



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

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

In Re: 08231886

DATE: JULY 6, 2020

Appeal of California Service Center Decision

Form I-129, Nonimmigrant Petition for an Intracompany Transferee

The Petitioner, a manufacturer and distributor of industrial lubricants, seeks to temporarily employ the Beneficiary as an executive manager of sales/marketing 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 on the grounds that the Petitioner did not establish that the Beneficiary had been employed abroad in a managerial or executive capacity and would be employed in a managerial or executive capacity in the United States.

The matter is now before us on appeal. The Petitioner asserts that the evidence of record establishes that the Beneficiary has been employed abroad in a managerial and executive capacity and will be employed in the United States in a managerial and executive capacity.

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 because the Petitioner has not established that the Beneficiary will be employed in the United States in a managerial or executive capacity. As this is a fundamental element of eligibility and the Petitioner has not satisfied this element, we will reserve the remaining issue relating to the Beneficiary's employment abroad.

I. LEGAL FRAMEWORK

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 involves 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.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

As defined in section 101(a)(44)(A) of the Act, the term “managerial capacity” means an assignment within an organization in which the employee primarily –

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) 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;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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.

As defined in section 101(a)(44)(B) of the Act, the term “executive capacity” means an assignment within an organization in which the employee primarily –

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(C) of the Act further provides that:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, [U.S. Citizenship and Immigration Services] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

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.

II. ANALYSIS

The Petitioner [REDACTED] is a branch of [REDACTED] based in [REDACTED] Australia ([REDACTED]). The Beneficiary is described in the petition as the managing director of [REDACTED]'s worldwide operations who is being sent to the United States to expand the operations of [REDACTED]. Though founded in 2011 to serve [REDACTED]'s U.S. customers, [REDACTED] had only two employees at the time the instant petition was filed in June 2019.¹ Without distinguishing whether she would be employed in a managerial or in an executive capacity, the petition described the Beneficiary's proposed duties for [REDACTED] as follows:

- Find administrative and sales staff to work and complete daily tasks of the business.
- Train new staff on procedures, plans, product knowledge, company structures, customer accounts and relations, daily duties.
- Training distributors and customers on detailed product knowledge and sales techniques.
- Setting up sales and pricing structures for distributors to place the products within its correct pricing market.
- Marketing through direct networking and promoting products at trade shows and conferences, in-person distributor contact and customer training and support.
- On-hand direction for employees and warehouse staff regarding product knowledge and company structure.
- Restructuring of corporate operations for increased efficiency and sales knowledge.

The petition was accompanied by a letter from counsel that also listed the Beneficiary's proposed duties with [REDACTED] and closely tracked the duties listed in the petition. Like the petition the letter did not distinguish whether the Beneficiary would be employed in a managerial or in an executive capacity. The letter from counsel stated that the Beneficiary's presence in the United States was necessary to execute the following key roles:

- Finding administrative and sales staff to work and complete daily tasks of the business.
- Provide specialized training to new staff on our procedures, plans, product knowledge, company structures, customer accounts and relations, and daily duties.

¹ The record indicates that [REDACTED] filed two previous I-129 petitions on behalf of the Beneficiary, in 2012 and 2017. The first petition was approved, and the Beneficiary received L-1A status from October 2012 through September 2015. The second petition was denied on March 24, 2017.

- Training distributors and customers regarding detailed product knowledge and sales techniques.
- Setting up sales and pricing structures for distributors to place the products within its correct pricing market.
- Setting up new distributors in specified industries to sell the products. They will need to have specific knowledge on the products, to help answer technical enquiries for their customers. They will also need to have training so they are confident in selling the product and be confident and be able to follow up with their customer base.
- Building business and trade partner relationships through networking.
- Participation at U.S-based trade shows – attendance for technical knowledge and support.

In response to the Director's request for evidence (RFE) the Petitioner submitted additional documentation which included, in particular, a letter from its COO, [REDACTED] providing a more detailed description of what the Beneficiary will be doing in the United States, as well as current and projected organizational charts of the U.S. entity. As described by [REDACTED] the Beneficiary will spend considerable time hiring and training a support staff, attending trade fairs and conferences, and marketing the Petitioner's products.

Based on the evidence submitted by the Petitioner, the Director concluded that the Beneficiary would be performing many daily operational tasks of the business, that the current and projected support staff would not be substantial enough to relieve the Beneficiary from performing non-qualifying operational duties, and that the record did not show that the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal the Petitioner submits a brief contending that the Director erred in concluding that the Beneficiary will not be employed in a managerial or executive capacity in the United States. The Petitioner makes a new assertion on appeal that the Beneficiary will initially be employed as a function manager, in charge of hiring and training staff for its U.S. business. The Petitioner quotes a section of the previously submitted letter from its COO, [REDACTED] which describes this managerial function, in pertinent part, as follows:

Given [the Beneficiary's] extensive knowledge and experience with hiring new employees for [REDACTED] in Australia, [she] will emulate these duties for [REDACTED] by preparing comprehensive and detailed job descriptions, recruiting for these new job opportunities, conducting interviews and screening potential candidates for required qualifications and experience. *She will be in charge of personnel, hiring and firing² and setting up the similar employment structure like it is in Australia.*

[The Petitioner] is in need of [the Beneficiary's] experience and knowledge in recruiting the right candidates to fill the following positions: Administration Accounts

² The Petitioner points out that this excerpt from [REDACTED]'s letter refutes a contrary statement in the Director's decision. According to the Director the record indicated that the Beneficiary would not have the authority to hire and fire and take other personnel actions in the United States.

Officer and Sales Representatives. Part of [the Beneficiary's] training duties with new staff members will include:

- Company-specific background and historic knowledge of [] and [] [the company's line of products], []'s USA business model.
- Basic understanding of []'s unique products and their technical abilities, applications/uses of product data information.
- Reviewing frequently asked questions and standard responses so enquiries can easily be answered.
- Training on sales techniques, customer base and how accounts are set up and monitored.
- Providing education regarding pricing requirements and structuring pricing for different types of customers according to their designated tier.
- In-store merchandising set-ups, incentive based sales programs, processes on establishing new and existing accounts.
- Specific training on how to use the back end of the [] website so stores can be regularly updated on our store locator feature.

In support of its claim that the Beneficiary will be employed as a function manager for hiring and training staff for [] the Petitioner refers to the previously submitted organizational charts for the company, the first of which projected a staff of five by the end of 2019 including the Beneficiary as "President and Managing Member" (a title which is inconsistent with the job title stated in the petition – Executive Manager of Sales/Marketing) and four subordinate employees, including the two employees in place at the time the petition was filed [] Chief of Operations, and [] part-time Warehouse Storeman) and two new employees to be hired (an administrative accounts officer and a sales representative). The second organizational chart projected three additional hires in 2020 and 2021 to fill the positions of sales manager, an additional sales representative, and an operations and logistics officer, which would raise []'s employee total to eight. The Petitioner has submitted a detailed job description for one of the seven expected positions subordinate to the Beneficiary – the yet to be hired administrative accounts officer – listing the duties to be performed and stating that a high school education and relevant experience were required to qualify for the job. For the other six staff positions (two currently in place and four to be hired, as explained above) the Petitioner has provided no detailed description of the job duties and no minimum qualifications for the jobs.

If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily manage, as opposed to perform, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Even if we accept the Petitioner's claim that hiring and training personnel for the U.S. office is an essential function, the Beneficiary does not meet the third requirement set forth in *Matter of G-*

because the evidence of record shows that the Beneficiary will not primarily manage the function, as opposed to perform the function. The job duties as described in the petition, the letter accompanying the petition, and the letters from COO [] in response to the RFE and on appeal clearly indicate that the Beneficiary will be personally performing the tasks of hiring and training new employees, not managing other employees who perform those tasks. No evidence has been submitted that any other employees at [] will relieve the Beneficiary of performing the operational tasks of hiring and training new personnel, and none of the job titles of current and future employees suggest that this would be the case. Since the Petitioner has not demonstrated that the Beneficiary will be primarily managing, rather than directly performing, the function of hiring and training employees for [] the Petitioner has not established that the Beneficiary meets all the requirements of a function manager as set forth in *Matter of G-*.

Nor has the Petitioner demonstrated that the Beneficiary meets the requirements of managerial capacity more generally since the Beneficiary does not meet the entire second element of the statutory definition at section 101(a)(44)(A)(ii) of the Act. Specifically, in addition to not managing an essential function as discussed above, the record does not show that the Beneficiary “[s]upervises and controls the work of other supervisory, professional, or managerial employees.” The Beneficiary’s job duties, as described in the petition and supporting letters, do not indicate that any of her hiring and training tasks to be performed for [] involve job positions to be filled with supervisory, professional, or managerial employees. Except for the administrative accounts officer (whose job duties and qualification requirements clearly indicate that it is not a supervisory, professional, or managerial position), no job descriptions and educational requirements have been submitted for any of the current and future staff positions at []. With respect to the COO position already filled by [] no description of his job duties or evidence of his educational credentials have been submitted to indicate that the job is supervisory, professional, or managerial in nature. The Beneficiary’s job duties, in addition to hiring and training new employees, include other activities such as product pricing and marketing, participating in trade shows and conferences, and building business relationships. These activities, like the hiring and training tasks, will be conducted largely by the Beneficiary, not by other employees under the Beneficiary’s management. In sum, nothing in the record indicates that any other employees at [] would relieve the Beneficiary from performing daily operational tasks of the business. Thus, the Petitioner has not established that the Beneficiary will be *primarily* engaged in managerial duties, as opposed to daily operational activities. *Family Inc.*, 469 F.3d at 1316 The Petitioner has not established that the Beneficiary will supervise and control the work of other supervisory, professional, or managerial employees at [] as required to meet the definitional element of managerial capacity at section 101(a)(44)(A)(ii) of the Act.

The Petitioner asserts on appeal that the Beneficiary will be employed in an executive capacity, as defined in section 101(a)(44)(B) of the Act, when her function manager duties are complete and [] is fully staffed. The Petitioner states that it intends for the Beneficiary to perform executive duties such as “developing company-wide policy, spearheading the rebranding efforts company-wide, creating and developing technical compliance documents as required by outside agencies, organizations and governmental entities, and serving as the face of [] as its primary executive at trade show, networking and marketing events.” In projecting these duties as future responsibilities for the Beneficiary, the Petitioner acknowledges that the proposed employment

at issue in this petition is not based on a claim that the Beneficiary will be employed immediately in an executive capacity.

The petition may not be approved, however, unless the Petitioner establishes the elements for its approval at the time of filing. The petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification as an executive (or managerial) position. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Since the Petitioner does not claim that the Beneficiary will be employed in an executive capacity until some uncertain time in the future, the Petitioner has not established its eligibility for approval of this petition based on its employment of the Beneficiary in an executive capacity.

III. CONCLUSION

Based on the foregoing analysis we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.