U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11211995

Date: OCT. 1, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself a designer and developer of software applications, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) in the United States under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The Director of the Nebraska Service Center denied the petition, concluding the record did not establish, as required, that the Beneficiary would be employed in a managerial or executive capacity in the United States. In addition, the Director determined the Petitioner did not demonstrate that the Beneficiary had been employed in a managerial or executive capacity in his former position abroad.

On appeal, the Petitioner asserts the Director erred in concluding that it did not submit a sufficiently detailed duty description including percentages of time the Beneficiary devoted to his daily tasks in the United States. Further, contrary to the Director's conclusions, the Petitioner contends it provided a U.S. organizational chart, "numerous examples," and "specific evidence" of the Beneficiary's managerial and executive duties in the United States. The Petitioner also states that the Director did not consider a submitted foreign employer support letter and other supporting evidence demonstrating the Beneficiary's former managerial and executive role abroad.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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).

II. DEFINITIONS

"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.

III. FOREIGN EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue we will address is whether the Petitioner has established that the Beneficiary acted in a managerial or executive capacity abroad. Throughout the record, and on appeal, the Petitioner did not definitively indicate whether the Beneficiary qualified abroad as a manager or an executive, or both. For instance, at times on the record the Petitioner referred to the Beneficiary's "executive control" abroad, but also indicated that he "spent 100% of his time in an executive and managerial 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 will primarily engage 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 will be primarily employed in either a managerial or executive capacity.

A. Duties

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement that clearly describes the duties performed by the Beneficiary abroad. To be eligible for L-1A nonimmigrant visa classification as a manager or executive abroad, the Petitioner must show that the Beneficiary performed the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)

and (B) of the Act. If the record does not establish that the foreign position met all four of these elements, we cannot conclude that it was a qualifying managerial or executive position.

If the Petitioner establishes that the foreign position meets all elements set forth in the statutory definition, the Petitioner must prove that the Beneficiary was *primarily* engaged in managerial or executive duties abroad, as opposed to ordinary operational activities alongside the foreign employer's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given beneficiary's foreign duties were primarily managerial or executive, we consider the Petitioner's description of the Beneficiary's foreign job duties, the foreign employer's organizational structure, the duties of a beneficiary's subordinate employees abroad, the presence of other foreign employees to relieve the beneficiary from performing operational duties, the nature of the foreign business, and any other factors that will contribute to understanding a beneficiary's actual duties and former role abroad.

The Petitioner stated that it and the foreign employer are "software as a service" technology companies offering "a wide range of software products for event and calendar management on websites, tablets and mobile devices." In a support letter written by the foreign employer in May 2016[1], the foreign employer explained the Beneficiary's duties abroad as follows:

> [The Beneficiary]…spent 100% of his time in a managerial or executive capacity. His duties have included the supervision of daily operations & personnel; hiring, firing, and supervision of management, staff, contracted and outside staff, professionals, legal representation, accountants, etc.; final decision making authority of all executive and managerial functions of our company's operations, finances, goals, policies, procedures, etc; complete discretionary control of all operations of the company; develop policies, strategies, procedures, conduct weekly staff/vendor/contractor meetings; review and approve budgets, investments, reports, allocation of resources, etc.

In a later request for evidence (RFE), the Director noted that the Beneficiary's foreign duty description was overly broad and ambiguous and that it did not reveal his specific duties abroad or the percentages of time he devoted to each of his tasks. In response, the Petitioner's provided the following statement related to the Beneficiary's former duties abroad:

> As President of [the foreign employer] since 2012, [the Beneficiary] was the final decision making authority for all executive functions of our company. For over 4 years, prior to coming to the US to open [the Petitioner], [the Beneficiary] oversaw the entire operations and the day-to-day functions of the company. He built long- & short-term goals, strategies, plans, & policies. He reviewed and approved contracts with vendors, providers, sub-contractors, etc. He oversaw all operations and business activities ensuring that our products and portfolio performed at optimum levels and provided the desired services to our customers. He had final decision making authority to hire, fire, promote, etc. management & staff. With guidance from our team, he reviewed and

[1] The petition was filed in April 2019. The Petitioner stated that the Beneficiary ended his employment with the foreign employer in July 2016 to enter the United States as an L-1A nonimmigrant.

> approved budgets & marketing campaigns, and made high-quality investing decisions, much like the decision to enter the North American markets, to increase markets, efficiency and profits, and maintain the highest standards possible. He built trusted relationships with our key customers, vendors, partners, and stakeholders, maintaining necessary networking relationships. He found investors to help us expand our business to the Americas and expand our product portfolio to meet the ever changing needs of our customers, old & new.

As previously stated, the Director concluded that the Beneficiary's asserted foreign duties were broad and ambiguous and noted that they did not provide the percentages of time he devoted to his daily tasks or reveal the specifics of his duties. We agree with the Director's conclusion. The foreign duty descriptions provided for the Beneficiary are generic, they include few credible details, and they do not demonstrate the time he devoted to each of his daily tasks abroad. In fact, the submitted duty description could apply to any manager or executive acting in any business or industry and they provide little insight into how the Beneficiary was primarily devoting his time to managerial or executive-level duties.

For instance, the Petitioner did not articulate or document the "functions of the company" the Beneficiary oversaw, the long- and short-term goals, strategies, plans, or policies he set, the contracts he approved with vendors, providers, or subcontractors, or the budgets or marketing campaigns he implemented. Likewise, the Petitioner did not describe or document the "high-quality investing decisions" the Beneficiary made abroad, the relationships he built with key customers, vendors, and partners, or investors he found. Although we do not expect the Petitioner to document all of the Beneficiary's former activities abroad, the near absence of credible detail and evidence to substantiate his managerial and executive duties abroad is noteworthy, particularly since it asserts he worked in this capacity abroad from 2012 to his entry into the United States in May 2016. 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).

In addition, the Petitioner otherwise provided foreign employer documentation indicating that the Beneficiary is engaged in non-qualifying operational tasks while employed in the United States, suggesting that he likely performed these tasks during his foreign employment. For example, the Petitioner submitted numerous foreign employer customer and vendor invoices listing the Beneficiary as the primary contact dated from March 2018 through November 2019. Although we acknowledge that the aforementioned invoices do not date from the time of the Beneficiary's foreign employment, it is reasonable to conclude, particularly without other supporting documentation of his qualifying foreign tasks, that he was likely involved in these non-qualifying aspects of the business while employed abroad.

Whether the Beneficiary was a managerial or executive employee abroad 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 foreign duties were managerial or executive functions and what proportion were non-qualifying operational tasks. The Petitioner submits supporting documentation indicating that the

Beneficiary was likely administrative or operational tasks while employed abroad, but it does quantify the time the he spent on these duties as opposed to asserted managerial or executive tasks. For this reason, we cannot determine whether the Beneficiary primarily performed the duties of a manager or an executive abroad. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The fact that the Beneficiary managed or directed his former foreign employer does not necessarily establish eligibility for classification as a multinational manager or executive. By statute, eligibility for this classification requires that the duties of a foreign position be "primarily" managerial or executive in nature. Sections 101(A)(44)(A) and (B) of the Act. Even though the Beneficiary may have exercised discretion over some of the foreign employer's day-to-day operations and possessed the requisite level of authority with respect to discretionary decision-making, the position descriptions alone are insufficient to establish that his foreign duties were primarily managerial or executive in nature.

B. Foreign Staffing and Operations

In denying the petition, the Director indicated that the Petitioner did not submit duty descriptions, education levels, salaries, or other relevant requested information and evidence related to the Beneficiary's subordinates in his former capacity abroad. On appeal, the Petitioner does not directly address this issue or supplement the record with a foreign organizational chart or duty descriptions, education levels, salaries, or other supporting documentation to substantiate the Beneficiary's subordinates while employed abroad. Further, in a foreign support letter provided in response to the RFE, the chief technology officer (CTO) of the foreign employer stated that they had "provided your office...previously with an organizational chart and detailed description of our contracted and full-time staff's duties prior to [the Beneficiary's] transfer to the US." The CTO of the foreign employer also added that "I believe it has been incorporated into the business plan, which should be attached again to this packet" and also noted that due to applicable European Union regulations it was "not able to provide additional staffing documentation for staff in 2015/16."

However, a review of the current record does not reflect the inclusion of a foreign organizational chart relevant to the Beneficiary's former employment abroad or duty descriptions, education levels, salaries, and other supporting documentation related to these subordinates. We note that each petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, we are limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). Further, the Petitioner's business plan dated in April 2017 only vaguely references that the CTO joined the company in June 2014 and that a "Chief Experience Officer" began working for the company in March 2015 and provides brief explanations of their experience.

As we have discussed, the Petitioner does not clearly indicate whether the Beneficiary qualified as manager or executive, or both, abroad. As such, we will address each separately. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to have primarily supervised and controlled 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 supervised other employees, the beneficiary must also have had the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2). Since the Petitioner does not clearly assert that the Beneficiary qualified as a function manager abroad or indicate that he oversaw an essential function, we will only analyze whether he qualified as personnel manager.

The Petitioner has not submitted sufficient evidence to establish that the Beneficiary qualified as a personnel manager overseeing subordinate supervisors or professionals abroad. First, as noted, the Petitioner did not submit a comprehensive organizational chart corresponding with the Beneficiary's foreign employment and there is no indication or evidence that he supervised subordinate managers abroad. As such, the Petitioner has not demonstrated that the Beneficiary qualified as a personnel manager abroad based on his supervision of subordinate supervisors or managers.

The only remaining question is whether the Beneficiary qualified as a personnel manager based on the supervision of subordinate professionals. To determine whether a beneficiary managed professional employees, we must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee was employed in a professional capacity.

The Petitioner only briefly mentioned a claimed foreign CTO and a chief experience officer in a submitted business plan from April 2017 and their asserted employment with the foreign employer during the Beneficiary's time of employment abroad. Although the business plan emphasized the experience of these employees, it did not provide comprehensive duty descriptions for these positions, nor did it specifically articulate how they qualified as professionals. As we have noted, the Petitioner also provides no evidence to establish the foreign employer's former organizational structure. For instance, there is no evidence on the record to substantiate the foreign entity's employees during the Beneficiary's employment nor is there documentary evidence of his personnel authority over any foreign employees. Although we acknowledge that the Petitioner may well be under certain privacy restrictions by foreign law, we also note that it is its burden to establish the Beneficiary's eligibility for the benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361.

In addition, as discussed, the record includes substantial evidence dating after the Beneficiary's time of foreign employment reflecting his involvement in non-qualifying operational tasks, including numerous foreign customer and vendor invoices including his name and contact information. This leaves substantial question as to whether the Beneficiary was primary delegating non-qualifying operational tasks to subordinate supervisors and professionals during the time of his foreign employment. As such, the Petitioner has not sufficiently established that the Beneficiary acted as a personnel manager abroad.

Next, we will consider whether the Petitioner demonstrated that the Beneficiary was employed in an executive capacity in his former role abroad. The statutory definition of the term "executive capacity" focuses on a person's elevated position. Under the statute, a beneficiary must have had 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 was "direct[ing] the management" of an organization or a major component or function of the foreign organization, a petitioner must show how the organization, major component, or function was managed and demonstrate that the beneficiary primarily focused 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 had an executive title or because they "direct[ed]" the organization, major component, or function as the foreign employer's owner or sole managerial employee. A beneficiary must have also exercised "wide latitude in discretionary decision making" and received only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The Petitioner has not sufficiently established that the Beneficiary was employed in an executive capacity abroad. Again, the Petitioner did not submit a comprehensive organizational chart relevant to the time of the Beneficiary's foreign employment nor did it submit duty descriptions or other information and evidence related to his former foreign subordinates. The Petitioner also submitted a generic foreign duty description that does not adequately detail the Beneficiary's executive-level tasks abroad nor has it provided supporting documentation to substantiate his previous performance of qualifying duties.

In contrast, the Petitioner provided substantial documentation, albeit from after the Beneficiary's time of foreign employment, reflecting his involvement in the non-qualifying operational aspects of the foreign employer. As we have discussed, it is reasonable to conclude that if the Beneficiary was performing these non-qualifying tasks during 2018 and 2019, he likely was also involved with these non-qualifying duties while employed abroad prior to July 2016. This likelihood is more pronounced given the lack of supporting evidence of the Beneficiary's executive-level duties or its foreign organizational structure at the time of his employment abroad. Therefore, the Petitioner has not demonstrated that the Beneficiary was employed in an elevated position within the foreign employer where he was primarily focused on broad goals and policies rather than its day-to-day operations.

For the foregoing reasons, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity in his former position abroad.

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

As we have discussed, the Director also denied the petition concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. Because of the dispositive effect of the above finding of ineligibility; namely, our affirmation of the Director's conclusion that the Petitioner did not establish that the Beneficiary acted in a managerial capacity in his former position abroad, we will only briefly address the remaining issue addressed by the Director.

In denying the petition on this ground, the Director also determined that the Beneficiary's U.S. duty description was also overly broad and ambiguous and noted that it did not include specific daily tasks and percentages of time he devoted to each. The Petitioner contends on appeal that the Beneficiary's provided duty description is "extremely detailed." Upon review, we agree with the Director's conclusion. Similar to the Beneficiary's foreign duties, the Beneficiary's U.S. duty description is generic and could apply to any manager or executive acting in any business or industry. There is little discussion of the Petitioner's actual business and the Beneficiary's role therein and it provides few credible details and it submits little supporting documentation to corroborate the policies, procedures, strategies, or goals the Beneficiary set, the key customers or projects he managed, law and regulations he navigated, problems he resolved, or final decisions he made on "improvements, development, or budget aspects." Although we do not expect the Petitioner to document all of the Beneficiary's activities in the United States, the lack credible details and supporting documentation to substantiate his managerial and executive-level tasks is noteworthy, particularly since it claims he has acted in this role for approximately three years as of the date the petition was filed.

In addition, as discussed, the Petitioner provided substantial documentation reflecting the Beneficiary's direct engagement in non-qualifying operational tasks abroad during his time in the United States, including numerous foreign customer and vendor invoices from throughout 2018 and 2019. Although this documentation is related to the foreign employer's operations, this leaves question as to how much time the Beneficiary devotes to these non-qualifying aspects of the business, particularly given the lack of supporting documentation corroborating his performance of managerial or executive duties in the United States.

Further, the Petitioner's descriptions of the Beneficiary's role in the United States suggest his direct involvement in non-qualifying duties alongside its other operational employees. *See Family Inc. v. USCIS*, 469 F.3d at 1313, 1316. For instance, the Petitioner indicated that at any point it might need varying degrees of web or logo designers, coders, or engineers to complete its projects and that they are not engaged on a fulltime basis. In fact, state employer's quarterly wage documentation from the first and second quarters of 2019 indicated that the Petitioner had only one other employee beyond the Beneficiary, the asserted chief operating officer. This leaves question as to who is performing the other operational aspects of the Petitioner's business not performed by contractors on a project-by-project basis, such as assessing client needs, collecting their specifications, creating and selling these solutions, amongst others. In fact, the Petitioner provided board minutes from March 2019 reflecting the Beneficiary providing "a progress report on the [Petitioner's] Website redesign phases" and an "overview of which resources need to go into building the new appointments tool codenamed MeetingThing." These documents suggest the Beneficiary's direct involvement in the operational aspects of the business alongside its claimed contractors, rather than him acting as a personnel manager or as a higher-level executive in an elevated position primarily setting goals and policies.

Once again, whether the Beneficiary is a managerial or executive employee abroad turns on whether the Petitioner has sustained its burden of proving that their duties would be "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 U.S. duties were managerial or executive functions and what proportion were non-qualifying operational tasks. However, the Petitioner submits supporting documentation indicating the Beneficiary's engagement in administrative or operational tasks, but it does not quantify the time he spends on these duties as compared to qualifying managerial or executive

level tasks. For this reason, we cannot determine whether the Beneficiary would primarily perform the duties of a manager or an executive in the United States. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 22.

For the foregoing reasons, the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States.

V. CONCLUSION

The appeal must be dismissed because the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad or that he would be employed in a managerial or executive capacity in the United States.

ORDER: The appeal is dismissed.