



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

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

In Re: 07906389

DATE: JULY 6, 2020

Appeal of California Service Center Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a real estate development business, seeks to temporarily employ the Beneficiary as its regional head under the L-1A nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required: (1) that the Beneficiary has been employed abroad in a managerial or executive capacity; and (2) that the new office will support a managerial or executive position within one year after the approval of the petition.

The matter is now before us on appeal. The Petitioner asserts that the evidence of record establishes that the Beneficiary was employed abroad in a managerial capacity, that the U.S. entity will support an executive position within one year of the petition's approval, and that the Beneficiary therefore qualifies for the classification of intracompany transferee under the Act.

In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act. 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal on the ground that the record does not establish that the new office will support a managerial or executive position within one year after the approval of the petition. We will reserve the issue of whether the Beneficiary has been employed abroad in a managerial or executive capacity.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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.*

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

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.

To be eligible for L-1A nonimmigrant visa classification as a manager or an executive, a petitioner must show that the beneficiary will perform the high-level responsibilities set forth in the statutory definitions at sections 101(a)(44)(A)(i)-(iv) and 101(a)(44)(B)(i)-(iv) of the Act, each of which has four parts. If the record does not establish that the offered position meets all four elements of the pertinent statutory definition, we cannot conclude that it is a qualifying managerial or executive position. If a petitioner establishes that the offered position meets all four elements of the applicable statutory definition, it must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the petitioner’s other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a beneficiary’s duties will be primarily managerial or executive, we consider the petitioner’s description of the job duties, the company’s organizational structure, the duties of the beneficiary’s subordinate employees, the presence of other employees 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.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The record indicates that the Beneficiary is the director of HR and operations at [REDACTED], a residential and commercial real estate development company in [REDACTED] India. [REDACTED] is an affiliate of the Petitioner. The Petitioner asserts that the Beneficiary is employed in a managerial capacity by [REDACTED]. The Director found that the Petitioner did not establish that the

Beneficiary has been employed abroad in a managerial or executive capacity. On appeal the Petitioner reiterates its claim that the Beneficiary has a top level managerial position with the foreign entity which qualifies her for an L-1A visa.

When examining the claimed managerial capacity of a given beneficiary, we look to the petitioner's description of the job duties. Beyond the job duties we also examine the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In this case, as the Petitioner has not established that the Beneficiary will be working in the U.S. in a managerial or executive capacity, we reserve on the issue of whether the Beneficiary is employed abroad in a managerial capacity for future proceedings.

IV. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the record did not establish that the new office in the United States would support a primarily managerial or executive position within one year of the petition's approval. On appeal the Petitioner asserts, as it has throughout this proceeding, that the new office will require a full-time executive employee within one year. We will therefore restrict our analysis to the executive nature of the proffered position.

As previously indicated, a petitioner seeking to employ a beneficiary as an executive of a new office must establish that the new office will support an executive position within one year of the approval of the petition. The petitioner must establish the nature of the proposed office, describing its scope, organizational structure, and financial goals; the size of the United States investment and the foreign entity's financial ability to remunerate the beneficiary and to commence doing business in the United States; and the foreign entity's organizational structure. 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is first established and commences operations, the regulations recognize that a designated executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive level and that often the full range of executive responsibility cannot be performed in that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a primarily executive position.

A. Job Duties of the Proffered Position

In examining whether the Beneficiary's employment in the United States will be in an executive capacity, we will first examine the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In denying the petition the Director focused on the Petitioner's response to a request for evidence (RFE) in which the Petitioner produced an extensive description of the Beneficiary's prospective job duties capped off with a chart summarizing the duties into four categories with percentages of time assigned to each. The categories included: (1) general management of the U.S. entity with a list of five general tasks concentrating on the business relationship with the Indian affiliate

(50%), (2) building relationships with development-focused third parties in business and government (20%), (3) identifying land or re-development opportunities in the [] and (4) HR responsibilities to staff up the U.S. company. The Director found that the job duties as described in the chart were vague and general and did not convey the “the actual nature of the [B]eneficiary’s role.” Referring to the Petitioner’s organizational chart, the Director indicated that it did not clearly state how the individuals in the proposed subordinate positions would relieve the Beneficiary from daily operational tasks, and thus did not show that the Beneficiary’s position was primarily executive in nature. Finally, the Director stated that the Petitioner had not demonstrated that it would reach a level of organizational complexity within one year to warrant a position in which the Beneficiary would be performing duties primarily executive in nature.

On appeal the Petitioner asserts that the Director did not consider the more detailed description of the Beneficiary’s proposed job duties that preceded the chart in its response to the RFE. In that purportedly overlooked section of its response the Petitioner summarized the Beneficiary’s job as building the team in the United States, sourcing land deals, and executing development projects. The Petitioner augmented the information in the chart with details about building contacts with specific commercial brokers, cultivating contacts in the building industry, hiring employees, and ensuring the timely execution of projects. The Petitioner also provided additional details about the specific government officials with whom the Beneficiary will develop relationships to facilitate the permitting process, and the Beneficiary’s responsibility for identifying new types of real estate development opportunities combining residential and commercial features. Regarding the actual commencement of business, the Petitioner stated that by the end of the first year following approval of the petition the Beneficiary aims to acquire an initial piece of property and begin the permitting process. The Petitioner stated that the Beneficiary will liaise between the U.S. company and the Indian affiliate, advising []’s board of directors regarding U.S. operations, evaluating each project, and facilitating intra-office transfers and senior level recruitment. The Petitioner asserted that the U.S. office would begin with the Beneficiary acting as the managing member assisted by one or two “key personnel,” scale up to around five to six personnel by the end of the first year, and stabilize the staff at around 12 by the end of the second year. In conclusion, the Petitioner stated that the Beneficiary will be the senior executive of the U.S. company responsible for building the legal, finance, core operations, marketing, sales and management teams for business in the United States.

While the duties described above appear to cover the four elements of “executive capacity” as defined in section 101(a)(44(B) of the Act, they ramp up over an extended period of time and do not indicate that the Beneficiary’s duties would be primarily executive in nature within one year of the petition’s approval, as required under 8 C.F.R. § 214.2(l)(3)(v)(C) for a new office. To review this issue in detail, we will examine the Petitioner’s business plan.

B. Petitioner’s Business Plan

A new office petition must include evidence of the proposed nature of the office, describing the scope of the entity, its organizational structure, and its financial goals. 8 C.F.R. § 214.2(l)(3)(v)(C)(I). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need

for an executive who will primarily perform qualifying duties by the end of the one-year period. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

The Petitioner is a residential and commercial real estate developer co-owned by the Beneficiary and [REDACTED] her fellow co-owner and co-director of the Indian affiliate, [REDACTED]. Documentation in the record shows that the Petitioner was legally formed in November 2018 and a few days later the co-owners (“members”) entered into an operating agreement stating that the purpose of the business was to buy, rent, build, and manage residential and commercial real estate. Bank account statements indicate that the Petitioner received initial capital investments of at least \$236,000 from its Indian affiliate through the end of March 2019, and there is evidence of additional remittances up to September 2019.¹ The Petitioner entered into a one-year lease for new office premises in [REDACTED] California, at the end of February 2019, paying a base rate of \$2,045 per month for 1,278 square feet of work space. Thus, the rudiments of a business were established in the months following the Petitioner’s creation.

The Petitioner has submitted two business plans. The first, dated April 1, 2019, was submitted with the petition and the second, dated July 9, 2019, was submitted with the Petitioner’s response to the Director’s RFE. The second business plan, which has modest revisions to the first and is the focus of our examination, includes a “detailed 1-year plan” listing the following items:

- Looking to purchase a ready-built asset and take on ground-up development projects.
- Assuming a ground-up approach, reach out to commercial real estate brokers and identify 3 key plots of land that are zoned for high-density developments to construct condos, townhomes and co-living spaces in the [REDACTED] or [REDACTED] area.
- Engage architects and lawyers to run feasibility and environmental assessments on each of those plots of land to understand the design and financial profile of each development scenario.
- Begin hiring process for an in-house architect and CFO to manage the financials and development process for [the Petitioner’s] first development.
- Initiate the design and permitting process with the relevant city and county officials for either [REDACTED] or [REDACTED] with [the Petitioner’s] COO and Architect leading the process.
- Conclude design and permitting process and engage a GC and subcontractors contingent upon approval of permits and begin construction for the development.
- Construction will take roughly 2-3 years for each project to complete and in the meantime engage marketing and sales consultants to start promoting the development via retail and online channels; begin hiring process for sales & marketing lead.
- Hire property management firm to start signing leases for the new development and begin the furnishing process.

¹ The Petitioner asserts that it had received a total of \$406,000 from its Indian affiliate at the time the petition was filed in April 2018, and that by the time the appeal brief was filed in September 2019 a total of \$1.35 million had been transmitted. While the Petitioner has submitted a printout listing dollar amounts received, the bank statements in the record are incomplete and do not confirm the totals alleged by the Petitioner. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s evidence also reflects on the reliability of the petitioner’s remaining evidence.

- Our current set-up and ongoing expenses – listing “set-up expenses” (three items) and “ongoing expenses (three items).

The business plan includes an organizational chart entitled “The Team – Hiring Plans” which identifies the Beneficiary as co-managing director, three directly subordinate positions consisting of a chief financial officer, a COO (chief operating officer)/head of development, and a chief legal counsel, and five positions subordinate to the COO/head of development consisting of head of sales & marketing, chief architect, lead construction manager/engineer, lead property manager, and chief technology officer. Each of these five positions has subordinate “support staff.” Thus, the organizational chart identifies at least 14 employees (or more if the support staff entries comprise more than one employee). The job duties of the prospective employees are not otherwise described, and the time frame(s) for hiring are not indicated.

The business plan also includes “The 5-year Plan” with the following entries:

- Year 1 – Identify and acquire 3 plot (*sic*) of developable land in [] and []; hire COO and architect to begin the designing and permitting process for a condo, town-house and co-living space as well as purchasing a ready-built asset [] in [].
- Year 2 – Finish permitting, raise debt and begin construction of the developments.
- Year 3 – Construction of developments in-progress; hire a head of sales & marketing and start marketing the development through retail and online channels.
- Year 4 – Deliver 50% of the developments while the other 50% is in-progress, begin signing leases and tenants will start moving in; in case of town-homes aim to sell 25% of development by year-end.
- Year 5 – Deliver 100% of the developments and aim to achieve 100% occupancy by year-end; in the case of town-homes aim to sell 50% by year-end [] will hold the remainder.)

The business plan projects no revenue from ground-up developments (condos, co-living, and town-homes) during the first three years. It does predict revenue of \$520,000 during the first year from the ready-built office building to be purchased in [].

The foregoing highlights of the business plan show that the Petitioner anticipates a five-year time frame for the business to develop and come into fruition. The business plan does not show that the business will have a sufficient organizational structure within one year to free the Beneficiary from performing daily operational tasks and allow her to primarily perform in an executive capacity vis-a-vis subordinate employees and the board of directors of the Indian affiliate. For example, the business plan indicates that the Petitioner intended to hire only two employees – a COO and an architect – during the first year, and no support staff. In its appeal brief the Petitioner asserts that it will scale up to five or six personnel by the end of the first year, but does not indicate whether they will be employees or contractors, what positions they will fill, and what duties they will perform. Thus, the Petitioner has not explained how the Beneficiary will have the necessary support staff to relieve her of the office’s daily operational duties by the end of one year so that she may function in a primarily executive capacity.

The statutory definition in section 101(a)(44)(B) of the Act indicates that a person must have an elevated position within a complex organizational hierarchy, or within a major component or function of the organization. An individual will not be deemed a multinational executive under the statute simply because they have an executive title or because they direct the enterprise as a co-owner or senior management employee.

While the Beneficiary in this case is anticipated to be the regional head for the U.S. operation, the Petitioner's business plan and other evidence in the record does not show that within a year the company will have a complex enough organizational structure to relieve the Beneficiary of daily operational duties and warrant the services of an employee performing in an "executive capacity" as defined in section 101(a)(44)(B) of the Act.

The new office regulations are premised on the understanding that a new company will progress to a stage of development that will support a beneficiary in a primarily executive (or managerial) capacity within one year. Given the evidence in the Petitioner's business plan regarding the staffing of the U.S. office – and the dearth of evidence that more than two employees will be hired during the first year – the record does not demonstrate that the business as described will have sufficient staff to support an executive capacity position and relieve the Beneficiary of daily operational duties within a year of the petition's approval.

V. CONCLUSION

The Director's finding that the Beneficiary has not been employed abroad in a managerial or executive capacity is reserved for future proceedings. However, the Petitioner has not established, as claimed, that the new office in the United States will support the employment of the Beneficiary in an executive capacity within one year after the approval of the petition. The appeal will be dismissed for the above stated reason.

ORDER: The appeal is dismissed.