiary would be employed in a qualifying executive capacity. The Petitioner, however, fails on motion to properly address our concerns with regard to the deficient job descriptions and the unresolved questions pertaining to the Beneficiary's subordinate staff, and the potential that the Beneficiary's management of such staff is further indication that the Beneficiary would be engaged in non-qualifying tasks. Furthermore, the Petitioner's focus on the Beneficiary's direction of the company's management and his discretionary authority regarding business decisions is not sufficient to establish that that Beneficiary would allocate his time primarily to the performance of tasks within a qualifying executive capacity. The burden is on the Petitioner to provide a detailed job description, including the proposed list of the Beneficiary's job duties and those of his subordinates, in order to establish that the primary portion of the

Beneficiary's time would be spent performing tasks of a qualifying nature. Due to the inconsistent position descriptions and conflicting information as to the subordinate employees' actual duties noted in our prior decision, it remains unclear how the Beneficiary's subordinates will relieve him from performing other nonqualifying administrative and operational duties.

On motion, the Petitioner also argues that we erred by not determining that the Beneficiary was supervising "professional" subordinate employees as defined by section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32). The statutory definition of "managerial capacity" under section 101(a)(44)(A) of the Act provides that personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Here, however, the Petitioner has consistently claimed that the Beneficiary will be employed exclusively in an executive capacity, and our analysis on appeal was restricted to determining whether the Petitioner satisfied the required elements of executive capacity as outlined under section 101(a)(44)(B) of the Act. While the Petitioner's assertion on motion regarding the claimed professional positions of the Beneficiary's subordinates is noted, a petitioner claiming that the beneficiary's position will consist of a mixture of managerial and executive duties will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. . The Petitioner has not done so in this case.

Nevertheless, while supervision of employees is not an express component of the statutory criteria for executive capacity, it is inherent to the definition that the organization must have a subordinate level of managerial employees for the Beneficiary to direct, as noted in our prior decision, and the Beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. While the definition of "executive capacity" does not require the Petitioner to establish that the Beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the Petitioner's burden to establish that someone other than the Beneficiary carries out the day-to-day, non-executive functions of the organization. In our prior decision, we determined that the job descriptions submitted for the Beneficiary's direct and indirect subordinates in the United States were not consistent and lacked detail regarding the specific functions they perform. On motion, the Petitioner does not sufficiently address this determination and does not articulate how our prior decision was based on an incorrect application of the cited statute or caselaw.

The Petitioner also asserts on motion that the COVID-19 pandemic presented challenges and complicated the company's early stages of development, and requests reconsideration given the extraordinary circumstances resulting from the global pandemic that impacted its first year of U.S. operations. The Petitioner, however, previously stated that the Beneficiary superseded his business plan hiring practices by onboarding three subordinate employees within the first six months of operations, and further stated that "[b]y January 2020, at the height of the COVID-19 pandemic,² which caused numerous business closures, [he] fully met the business plan hiring projections that led to his initial L-1A approval." (Emphasis in original). It appears, therefore, that the Petitioner's hardship claims surfaced in response to our decision dismissing the appeal. While we acknowledge that a portion of its first year of operations was impacted by the pandemic, the Petitioner must

² We note that COVID-19 was not declared a pandemic until March 2020.

nevertheless 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).

The Petitioner cites *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), for the proposition that we “weigh all relevant factors including . . . evidence of the beneficiary's role within the wider qualifying international organization,” and asserts that the same reasoning applies here because it is part of a multinational organization and the parent company’s hundreds of employees and contractors support the U.S. entity. The Petitioner cited this same caselaw in support of its appeal and we addressed its claim, noting that it mischaracterized the foreign entity’s relationship to the petitioning U.S. employer because the Petitioner exists for the benefit of the parent company, and not vice versa.³ The Petitioner does not articulate on motion how our prior decision was based on an incorrect application of the cited caselaw.

The Petitioner also restates its previous claims regarding recent revisions to the *USCIS Policy Manual*, requiring deference to prior approvals when adjudicating extension petitions. See 2 *USCIS Policy Manual* A.4(B)(1), <https://www.uscis.gov/policymanual>; see also USCIS Policy Alert, PA-2021-05, *Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity* (Apr. 27, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf>. However, we do not defer to prior approvals where there has been a material change in circumstances or eligibility requirements. 2 *USCIS Policy Manual*, *supra*, at A.4(B)(1). This includes situations in which the regulations require criteria to be met after approval, such as L-1A extension petitions for new offices detailed at 8 C.F.R. § 214.2(l)(3)(v)(C) (a new office has one year from the date of the initial approval to support an executive or managerial position). See 8 C.F.R. § 214.2(l)(14)(ii) (a petitioner seeking to extend an L-1 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 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).

While the Petitioner’s reliance on the recent revisions to the *USCIS Policy Manual* is noted, it Petitioner has not shown on motion that our determination that it did not establish that it would employ the Beneficiary in an executive capacity under the extended petition was erroneous. As noted in our prior decision, new office petitions are subject to different conditions than other L-1 petitions (including extension petitions), and the approval of a new office petition does not imply a presumption of eligibility at the extension stage.

Finally, in our previous decision, we addressed the Petitioner’s claim that it must only establish eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-76. To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989). On motion, the Petitioner simply maintains that it submitted more than sufficient evidence to meet this standard.

³ If a petitioner claims that it has a reasonable need for foreign staff to perform some of the operational tasks associated with its U.S. business, it has the burden of documenting those foreign employees and the duties they perform for the U.S. entity. *Id.*

However, it does not adequately address the fact that we articulated a reasonable basis for questioning the probative value of certain critical evidence, including the Petitioner's descriptions of the duties performed by the Beneficiary and his subordinates.

In our prior decision, we did not question that the Beneficiary occupies a senior role in the business and participates in discretionary decision-making. These factors are necessary, but not sufficient, to support a conclusion that a position is in an executive capacity as defined at section 101(a)(44)(B) of the Act; the Petitioner must also establish that the actual duties of the position are primarily executive in nature. Ultimately, we concluded that the Petitioner had not met its burden to provide a sufficiently probative description of the Beneficiary's actual duties, as well as a probative description of his subordinate employees at the time of filing, because the descriptions it submitted were inconsistent, vague, and did not describe the specific tasks he would perform within the context of its business. The Petitioner has not established that we failed to apply the preponderance of the evidence standard when evaluating whether the Beneficiary would perform primarily executive duties.

Although the Petitioner disagrees with our determination that it did not meet its burden to establish, by a preponderance of the evidence, that it would employ the Beneficiary in an executive capacity under the extended petition, for the reasons discussed above, it has not demonstrated that we incorrectly applied the law or USCIS policy in reaching that determination. Accordingly, the motion to reconsider will be dismissed.

C. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Although we review new evidence submitted in support of a motion to reopen, 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).

The new evidence submitted in support of the motion to reopen does not overcome our reasons for dismissing the Petitioner's appeal. The Petitioner resubmits much of the documentary evidence previously provided in support of the assertion that it has established eligibility in this matter. However, we do not consider such evidence, which has already been reviewed and evaluated, to constitute new facts supported by documentary evidence.

The Petitioner's new evidence on motion includes, in part, documentation related to the academic credentials and experience of the Beneficiary's subordinate employees, many of whom were hired after the filing of the extended petition, as well as documentation pertaining to business activities of the Petitioner that originated after the filing of the extended petition.

The evidence of business transactions and activities occurring after the filing of the underlying petition in June 2020 may not be considered in determining whether the Petitioner has established that the Beneficiary will be employed in a primarily executive capacity in the United States. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this matter, the Petitioner claimed in the extended petition that the Beneficiary had executed

contractual agreements and oversaw three subordinate employees at the time the extended petition was filed. Accordingly, only those duties pertaining to the staff and the status of the enterprise at the time of filing may be considered. Duties ascribed to the Beneficiary and his subordinates in the future due to transactions and activities occurring after the filing of the petition, including the purported supervision of professional employers, newly hired subordinates, and independent contractors, may not be considered. On motion or on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, we find that the evidence submitted on motion is not relevant for the purpose of overcoming our previous adverse decision dismissing the appeal.

Regarding the Petitioner's submission of experiential and educational documentation in support of the assertion that the Beneficiary supervised professional employees, and its assertion that we erroneously disregarded this fact, we again note that the Petitioner has continuously maintained that the Beneficiary would be employed in a primarily executive capacity. The Petitioner's attempt to present new facts to demonstrate that the Beneficiary may qualify as a personnel manager under the statutory provisions of managerial capacity, for the first time on motion, is not proper cause for reopening the proceedings. Again, a petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

Therefore, since the Petitioner has not stated new facts supported by documentary evidence necessary to support a motion to reopen, the motion must be dismissed. *See* 8 C.F.R. § 103.5(a)(2).

III. CONCLUSION

The Petitioner has not established that our decision to dismiss its appeal was based on an incorrect application of law or USCIS policy, nor has it submitted new evidence that would warrant the reopening of its appeal. Accordingly, the motions will be dismissed.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.