



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

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

In Re: 21920271

Date: SEP. 2, 2022

Appeal of California Service Center Decision

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

The Petitioner sells touchscreen panels and displays. During the company's first year of operation in the United States, it employed the Beneficiary under the L-1A nonimmigrant visa status in an executive capacity as its chief executive officer (CEO). *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Petitioner sought to continue temporarily employing her in the same visa status, capacity, and position.

The Director of the California Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its proposed employment of the Beneficiary in the claimed executive capacity. On appeal, the Petitioner submits additional evidence and asserts that prior counsel misdescribed the Beneficiary's proposed role with the company. The Petitioner contends that counsel should have requested the Beneficiary's L-1A classification in a managerial capacity, specifically as a manager of an essential function. *See* section 101(a)(44)(A) of the Act (defining the term "managerial capacity" to include a function manager).

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1391 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. L-1A MANAGERS AND EXECUTIVES

A petitioner seeking to employ an L-1A manager or executive must demonstrate that - for at least one continuous year in the three years before a beneficiary's admission to the United States - the petitioner or its parent, branch, subsidiary, or affiliate employed the beneficiary abroad in a capacity that was managerial, executive, or involved specialized knowledge. 8 C.F.R. § 214.2(l)(3)(i), (iii), (iv). The petitioner must also establish that the beneficiary's prior education, training, and employment qualifies them for the proposed managerial or executive position in the United States. 8 C.F.R. § 214.2(l)(3)(ii), (iv).

Because the Petitioner seeks to extend an L-1 petition that involved a "new office" in the United States, the company must demonstrate that it and the Beneficiary's foreign employer maintain a qualifying

relationship and that it regularly did business during the year before the petition's filing. 8 C.F.R. § 214.2(l)(14)(ii)(A), (B). A petitioner must also submit statements describing: the beneficiary's duties the prior year; the proposed duties; and the petitioner's staffing, including number of employees, types of positions held, and employee wages. 8 C.F.R. § 214.2(l)(14)(ii)(C), (D). Additionally, the Petitioner must provide evidence of its financial status. 8 C.F.R. § 214.2(l)(14)(ii)(E).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A petitioner must generally establish its eligibility "at the time of filing the benefit request." 8 C.F.R. § 103.2(b)(1). A petitioner cannot make material changes to a petition after its filing in an effort to make it comply with eligibility requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (AAO 1998).

Under USCIS policy, however, a petitioner's demonstration of ineffective assistance of counsel may warrant reversal or remand of a petition's denial. To assert a claim for ineffective assistance of counsel in immigration proceedings, a petitioner must submit the following materials:

- A written affidavit describing: the petitioner's agreement with former counsel; the specific actions that counsel agreed to take; the actions counsel actually took; and any representations that counsel made about the actions;
- Evidence that the petitioner informed prior counsel of the ineffectiveness allegation and gave them an opportunity to respond; and
- Evidence that the petitioner filed a complaint against counsel with appropriate disciplinary authorities or an explanation for the non-filing of a complaint.

Matter of Lozada, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The Board of Immigration Appeals (BIA) designed these requirements to ensure adjudicators have the information needed to sufficiently evaluate claims of ineffective assistance and to deter meritless allegations. *Matter of Lozada*, 19 I&N Dec. at 639-40. Besides these documentary requirements, a petitioner must show that former counsel provided such poor legal help that the performance prejudiced the petitioner. *Id.* at 640. The United States Court of Appeals for the Ninth Circuit, which has jurisdiction over the proposed worksite in this matter, generally requires applicable parties to satisfy all *Lozada* requirements. *Reyes v. Ashcroft*, 358 F.2d 592, 597 (9th Cir. 2004).

Consistent with the Petitioner's signed petition and support letters, the Director considered the Beneficiary's eligibility for extended L-1A visa status in an executive capacity as CEO. The Petitioner's response to the Director's request for additional evidence also indicated the company's proposed employment of the Beneficiary in an executive capacity as CEO.

On appeal, however, the Petitioner alleges for the first time that the "petition's denial largely stems from prior counsel's negligent assistance." The Petitioner's chief financial officer (CFO) states that the company "made it clear to our former attorney that [the Beneficiary's] role would shift from executive oversight of the U.S. company, to her more natural specialized sales/marketing role, overseeing our largest division, Touch and Interactive Flat Panel Displays (IFPD)." The CFO states that "our attorney at the time[] felt it would be best to be consistent with the earlier filing and continue to categorize her as an executive." But the CFO says: "I can confirm she was then, and continues to

be[,] primarily tasked with overseeing the sales for the most popular and critical product line, our IFPD sales.” The Petitioner now asserts that, as sales director of the IFPD division, the Beneficiary would manage an essential function of the business.

Because the Petitioner has not met the *Lozada* requirements, however, we will not consider its claim of ineffective assistance of counsel. The Petitioner does not provide evidence that it informed prior counsel of the ineffectiveness claim or gave him an opportunity to respond. Also, the record lacks evidence that the company filed a complaint against him with appropriate disciplinary authorities. The Petitioner also does not explain the apparent non-filing of a complaint. As the Petitioner did not comply with *Lozada*, we will not consider whether prior counsel misdescribed the offered position.

Also, because the Petitioner had to establish eligibility at the time of the petition’s filing and cannot later materially change the petition, we will not consider the Beneficiary’s proposed work as a sales director in a management capacity. See 8 C.F.R. § 103.2(b)(1); see also *Matter of Izummi*, 22 I&N Dec. at 175. Rather, we will review the Director’s decision based on the Petitioner’s original request for the Beneficiary’s L-1A classification in an executive capacity as CEO.

III. THE NATURE OF THE ORIGINAL PROPOSED EMPLOYMENT

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 it, its component, or its function;
- Exercising wide latitude in discretionary decision-making; and
- Receiving only general supervision or direction from higher-level executives, the board of directors, or organization stockholders.

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

When considering the executive nature of a proposed position, USCIS reviews a petitioner’s description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii) (requiring “a detailed description of the services to be performed”). The Agency also considers: the business’s organizational structure; whether other employees would relieve a beneficiary from performing operational duties; the duties of any proposed subordinate workers; the business’s nature; and other factors potentially affecting a beneficiary’s duties or role.

The Director found that, at the time of the petition’s filing, the Petitioner did not demonstrate its possession of sufficient staffing to relieve the Beneficiary from primarily performing non-executive duties. See 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to demonstrate eligibility “at the time of filing the benefit request”); see also *Matter of G- Inc.*, Adopted Decision 2017-05, 4 (in the context of an L-1A petition for a functional manager, considering the operational and administrative work performed by the petitioner’s staff). At the time of the petition’s filing, the record shows the company’s employment of five people. On appeal, the Petitioner concedes in its written brief that “sufficient staffing levels do not currently exist” to support the originally offered, executive position of CEO. Therefore, the Beneficiary would lack sufficient support to primarily perform executive-

level duties. *See* 8 C.F.R. § 214.2(l)(3)(v)(C) (requiring a petitioner to demonstrate that a new office “will support an executive or managerial position” within one year of the initial petition’s filing).

Also, the Petitioner does not allege any errors in the Director’s decision. The company states that “it is simply [prior counsel’s] misclassification of the Beneficiary as an Executive, rather than a Functional Manager, and an inadequate description of the beneficiary’s role that is the cause of the negative decision.” Thus, we will affirm the petition’s denial. *See* 8 C.F.R. § 103.3(a)(1)(v) (requiring dismissal of an appeal that does not specify any erroneous conclusion of law or statement of fact); *see also United States v. Sineng-Smith*, 140 S.Ct. 1575, 1579 (2020) (stating that, in the adversarial U.S. legal system, adjudicators rely on parties to frame the issues for decision).

IV. CONCLUSION

Because the Petitioner did not comply with case law requirements, we will not consider its claim of ineffective assistance of counsel. Also, as the Petitioner had to establish eligibility at the time of the petition’s filing and cannot later materially change the petition, we will not consider the company’s appellate amendments to the Beneficiary’s proposed position and capacity. The Petitioner concedes that it lacks sufficient staffing to support an executive position as it originally requested and does not allege any errors in the Director’s decision. We will therefore affirm the petition’s denial.

ORDER: The appeal is dismissed.