U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30470987

Date: APR. 8, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a wholesaler of wool and cashmere products, seeks to permanently employ the Beneficiary as its president under the employment-based, first-preference (EB-1) immigrant visa category for multinational managers or executives. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This category allows a U.S. business to transfer a qualified foreign employee to the United States to work in a managerial or executive capacity. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner neither demonstrated its intent to employ the Beneficiary in the claimed "executive capacity" nor its parent company's prior foreign employment of her in the same claimed capacity. On appeal, the Petitioner contends that the Director should have considered evidence of circumstances arising after the petition's filing and deferred to the company's prior L-1A nonimmigrant visa petition for the Beneficiary.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has not established its proposed employment of the Beneficiary in an executive capacity. We will therefore dismiss the appeal.

I. LAW

A noncitizen qualifies as a multinational executive if - in the three years before their U.S. entry as a nonimmigrant - they worked outside the country for at least one year in a managerial or executive capacity. Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(B). The noncitizen must also seek to provide managerial or executive services in the United States to the same employer or its subsidiary or affiliate. *Id.*

A petitioner for a multinational manager or executive must state that it would employ a beneficiary in the United States in a managerial or executive capacity and "clearly describe" the offered job's duties. 8 C.F.R. § 204.5(j)(5). Also, a petitioner must demonstrate that it has been doing business for at least one year and that it has the ability to pay the beneficiary the offered job's proffered wage. 8 C.F.R. §§ 204.5(g)(2), (j)(3)(D).

II. ANALYSIS

The record shows that the Petitioner's parent company in Mongolia continuously employed the Beneficiary from 2014 to 2020. From 2014 to 2016, she worked as an accountant. From 2016 to 2021, the parent employed her as general manager.

The parent company established the petitioning U.S corporation in 2020. The following year, U.S. Citizenship and Immigration Services (USCIS) approved the Petitioner's petition to employ the Beneficiary in the United States in L-1A nonimmigrant visa status. *See* section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The Beneficiary's L-1A status allowed her to work for the company in the offered U.S. position of president. But, unlike the requested immigrant status, which potentially leads to U.S. permanent residence, nonimmigrant L-1A status remains valid for only a temporary period.

The Petitioner seeks to continue employing the Beneficiary on a permanent basis in her current purported executive role. The company asserts that, in the three years before her U.S. entry in nonimmigrant status, she worked abroad for the company's parent for at least one year in an executive capacity.

As previously indicated, the Director concluded that the Petitioner demonstrated neither its intent to employ the Beneficiary in the United States in an executive capacity, nor its parent's foreign employment of her during the relevant period in an executive capacity. We first review the Petitioner's claimed intent to employ the Beneficiary in an executive capacity.

A. The Nature of the Offered U.S. Job

The term "executive capacity" means work "primarily" involving:

- Directing the management of an organization or a major component or function of it;
- Establishing the goals and policies of the organization, component, or function;
- Exercising wide latitude in discretionary decision-making; and
- Receiving only general supervision or direction from higher level executives, the organization's board of directors, or its stockholders.

Section 101(a)(44)(B) of the Act.

When assessing an offered job's nature, USCIS focuses on the job's duties. *See* 8 C.F.R. § 204.5(j)(5) (requiring a petitioner to "clearly describe the duties to be performed by the alien"). Under the Act, a beneficiary is not an executive simply because they have an executive title or would spend time directing an organization as its owner or sole manager. *See generally* 6 *USCIS Policy Manual* F.(4)(C)(3), www.uscis.gov/policy-manual. Rather, a petitioner must demonstrate sufficient staffing to perform the organization's daily operations, thereby freeing a beneficiary to "primarily" perform executive duties. *Id.*

When considering a job's executive nature, USCIS should review the totality of the evidence, including: descriptions of the beneficiary's proposed duties and those of their intended subordinates;

the nature of the petitioner's business; employment and remuneration of other employees; and any other factors providing an understanding of a beneficiary's business role. 6 *USCIS Policy Manual* F.(4)(C)(4).

The Petitioner submitted descriptions of the offered job's duties, indicating the Beneficiary's primary performance of executive tasks. But the Director noted that a petitioner must demonstrate eligibility "at the time of filing." *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (affirming a petition's denial where the beneficiary lacked the requisite bachelor's degree at the time of filing). The Director concluded that, at the time of this petition's filing in July 2022, the Petitioner did not establish the Beneficiary's primary performance of executive duties. The Director found that, at that time, the Petitioner employed only one other person besides the Beneficiary.[1] The Director stated that "[t]he petitioning entity's staffing levels appear to be woefully inadequate" to allow the Beneficiary to focus on executive duties without having to primarily perform operational tasks. The Director acknowledged the Petitioner's hiring of two additional employees after the petition's filing. But the Director stated: "The petitioner's projections of how the beneficiary will perform duties in the future after hiring more employees has no basis in establishing that the beneficiary was performing the duties of an executive on the date this petition was filed."

On appeal, the Petitioner contends that the Director misrelied on *Katigbak* and should have considered the additional employees' hirings after the petition's filing. The company states that the hirings demonstrate the executive nature of the Beneficiary's job. The Petitioner states:

> The additional employees being hired by the beneficiary during the course of the pendency of the petition showed that she had been performing those [executive] duties. It also showed that she was increasing the size of the company and divesting herself of duties which were not related to her executive capacity. It did not change her prima facie eligibility for the position.

USCIS generally cannot require a petitioner for a multinational executive or manager to demonstrate its employment of a beneficiary in the offered job and claimed capacity at the time of the petition's filing. A petitioner in this category need only establish that, at the time of filing, it *offered* a beneficiary a permanent U.S. job in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5) ("[T]he prospective employer in the United States must furnish a *job offer* in the form of a statement which indicates that the [noncitizen] is to be employed in the United States in a managerial or executive capacity.") (emphasis added). Thus, at the time of filing a petition for a multinational executive or manager, a beneficiary need neither work for the petitioner in the offered job nor even be in the United States. *See Matter of Rajah*, 25 I&N Dec. 127, 132 (BIA 2009) (noting that a petitioner need not employ a beneficiary before they obtain permanent residence).

Here, however, the Petitioner claims that it would employ the Beneficiary in the same job and purported executive capacity that she has held with the company since obtaining L-1A status. In

[1] Contrary to the Director's finding, copies of quarterly tax returns and payroll records show the Petitioner's employment of only one person at the time of the petition's filing in July 2022. Evidence demonstrates that, because the Beneficiary lacked U.S. employment authorization after her L-1A status expired in June 2022, she did not work for the Petitioner from July 2022 to October 2022. Tax and payroll records show that, when she returned to work with an employment authorization document in October 2022, she served as the Petitioner's sole employee until January 2023.

response to the Director's request for additional evidence (RFE), the Beneficiary wrote: "This petition proposes that [the Beneficiary] continue to serve [the Petitioner], on a permanent basis, in the same executive capacity." Thus, if the Beneficiary did not work in the claimed capacity at the time of the petition's filing, it follows that she may not work for the company in the claimed capacity in the future. As the Director found, the number of the Petitioner's employees at the time of the petition's filing suggests that the company lacks sufficient staffing and organizational hierarchy to employ the Beneficiary in an executive role. *See GB Int'l v. Crandall*, 403 F. Supp. 3d 927, 933 (W.D. Wash. 2019) ("[T]here is nothing in the plain language [of the Act] that keeps USCIS from considering whether an organization has reached the level of sophistication where an individual could devote primary attention to executive duties as opposed to operational ones.") Evidence that she did not work in an executive capacity casts doubt on the claimed nature of the Petitioner's job offer and the company's credibility. *See Doe v. McAleenan*, 929 F.3d 478, 486-87 (7th Cir. 2019); *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies with independent, objective evidence pointing to where the truth lies). Because the Petitioner stated that it already employed the Beneficiary in the offered job and claimed executive capacity, the Director appropriately considered evidence of her employment's nature at the time of the petition's filing.

The Director also properly discounted evidence of the Petitioner's hiring of additional employees after the petition's filing. The company had to demonstrate the executive nature of its job offer "at the time of filing the benefit request." *See* 8 C.F.R. § 103.2(b)(1). The company's hiring of workers after the petition's filing changed the company's staffing level and organizational structure, factors that USCIS considers when assessing an offered job's executive nature. Thus, as the Director found, USCIS could not consider the Petitioner's post-filing hirings where, by regulation, the company had to demonstrate the executive nature of the offered job at the time of filing.

The Petitioner also suggests that the Director should have deferred to USCIS's prior approval of the company's L-1A petition for the Beneficiary. The company asserts: "The prior L-1A approval shows that USCIS found that she was performing executive or managerial duties with the company with a smaller amount of employees."

First, USCIS' approval of the Petitioner's L-1A petition for the Beneficiary does not require the Agency to approve this petition.

> Eligibility as an L-1A nonimmigrant does not automatically establish eligibility under the criteria for an immigrant visa classification for a multinational executive or manager. Each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

6 *USCIS Policy Manual* 7.(F)(4)(D).

Also, the Petitioner incorrectly states that USCIS found that the Beneficiary performed executive or managerial duties for the company. At the time of the L-1A petition's filing, the Petitioner was a "new office," an organization that had been doing business in the United States for less than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Because a new office filed the petition, the L-1A filing for the Beneficiary remained valid for only one year. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). A new office petitioner need not demonstrate that it would immediately employ a beneficiary in an executive or

managerial capacity. Rather, the petitioner must demonstrate that "[t]he intended United States operation, *within one year of the approval of the petition*, will support an executive or managerial position." 8 C.F.R. § 214.2(l)(3)(v)(C) (emphasis added).

Thus, contrary to the Petitioner's argument, the approval of its L-1A petition did not establish the Beneficiary's performance of executive or managerial duties for the company. The approval demonstrated only that the Petitioner convinced USCIS of the company's likely ability to employ her in a managerial or executive role within one year of the petition's approval. Indeed, Agency records show that, when the Petitioner petitioned to extend the Beneficiary's L-1A status beyond the initial one-year period, USCIS denied the petition, finding that the company did not demonstrate its ability to support the Beneficiary in an executive or managerial position at the time of the initial petition's expiration. Thus, the record does not support the Petitioner's contention that USCIS found the Beneficiary's performance of executive or managerial duties for the company.

Finally, the Petitioner argues that, in finding insufficient evidence of the offered job's executive nature, the Director impermissibly focused on the company's size. The Petitioner notes that:

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General 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.

Section 101(a)(44)(C) of the Act.

The Petitioner contends:

> While the decision states that the staffing levels appear inadequate to support an executive position, that position is necessary for the business at this time. . . . The beneficiary has served as the primary person who has been building up the operations of the business.

As the Petitioner argues, much of the Director's decision discusses the company's number of employees at the time of the petition's filing. But the decision also demonstrates the Director's consideration of other factors, including: the Beneficiary's proposed job duties; the Petitioner's organizational hierarchy; and the duties of the Beneficiary's subordinates.

"USCIS may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a [multinational] manager [or executive]." *Hererra v. USCIS*, 571 F.3d 881, 890 (9th Cir. 2009) (citation omitted). Because the Director considered additional factors, she did not impermissibly focus on the Petitioner's small size.

For the foregoing reasons, the Director properly found insufficient evidence that the Petitioner would employ the Beneficiary in the claimed executive capacity. We will therefore affirm the petition's denial.

B. The Nature of the Beneficiary's Employment Abroad

Our decision regarding the Petitioner's intent to employ the Beneficiary in an executive capacity resolves this appeal. We therefore decline to reach and hereby reserve the company's appellate arguments regarding the Beneficiary's employment abroad in the same claimed capacity. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies need not make "purely advisory findings" on issues unnecessary to their ultimate decisions); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant did not otherwise qualify for relief).

III. CONCLUSION

The Petitioner has not demonstrated the requisite ability to support the Beneficiary in the claimed executive capacity. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.