



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

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

MATTER OF S-S- LLC

DATE: MAR. 6, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a sports management, marketing, and communications company, seeks to amend¹ and extend the Beneficiary's temporary employment as its chief executive officer (CEO) under the L-1A nonimmigrant classification for intracompany transferees. *See* 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 Beneficiary would be employed in a managerial or executive capacity under the extended petition. The Petitioner appealed the Director's decision and we dismissed the appeal. We have since denied two subsequent combined motions to reopen and reconsider.

The matter is now before us again on a third combined motion to reopen and reconsider. The Petitioner asserts that we have consistently placed undue emphasis on a single factor in determining that the Beneficiary would not primarily perform managerial or executive duties, and failed to consider the Petitioner's reasonable needs as required by section 101(a)(44)(C) of the Act. The Petitioner cites to case law and asserts that the Beneficiary passes a "four factor test of 'primary' engagement in managerial and or executive duties" set forth in *Nat'l Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989).

Upon review, we will deny the combined motion.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

¹ The Petitioner previously filed three L-1B classification petitions on behalf of the Beneficiary which authorized him to work in a specialized knowledge capacity as its "soccer promotions coordinator" for a total period of approximately 4 years and 10 months, from December 2010 until October 2015.

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 we based our decision 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. A petitioner must support its motion to reconsider with a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The primary issue in this matter is whether the Petitioner has submitted new facts, evidence, or arguments to establish that the Beneficiary would be employed in a managerial or executive capacity, as defined at section 101(a)(44) of the Act. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing (in this case, October 29, 2015) and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

For the reasons discussed below, we will deny the motion to reopen and the motion to reconsider. While the current motion includes newly submitted legal arguments and citations to case law in support of the Petitioner's claim that we incorrectly applied the law and USCIS policy to the facts presented, the Petitioner has not shown proper cause for reopening or reconsideration.

A. Previous AAO Decisions

In dismissing the Petitioner's appeal, we determined that the Petitioner did not sufficiently define or support the Beneficiary's claimed managerial or executive duties in the record, and that the evidence did not establish that his duties as CEO would be significantly different from those he has been performing in the non-managerial position of "soccer promotions coordinator" since 2010. We also found that the Petitioner did not demonstrate that the Beneficiary would delegate most of the company's day-to-day operational tasks to employees and contractors, as the company had, at most, one other employee and it provided insufficient evidence to establish that it regularly engaged independent contractors.²

In addition, we determined that the evidence and arguments submitted in support of the Petitioner's two subsequent combined motions to reopen and reconsider focused on establishing the Beneficiary's senior role within the company, his level of autonomy, and his critical role in the company's ongoing operations. We did not question that the Beneficiary is the senior employee in the company or that he exercises a level of autonomy consistent with a managerial or executive

² In reaching this determination, we noted that the Petitioner had stated on the Form I-129 that the Beneficiary's duties will be to "promote exchange of soccer activities between the United States and Brazil; introduce United States soccer players to Brazilian methods by meeting with Brazilian players in the United States and arranging soccer tours to Brazil." We found that the Petitioner had not established that it had staff to arrange for coaches, referees, equipment, and facilities for its soccer camps and team visits.

employee. However, we determined in each case that the Petitioner's motions did not adequately address the deficiencies in the Beneficiary's job description or the lack of sufficient evidence showing how he delegates most of the non-managerial and non-executive duties required for the day-to-day operation of the business so that he can focus *primarily* on managerial or executive tasks.

B. Motion to Reopen

Although the Petitioner indicated that it was filing a combined motion, the instant motion to reopen does not contain new facts supported by documentary evidence, as required by 8 C.F.R. § 103.5(a)(2). The Petitioner submits six exhibits labeled "A" through "F." These exhibits include: copies of prior USCIS denial letters; an October 2015 letter from the Petitioner and a "responsibility chart" that were both previously submitted and addressed in prior decisions; and copies of three U.S. district and circuit court decisions cited in the Petitioner's brief.

We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." We will address the Petitioner's citations to case law below in our discussion of the motion to reconsider.

In addition, although the Petitioner submits a brief in support of the motion, it has not introduced new facts in its brief. As the Petitioner has not submitted new facts supported by documentary evidence, it has not shown proper cause to reopen the proceeding.

C. Motion to Reconsider

In support of its motion to reconsider, the Petitioner asserts that we incorrectly applied the regulation at 8 C.F.R. § 214.2(l)(3)(ii), which requires that a petitioning employer provide only "a detailed description of the services to be performed" in a managerial or executive capacity. Specifically, the Petitioner maintains that we evaluated four factors in determining whether the Beneficiary would be employed in a managerial or executive capacity, including the Beneficiary's level of autonomy, whether he holds a senior position, the Petitioner's description of the Beneficiary's duties, and the staffing of the petitioning company, but "did not provide the source" for those requirements or specifically clarify those requirements. The Petitioner also maintains that our prior decisions demonstrate "a baseless fixation on the size of the Beneficiary's business" and a "singular amount of focus placed on the percentage of time the Beneficiary spends on each type of job duty."

A review of our prior decisions demonstrates that we have appropriately considered the totality of the evidence in determining whether the Beneficiary would be employed in a managerial or executive capacity and have not placed undue emphasis on any one factor. While it is true that the evidentiary requirements set forth in the regulations are minimal and entail only the submission a detailed description of the Beneficiary's job duties, we cannot review a job description, even a sufficiently detailed one, without proper context or relevant supporting evidence, as the Petitioner seems to assert we should have done in this case.

Rather, beyond the required description of the job duties, USCIS reviews the totality of the evidence when examining the claimed managerial or executive capacity of a beneficiary, including 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 evidence contributing to understanding a beneficiary's actual duties and role in a business. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

The Petitioner also argues that we have consistently misinterpreted the meaning of the word "primarily" in analyzing whether the Beneficiary primarily performs managerial or executive duties. The Petitioner correctly notes that the statute does not define the word "primarily" as it used in the definitions of managerial and executive capacity. The Petitioner maintains that the standard legal dictionary definition of "primarily" should apply and asserts that "one's primary duties, as opposed to collateral duties, would be those that are of greatest importance – of first, principal, chief, or leading importance – of the position within the organization." In other words, it appears that the Petitioner is claiming that those duties that are most important to the organization are indicative of the Beneficiary's "primary" duties, rather than those duties which require the greatest portion of his time. The Petitioner favors a qualitative approach to determining which duties constitute the Beneficiary's "primary" duties as opposed to a quantitative approach.

The Petitioner then goes on to cite to *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999), and *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991) in support of its claim. However, both of these cases support a quantitative approach to determining whether the Petitioner has met its burden to show that a beneficiary performs "primarily" managerial or executive duties. Specifically, these cases support our finding that it is a petitioner's burden to establish how much time a given beneficiary spends on managerial or executive duties, and how much he or she spends on non-managerial and non-executive duties. In fact, both cases support a conclusion that petitioners should express the amount of time a beneficiary devotes to managerial versus non-managerial duties as a numerical percentage or proportion. Such percentages are particularly critical where, as here, the evidence of record indicates that the beneficiary performs a combination of both qualifying managerial or executive tasks and various non-managerial or non-executive tasks.

We do not doubt that the Petitioner considers the Beneficiary's higher level duties as his "primary" or most important duties. We have acknowledged its claim that he is the "face" of the organization and that his reputation and connections in the sport of soccer have likely contributed to the company's success. However, these facts do not overcome our previous finding that the record as a whole does not show that the Beneficiary would be spending the primary part of his time performing duties that fall within the statutory definitions of managerial or executive capacity.

The record shows that the Beneficiary does in fact perform a number of "day-to-day responsibilities" that reasonably prevented us from concluding that his actual duties would be primarily managerial or executive in nature. For example, the Beneficiary himself was responsible for marketing the company's services and would more likely than not continue to perform many of the same non-managerial duties he performed in his previous L-1B position as soccer promotions coordinator, as

the Petitioner has not claimed that it has hired an employee or retained a contractor to take over his former responsibilities. The Petitioner once again does not directly address this finding on motion. Rather, the Petitioner acknowledges that the Beneficiary performs “job duties of all kinds” and emphasizes that his most important duties are managerial or executive.

The Petitioner goes on to emphasize that the company’s small size and “atypical organizational structure” actually support its claim that the Beneficiary must be primarily a manager or executive. Specifically, the Petitioner states that “given the already documented business success and growth of [the company], any reviewer of this case must acknowledge the unavoidable conclusion that *someone* is engaging in primarily in the executive and managerial functions of the business,” and that “there is no evidence anywhere in the record pointing to anyone other than the Beneficiary fulfilling these functions.”

The Petitioner’s argument presumes that every successful business must employ at least one person who would qualify as a manager or executive under the statutory definitions of these terms. However, the fact that the Beneficiary will manage or direct the business as the senior member of its two-person staff does not necessarily establish his eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. We do not dispute that all companies, regardless of their size, require leaders or individuals who plan, oversee, and coordinate activities; however, the petitioner must establish with specificity that the beneficiary’s duties within the context of its business require him to spend his time primarily on these duties and not on routine operational or administrative tasks. Performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks do not require a significant portion of the beneficiary’s time. However, whether a beneficiary is a manager turns in part on whether the petitioner has sustained its burden of proving that their duties are “primarily” managerial. *See Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

Finally, the Petitioner argues that the Beneficiary passes a “four factor test of ‘primary’ engagement in managerial and or executive duties” set forth in *Nat’l Hand Tool*, 889 F.2d 1472. Specifically, the Petitioner maintains that *National Hand Tool* sets forth a four-factor test which considers: (1) what types of tasks a beneficiary performs; (2) how much time a beneficiary spends on each type of task; (3) whether subordinate employees assist the beneficiary in completing tasks; and (4) whether a beneficiary directs others in completing tasks. The Petitioner claims that the application of this “test” to the facts of this case must result in a conclusion that the Beneficiary performs primarily managerial and executive tasks.

We disagree. First, there are no references to a four-part “test” in *National Hand Tool*. However, the decision does reflect that the court considered the beneficiary’s job duties to determine the nature of his tasks, the relative amount of time spent on each task, the presence of other employees who might assist with those duties, and the extent of the beneficiary’s supervisory authority. We did in fact consider these and other factors, such as the nature of the Petitioner’s business, in reaching our conclusion that the Petitioner had not met its burden to show how the Beneficiary would perform primarily managerial or executive tasks. The Petitioner’s claim that the Beneficiary delegates the

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majority of the company's non-managerial and non-executive functions to the company's sole other employee, contractors, and staff of the foreign entity remains unsupported in the record.

The Petitioner has not established that our prior decision was incorrect at the time of that decision. Therefore, the Petitioner has not shown proper cause for reconsideration.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause to reopen the proceeding or proper cause for reconsideration.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-S- LLC*, ID# 1092522 (AAO Mar. 6, 2018)