



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

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

In Re: 16402403

Date: JULY 15, 2022

Appeal of Texas Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, an automobile dealer and provider of vehicle repair services, seeks to continue employing the Beneficiary temporarily as its “Director” under the L-1A nonimmigrant classification for intracompany transferees.<sup>1</sup> 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.

Although the petition was approved, upon further review and subsequent to a post adjudicative site visit, the Director of the Texas Service Center revoked the approval of the petition concluding that the Petitioner did not establish, as required, that the Beneficiary’s proposed employment would be in a managerial or executive capacity. The Director also entered a separate finding of “fraud or willful misrepresentation of a material fact.” The matter is now before us on appeal.

In these proceedings, it is the Petitioner’s burden to establish eligibility for the requested benefit. See Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we conclude that the Director did not provide an adequate analysis to support a finding of fraud or misrepresentation. Therefore, we will remand the matter for further consideration and entry of a new decision.

## 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.*

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<sup>1</sup> The Petitioner previously filed a “new office” petition on the Beneficiary’s behalf which was approved for the period February 11, 2016, until December 15, 2016. A “new office” is an organization that has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a “new office” operation one year within the date of approval of the petition to support an executive or managerial position.

A petitioner seeking to extend an L-1A petition that involved a new office must submit a statement of the beneficiary's duties during the previous year and under the extended petition; a statement describing the staffing of the new operation and evidence of the numbers and types of positions held; evidence of its financial status; evidence that it has been doing business for the previous year; and evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

In addition, under U.S. Citizenship and Immigration Services regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, a director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

## II. WILLFUL MISREPRESENTATION OF MATERIAL FACTS

To make a finding of willful misrepresentation of a material fact in visa petition proceedings, an immigration officer must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975).

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Here, the revocation is based, in part, on a finding of "fraud or willful misrepresentation." However, despite noting that "the [B]eneficiary and the [P]etitioner have issued conflicting testimony, under penalty of perjury . . . which shows a misrepresentation to gain an immigrant benefit," the notice of intent to revoke (NOIR) did not clearly inform the Petitioner that the Director may make a finding of fraud or willful misrepresentation and thus it did not fully provide the Petitioner with an opportunity to address the derogatory information. As such, we remand to allow the Director to reissue the NOIR and allow the Petitioner an opportunity to respond.

Further, in making an ambiguous finding of "fraud or willful misrepresentation," the Director neglected to separate the elements of fraud and willful misrepresentation or to adequately discuss those elements within the context of the relevant factors that contributed to the finding. Although the Director noted that the record contained "conflicting testimony" and "inflated" descriptions of the Beneficiary's proposed position and the Petitioner's business, the Director's decision did not set forth how these deficiencies rise to the level of fraud or willful misrepresentation. The Director also did

not clearly identify the subject of the finding, whether the finding was being made against the Petitioner, the Beneficiary, or against both parties in order to allow the Petitioner to respond to the alleged fraud or misrepresentation.

In light of deficiencies described above, we are currently unable to affirm the Director's finding of "fraud or willful misrepresentation."

### III. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

Notwithstanding the errors noted above, we additionally note continued deficiencies related to other identified issues in that the Petitioner did not establish that the Beneficiary's U.S. position would be in an executive capacity.<sup>2</sup> The remainder of this decision will address the evidentiary deficiencies of this petition.

"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.

Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. Section 101(a)(44)(A) of the Act. The Petitioner must also prove that the Beneficiary will be *primarily* engaged in 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).

The description of the job duties must clearly describe the Beneficiary's duties and indicate whether such duties are in a managerial or an executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, we examine the employing 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 a business.

Accordingly, we will discuss evidence regarding the Beneficiary's job duties along with evidence concerning the nature of the Petitioner's business and its staffing levels.

#### A. Factual Background

At the time of filing, the Petitioner claimed to have a 12-person staff comprised of six in-house employees and six contractors. In a supporting cover letter, the Petitioner stated that it was providing vehicle repair and maintenance services and selling new and used automobiles and auto parts at a 10,000 square foot commercial facility. The Petitioner anticipated that a website with e-commerce

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<sup>2</sup> The Petitioner claims that the Beneficiary would be employed in the United States in an executive capacity and does not claim that the Beneficiary would be employed in a managerial capacity.

features, once fully developed, would account for “a significant and growing proportion of sales and services . . . as well as wholesale distribution relationships.” The Petitioner claimed that the Beneficiary would perform executive-level duties and assume a leadership role in expanding the U.S. operation based on his “experience, expertise and commercial relationship with providers.” The Petitioner stated that the Beneficiary sets corporate policies and oversees managerial and professional employees who relieve him from having to perform “the services of the company.” In support of these claims, the Petitioner provided a list of the Beneficiary’s responsibilities as well as a job duty breakdown listing his duties and their respective time allocations.

The record also contains job descriptions for five in-house employees and an organizational chart depicting the placements of those employees as well as the Beneficiary, two vacant positions, and outsourced contractors. The organizational chart depicts a five-tier organization with the Beneficiary at the top tier in the position of “executive director,” overseeing an accountant and “legal adviser” at the second tier and an administrative coordinator at the third tier. The fourth tier is comprised of a secretary, which was indicated as “vacant,” a sales manager, market services employee, a mechanic department supervisor, and a warehouse coordinator, all depicted as subordinate to the administrative coordinator. The bottom tier includes a vacant customer service/sales representative position as subordinate to the sales manager and four businesses and one individual contracted as mechanics who are depicted as subordinate to the mechanic department supervisor.

Further review of the record and findings from a 2019 site visit and compliance interview prompted the Director to issue the previously referenced NOIR to notify the Petitioner of factors that may adversely affect its eligibility. In sum, the Director found that the Petitioner inflated the Beneficiary’s proposed position and the complexity of its business operation and did not establish that it would employ the Beneficiary in an executive capacity. In addition, the Director observed that the Petitioner’s description of its operations was inconsistent with the activities observed during the site visit, noting that the Petitioner’s current operation is housed at a location that includes a 3000 square-foot car lot and 1000 square-foot commercial building, which is considerably smaller than the 10,000 square-foot premises the Petitioner claimed to occupy at the time of filing.

The Petitioner responded to the NOIR, claiming that the Beneficiary exercises discretion in overseeing “all aspects of [the] organization,” works “closely with government entities and the public,” is “the face of the company,” and performs “executive functions” with respect to business goals and objectives, staff recruitment, and the company’s legal compliance, finances, and “culture.” and “

The Petitioner stated that its change in location was part of a “business strategic decision” that did not affect the company’s operation or staffing, which included six full-time employees and used six “subcontractors/services” to support the Beneficiary’s position at the time of filing; it provided quarterly tax returns, wage reports, and copies of checks, explaining that quarterly tax returns for 2017 reflected additional hires “to fill the vacant positions.”

In revoking approval of the petition, the Director stated that the Petitioner did not adequately describe the Beneficiary’s proposed position and noted that during the 2019 site visit the Beneficiary was observed carrying out non-executive job duties and having no managers or professional subordinates. Although the Director acknowledged the Petitioner’s submission of an organizational chart illustrating different management levels, he determined that the Petitioner did not demonstrate that it was

adequately staffed and that it comprised a complex organizational hierarchy that would support the Beneficiary in an executive role and allow him to focus on the broad goals and policies of the organization. The Director also questioned the likelihood that the Beneficiary would be required to report to the foreign organization, given the Beneficiary's ownership interest in that organization.

## B. Analysis

As a preliminary matter, we note that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Thus, any plans the Petitioner may have had to hire additional employees or to conduct business activities that were not part of its operation when the petition was filed are not relevant to the issue of whether the Petitioner was eligible *at the time of filing*. That said, the Petitioner points out that the 2019 site visit took place more than two years after the petition was filed and states that “the subordinate staff were bigger [*sic*] enough to relieve the beneficiary from having to spend his time performing primarily non-qualifying tasks.” This statement indicates that the Petitioner seeks to disregard changes it may have experienced, staffing or otherwise, since this petition was filed. Thus, while the Petitioner must first establish eligibility at the time of filing, it must continue to be eligible throughout the petition's adjudication, including at the time of the site visit.

Accordingly, any changes that were observed at the time of the USCIS site visit regarding the Petitioner's staffing, changed business premises, or scope of business operations are relevant, even if, *arguendo*, the Petitioner had established eligibility at the time of filing. Here, the USCIS officer who conducted the site visit observed that the Petitioner's staff, business activity, and business premises had all changed from what was claimed at the time of filing. The officer observed no import or export activity and noted that the operation appears to have consisted of a small used car lot that had been relocated to a smaller business premises with only one room set up as an office. The officer further observed that the Beneficiary himself was running the used car lot with the assistance of seven full- and part-time employees who were not deemed to be managers or professionals. In light of the new information, the Director determined that neither the scope nor the staffing of the Petitioner's operation was sufficient to support the Beneficiary in an executive position that would primarily involve matters concerning the organization's goals and policies.

Although the Petitioner explains that moving to a new location was precipitated by its inability to renew the original business lease, it does not address the significant reduction in space at the new location or establish that this change had no adverse impact on the scope of its operation or the Beneficiary's position and duties within the context of the diminished operation. The Petitioner also does not clarify whether or how the smaller size of the new business premises impacted its organization's staffing in terms of the number of staff needed and the capacity of the new space to accommodate that staff.

Furthermore, the Petitioner has not adequately addressed the Director's finding that the provided job description is generic and lacks meaningful content. On appeal, the Petitioner merely states that the Beneficiary will perform “high level or [*sic*] responsibilities” and will not allocate his time primarily to operational functions; however, it does not elaborate on the ambiguous job duties that comprised a significant portion of the Beneficiary's job description.

The Petitioner was also overly vague in stating that the Beneficiary would exercise a high degree of discretionary authority by developing goals and objectives, ensuring legal compliance, creating “a culture of transparency and communication,” addressing business challenges, and maintaining authority over the company’s budget and finances. While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, his actual duties cannot be readily identified and may not be primarily executive in nature. To make this determination, we rely on specific information about a beneficiary’s actual daily tasks as an important indication of whether their duties are primarily 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). Where, as here, the job description lacks adequate detail, we cannot ascertain what actual tasks the Beneficiary performs or conclude that he will spend his time primarily performing executive job duties. See section 101(a)(44)(B) of the Act.

Lastly, The Petitioner has not adequately explained how its organization is managed or provided a job duty breakdown establishing that the Beneficiary focuses on the organization’s broad goals and policies, rather than the day-to-day functions involved in operating a used car lot and providing auto repair services. Further, although the Director determined that the Petitioner did not substantiate the inclusion of independent contractors as part of its organizational structure, the Petitioner did not address this issue on appeal. As such, it is unclear why the organizational chart depicts a “Legal Advisor” and “Account” in the tier directly below the Beneficiary or why the chart includes a fourth tier comprised of a vacant “customer service/sales rep.” position and businesses that provided various auto repair and glass services. We note that artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive position. If USCIS finds reason to doubt an assertion stated in the petition, USCIS may reject that assertion. See, e.g., Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In light of the deficiencies in the Director’s decision specifically related to the fraud or willful misrepresentation claims, we hereby withdraw that decision and remand the matter for further consideration of the evidence and a new determination of the Petitioner’s eligibility. If the Director determines that a finding of either fraud or willful misrepresentation is warranted, the Director shall issue a NOIR that (1) clearly identifies the finding and the party or parties against whom that finding is made, and (2) includes a detailed analysis highlighting the factors that may support that finding. The NOIR must also include all other grounds for the intended revocation so that the Petitioner has an opportunity to address any intended adverse findings.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.