



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

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

In Re: 10875565

Date: MAY 10, 2022

Appeal of California Service Center Decision

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

The Petitioner seeks to continue the Beneficiary's temporary employment as its CEO under the L-1A nonimmigrant classification for intracompany transferees.¹ See section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 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 Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. 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 will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary in a managerial or executive capacity, or in a position requiring specialized knowledge 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)(1). The prospective U.S. employer must also be a qualifying organization that seeks to employ a beneficiary in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(i).

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

¹ The Petitioner previously filed a "new office" petition on the Beneficiary's behalf which was approved for the period November 16, 2018, until November 15, 2019. 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.

evidence that it maintains a qualifying relationship with the beneficiary's foreign employer. 8 C.F.R. § 214.2(l)(14)(ii).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The sole issue to be addressed is whether the Petitioner provided sufficient evidence establishing that the Beneficiary's position with the U.S. entity would be in a managerial capacity. The Petitioner does not assert that the Beneficiary would be employed in the United States in an executive capacity.

To be eligible for L-1A nonimmigrant visa classification as a manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying managerial position. Here, upon review of the evidence and the materials submitted on appeal, the Petitioner has established by a preponderance of the evidence that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) of the Act.

Although the Petitioner has established that the offered position meets all elements set forth in the statutory definition, the Petitioner must also prove that the Beneficiary will be *primarily* engaged in managerial 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 given beneficiary's duties will be primarily managerial, we consider the Petitioner's description of the job duties, the company's organizational structure, the duties of a 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 a

beneficiary's actual duties and role in a business. Here, the Petitioner has not established that the Beneficiary will be *primarily* engaged in managerial duties under the extended petition.

A. Staffing and Organization Structure

First, we will address the U.S. company's staffing at the time of filing. If staffing levels are used as a factor in determining whether an individual is acting in an executive capacity, the reasonable needs of the organization must be considered in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act. As noted, the U.S. company was established as a new office and its prior petition was approved for one year, with a validity period that ended on November 15, 2019. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "new office" operation one year from the date of approval of the petition to support an executive or managerial position.

The extension petition, which was filed on November 12, 2019, indicates that the Petitioner imports and wholesales plastics products. At the time of filing, the Petitioner claimed six employees.² It provided its organizational chart listing nine positions, of which three were indicated as vacant. The organizational chart shows the Beneficiary at the top of the hierarchy overseeing a wholesale manager, an e-commerce manager, and an administrative manager. The wholesale manager is depicted as overseeing two wholesale specialists, one of which is vacant; the e-commerce manager is depicted as overseeing two e-commerce specialists, one of which is vacant; and the administrative manager is shown as overseeing the vacant office assistant position. A business plan submitted with the petition indicates that the Petitioner also plans to add a logistics manager and logistics specialist to its organizational hierarchy.

In the RFE, the Director instructed the Petitioner to provide additional information about the Petitioner's organizational structure and staffing. She noted staffing inconsistencies between the Petitioner's organizational chart and its employment tax return. In response to the RFE, the Petitioner reiterated the original claim that the Beneficiary would be employed in a managerial capacity, and that the Beneficiary would oversee three subordinates including a wholesale manager, an e-commerce manager, and an administrative manager. It submitted its quarterly federal tax returns, payroll reports, and IRS Forms W-2, Wage and Tax Statements, for 2019 and indicated that while its payroll fluctuated in 2019, it had six employees on its payroll at the end of the third quarter.

In her denial decision, the Director highlighted the fluctuations in the Petitioner's payroll since the initial filing, and questioned whether the Petitioner had six employees at the time of filing the extension petition. On appeal, the Petitioner has sufficiently explained the changes in its payroll in 2019. Although it only had four employees at the start of July, it hired two employees in September 2019, bringing its total to six. The submitted tax and payroll documentation supports this explanation. The Petitioner has overcome the discrepancies in the record regard the number of employees it had as of the date of filing. However, additional deficiencies in the record remain.

In the denial decision, the Director noted that the Petitioner's initial business plan submitted with its new office petition on behalf of the Beneficiary in 2018 indicated that the Beneficiary would supervise

² The Petitioner provided its quarterly wage reports for the first three quarters of 2019. The quarterly wage report for the third quarter of 2019 lists six employees, corroborating the Petitioner's claims about its staffing as of the date of filing.

nine employees. On appeal, the Petitioner rejected the Director's assertion that it initially planned to hire nine employees to be overseen by the Beneficiary. Instead, it quoted its response to an RFE in that case stating that it expected to have a "at least" six employees, including the Beneficiary. The Petitioner submitted a copy of its RFE response which supports its assertion. However, the staff identified in the initial petition differs significantly from the staff identified in the extension petition.

Specifically, the initial staff detailed in the initial petition included the Beneficiary as CEO; one sales manager; one logistics manager; one administrative manager; one sales representative; and one bookkeeper. It also stated that it expected to hire one logistics representative and one sales representative within the first year of its operations. As noted above, the extension petition lists the following staff: the Beneficiary as CEO; a wholesale manager; an e-commerce manager; an administrative manager; two wholesale specialists (one of which is vacant); two e-commerce specialists (one of which is vacant); and an office assistant (which is vacant). A business plan submitted with the petition indicates that the Petitioner also plans to add a logistics manager and logistics specialist to its organizational hierarchy. In her denial decision, the Director also noted discrepancies in the job descriptions of the employees in the record, as well as discrepancies regarding who they report to and who they supervise. She concluded that the Petitioner had not established that it had an organizational structure sufficient to support a managerial or executive position.

On appeal, the Petitioner asserts that the estimation of personnel in the new office petition was always subject to adjustment to meet the demands that arose in business reality. It states that due to the "unexpected trade war," it had to change its hiring plan, but that its current hiring plan still falls within the one initially submitted with the new office petition. The Petitioner cites *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570, 1574 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act primarily in a managerial or executive capacity. However, the Petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff.³ In *Mars Jewelers, Inc.*, the court emphasized that the former Immigration and Naturalization Service should not place undue emphasis on the size of a petitioner's business operations when reviewing managerial or executive capacity. We have long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with the statute, the Petitioner is required to establish that the Beneficiary's position consists of primarily managerial or executive duties and that it will have sufficient personnel to relieve the Beneficiary from performing operational and/or administrative tasks. Our holding is based on the conclusion that the Beneficiary is not primarily performing managerial duties and does not have sufficient personnel to relieve the Beneficiary from performing operational and/or administrative tasks. Our holding does not rest on the size of the Petitioner.

The Petitioner also asserts on appeal that the administrative manager will be a supervisory employee in the next two years, and that the fact that the Petitioner is still in its initial stage of development should be considered. However, the regulation at 8 C.F.R. § 214.2(I)(3)(v)(C) only allows the intended U.S. operation one year within the date of approval of the petition to support an executive or

³ We are not bound to follow the published decision of a U.S. district court in matters arising within the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

managerial position. There is no provision in U.S. Citizenship and Immigration Services (USCIS) regulations allowing for an extension of this one-year period. If the business does not have the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks, the Petitioner is ineligible for an extension.

The record does not demonstrate that the Petitioner has sufficient staffing to relieve the Beneficiary from performing operational and administrative tasks. While the Petitioner has demonstrated that it employs a few individuals to carry out some of the operational functions of the company, it has not established how they relieve the Beneficiary from performing the day-to-day activities of the U.S. company or otherwise support a position in which her actual duties would be primarily managerial in nature. Specifically, the Petitioner's organizational chart identifies three unfilled positions, including a wholesale specialist, an e-commerce specialist, and an office assistant. The record is not clear whether other employees were performing the duties of these positions at the time of filing, including the Beneficiary. Given that wholesaling and e-commerce are essential aspects of the Petitioner's business, the Petitioner would necessarily require support in these areas. The Petitioner also indicated an intention to hire a logistics manager and logistics specialist to its organizational hierarchy, but it is unclear whether other employees were performing the duties of these positions at the time of filing, including the Beneficiary. The Petitioner states that it had originally planned to rent its own warehouse and thus the employees would have duties related to inventory management but, "given the unexpected trade war," the Petitioner postponed its plan to rent a warehouse and is outsourcing inventory to a third-party logistics service provider. The Petitioner also asserts that the discrepancies in the job duty descriptions are due to the "stage of development" of the Petitioner's business. It again states that the personnel changes were made due to "business reality." The Petitioner, however, has provided no evidence tying the "trade war" to the change in its business activities. The burden of proof is on the Petitioner in the current matter. Section 291 of the Act, 8 U.S.C. § 1361. Thus, the record does not credibly demonstrate that the Petitioner has the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Although the Petitioner focuses on the Beneficiary's top placement with the U.S. organization and her authority over management staff, it does not clarify how the vacancies in several positions will affect the Petitioner's operation and its ability to support the Beneficiary in a managerial capacity. 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).

As noted above, the Director also noted discrepancies in the job descriptions of the employees in the record, as well as discrepancies regarding who they report to and who they supervise. The Petitioner must resolve the inconsistencies described above with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not done so here. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In sum, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) only allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. If a business does not have the necessary staffing after one year to sufficiently relieve the beneficiary from performing operational and administrative tasks, the petitioner is ineligible for an extension. Here,

although the organizational chart suggests that a subordinate staff is available to perform some of the non-qualifying operational duties, the Petitioner has not explained how the yet-to-be-hired staff's duties have been delegated to existing employees.

B. Job Duties

In a supporting statement submitted with the petition, the Petitioner offered a job duty breakdown indicating that the Beneficiary has been, and will continue to:

- Manage the entire company's business operations (40% of time).
 - Establish sales goals and marketing objectives.
 - Direct the financial budgets of the company's operations.
 - Establish the company's business operations policies, procedures, and guidelines for the business operations, including price policies, discounts, client maintenance, etc.
 - Direct the localization and maintenance of the online platform and web-based sales operations.
- Supervise the managers and professionals of the company (50% of time).
 - Direct wholesale manager to develop promotion and marketing strategy.
 - Oversee e-commerce department.
 - Preside at meetings with subordinate managers to discuss business performance.
 - Appraise the work performance of subordinates.
 - Make personnel decisions including hiring, promotions, and discipline.
 - Plan and supervise hiring and employee training.
 - Make decisions on employee compensation and bonus.
- Other discretionary decision-making (10% of time).
 - Represent the company in trade shows and exhibitions to develop new marketing channels.
 - Report the U.S. company's development and business performance to the Chinese parent company.

The Director issued a request for evidence (RFE) instructing the Petitioner to clearly identify (a) the Beneficiary's duties the prior year, and (b) the duties that the Beneficiary will perform under the extended petition. In response to the RFE, the Petitioner offered a revised job duty breakdown indicating that the Beneficiary will:

- Direct the study of the U.S. market to identify potential target markets and business opportunities; devise the company's development strategy and business plan (10%).
- Establish the company's internal management policies, including employment policies, salary standards, employee rewards, and commission policies (10%).
- Make decisions on hiring, firing, promotion, vacation, and other personnel decisions on subordinate managerial employees (10%).
- Set hiring standards and procedures for hiring other subordinate employees and direct training plans of the new employees; personally interview job candidates and sign offer letters (10%).
- Establish business procedures including preparation of periodic financial reports to monitor the company's business performance (10%).

- Oversee and appraise the performance of the subordinate managers by meeting with them regularly, and reviewing their work reports and business performance (20%).
- Direct the plan and make final decision on the company's financial budget, marketing, promotion events, pricing policies and other important business decisions (20%)
- Make other important business decisions, including the plan of renting a warehouse based on business needs, the geographical factors, logistics expenses, and other relevant business considerations (10%).⁴

In response to the RFE, the Petitioner also provided sample company documents related to the Beneficiary's duties in the company, including work instructions made by the Beneficiary to her subordinates; work reports delivered to the Beneficiary; an employee handbook signed by the Beneficiary; and an employment offer extended by the Beneficiary. After reviewing the evidence, the Director denied the petition, finding that the record did not adequately establish what the Beneficiary would be doing on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). She also noted repetitious and overlapping duties in the Beneficiary's job description that prevented a clear understanding of whether she would be performing primarily managerial duties.

On appeal, the Petitioner asserts that the Director erroneously analyzed the Beneficiary's job duties by overstating the repetition that was present in the job duty description. While the Director's decision includes some erroneous references to the Beneficiary's job duties, the error does not ultimately affect the outcome of the appeal because the Petitioner has not provided a clear understanding of whether the Beneficiary would be performing primarily managerial duties. For example, the Petitioner acknowledges on appeal that the Beneficiary's job description includes repetitive duties related to human resources and personnel actions. These include making decisions on hiring, firing, promotion, vacation, and other personnel decisions on subordinate managerial employees; setting hiring standards and procedures for hiring other subordinate employees and direct training plans of the new employees; personally interviewing job candidates and signing offer letters; overseeing and appraising the performance of the subordinate managers; and establishing the company's employment policies, salary standards, and employee rewards. The Director noted in her decision that the Petitioner did not provide sufficient details about these duties or clarify at what frequency they are performed, and it has not done so on appeal.

⁴ The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See* 8 C.F.R. § 103.2(b)(1). If significant changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the focus on our analysis will be based on the job description submitted with the initial petition.

Further, on appeal, the Petitioner asserts that the Beneficiary's duties related to establishing policies and procedures are not repetitive because they relate to different areas of her duties. The Beneficiary's duties related to establishing policies and procedures include devising the company's development strategy and business plan; establishing the company's internal management policies; setting hiring standards and procedures; establishing business procedures; and directing the plan on the company's financial budget, marketing, promotion events, and pricing policies. The Director noted in her decision that the Petitioner did not provide sufficient details about these duties or clarify at what frequency they are performed, and it has not done so on appeal. The Petitioner's unsupported statements are insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The fact that the Beneficiary will manage or direct the business as its CEO does not necessarily establish eligibility for classification as an intracompany transferee in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. 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, the record does not establish that her actual duties will be primarily managerial in nature. The Petitioner has not established that the Beneficiary would be employed in the United States in a managerial capacity under the extended petition as defined at section 101(a)(44)(A) of the Act.

We note that while the appeal was pending, USCIS updated the *USCIS Policy Manual's* guidance regarding deference to prior approvals. 2 *USCIS Policy Manual* A.4(B)(1), <https://www.uscis.gov/policymanual>; *see also* USCIS Policy Alert, PA-2021-05, *Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity* (Apr. 27, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf>. However, we do not defer to prior approvals where there has been a material change in circumstances or eligibility requirements. 2 *USCIS Policy Manual*, *supra*, at A.4(B)(1). This includes situations in which the regulations require criteria to be met after approval, such as L-1A extension petitions for new offices detailed at 8 C.F.R. § 214.2(l)(3)(v)(C) (a new office has one year from the date of the initial approval to support an executive or managerial position). *See* 8 C.F.R. § 214.2(l)(14)(ii) (a petitioner seeking to extend an L-1 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).

Here, while we acknowledge the Director's prior approval of the Petitioner's new office petition, we will not defer to the prior approval because, as noted above, the record does not credibly demonstrate that the Petitioner has the necessary staffing after one year to sufficiently relieve the Beneficiary from performing operational and administrative tasks. We will therefore dismiss the appeal.

ORDER: The appeal is dismissed.