



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

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

In Re: 23944913

Date: APR. 19, 2023

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner is a construction and property development company seeking to continue the Beneficiary temporarily as general manager¹ under the L-1A nonimmigrant classification for intracompany transferees.² See Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The Director of the California Service Center denied the petition, concluding that the record did not establish that the Beneficiary would be employed in an executive capacity under an extended petition.³ The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

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).

¹ The Petitioner has since submitted evidence changing the Beneficiary's position title from that of general manager to chief executive officer. At the time of filing, however, the Petitioner indicated that it sought to employ the Beneficiary in the position of general manager.

² The Petitioner previously filed a "new office" petition on the Beneficiary's behalf. That petition was approved for the one-year period from November 10, 2020, until November 9, 2021. 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.

³ The Petitioner claims that the proposed employment would be in an executive capacity.

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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The issue to be addressed in this decision is whether the Petitioner established that the Beneficiary's position under an extended petition would be in an executive capacity.⁴

"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)(B) 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 of the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Job Duties

First, we will discuss the duties to be performed by the Beneficiary in the proposed position with the U.S. entity. We note that the actual duties themselves reveal the true nature of the employment. *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).

In a supporting cover letter, the Petitioner stated that the Beneficiary will be employed in the position of general manager where he will spend 25% of his time overseeing and directing personnel, 30%

⁴ The Petitioner does not claim that the Beneficiary would be employed in a managerial capacity. We will therefore limit our discussion to the basis of the Petitioner's claim that the Beneficiary would be employed in an executive capacity.

formulating and implementing goals and strategies through subordinate personnel, 20% establishing and implementing policies and procedures by negotiating with third parties and “caus[ing] the drafting of contracts with third parties”; the Petitioner allocated the remaining 25% of the Beneficiary’s time to overseeing financial activities by directing a bookkeeper and third-party accountant, monitoring budgets, and engaging in risk management by establishing tools and procedures for assessing risk and defining risk management guidelines.

In a request for evidence (RFE), the Director commented on the Beneficiary’s job description, finding that the information it conveyed was too general and did not disclose the Beneficiary’s daily duties within the scope of the Petitioner’s operation. The Director asked the Petitioner to provide a more detailed description of the Beneficiary’s proposed job duties illustrating how the stated duties apply to the Petitioner’s business. The Director also asked the Petitioner to list the Beneficiary’s typical executive job duties and assign a percentage of time to each.

In response, the Petitioner provided a new job duty breakdown with new percentage allocations that are markedly different from those listed in the original job description. The new job description is divided into four sections, each representing one of four prongs that comprise the definition of executive capacity. Despite the Director’s request, a percentage of time was not assigned to individual job duties, but rather to each prong of the statutory definition with 35% of the Beneficiary’s time assigned to duties listed under the first prong – directing the management of the organization; 25% to duties under the second prong – establishing the goals and policies of the organization; 32% to duties under the third prong – exercising wide latitude in discretionary decision making; and 8% to the last prong, which focuses on the level of direction or supervision over the Beneficiary. The Petitioner also changed the Beneficiary’s position title from that of general manager to chief executive officer (CEO), stating that the company has retained a chief operating officer (COO) who will take over many of the Beneficiary’s responsibilities.

Although we acknowledge change in the Beneficiary’s position title to that of CEO, we note that this new position title is a departure from the Petitioner’s original claim at the time of filing. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998) (establishing that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements). We further note that the purpose of an 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 at the time of filing 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 Petitioner’s RFE response does not clarify or provide more specificity to the original duties of the proposed position, but rather provides an altogether new job description with a new percentage breakdown, which, as noted early, is markedly different from the original job description. The fact that the hiring of a COO is claimed to alter the Beneficiary’s job duties underscores the likelihood that the job description offered in response to the RFE reflects a change in the Petitioner’s staffing

structure. The new description does not, however, impart clarity to the Beneficiary's original job description and proposed job duties at the time of filing.

In light of the above, the focus of our analysis will be based on the job description submitted with the initial petition. That said, we find that the original job description was vague and did not convey a meaningful understanding of the Beneficiary's proposed job duties in the daily or weekly course of the Petitioner's construction business. For instance, the Petitioner stated that 25% of the Beneficiary's time would be allocated to oversight and direction of personnel, giving the Beneficiary "ultimate authority" over the company's staffing levels and charging him with the responsibility of implementing tools, programs, and procedures to enable "adequacy of the professional and managerial competencies" and ensuring the following: "the planning and reporting processes of human resources and labour [sic] costs," benefits and compensation, "organizational development" and coordination of changes in "management plans," and development of human resources based on the needs of the organization. However, the ambiguous reference to "tools, programs, and procedures" lacks sufficient clarity and does not further our understanding of the Beneficiary's daily or weekly activities within the scope of the Petitioner's operation. Likewise, references to "organizational development" and "the planning and reporting processes" are equally ambiguous, as these responsibilities can be broadly applied to a variety of industries or businesses, and they offer no insight about the Beneficiary's specific role and job duties within the scope of a construction business.

The Petitioner also provided a list of the contractors and subcontractors it routinely hires for its building projects, stating that 30% of the Beneficiary's time would be spent formulating and implementing goals and strategies through the contracted staff. However, the Petitioner did not list specific goals or strategies that the Beneficiary would set, nor does the record indicate that formulating new goals and strategies would be a daily or weekly activity to be performed by the Beneficiary in the routine course of a construction business. We note that reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. 8 C.F.R. § 214.2(l)(14)(ii)(C). As previously stated, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41.

On appeal, the Petitioner states that the petition was denied because "the Beneficiary is not employed as an executive." The Petitioner argues that deference must be given to the prior approval of the Petitioner's initial petition. As a preliminary matter, we note that the petition was not denied because the Beneficiary *is not* currently employed in an executive capacity, but rather because the Petitioner failed to establish that the Beneficiary *would be* employed in an executive capacity under the extended petition. This distinction between the present and future tenses is critical, given that the Petitioner's burden is to establish that the Beneficiary's prospective rather than his current employment fits the statutory definition of executive capacity. Although the Petitioner bears the burden of establishing eligibility at the time of filing, that burden is with respect to employment that the Beneficiary would hold in the future, if or when this petition is approved. Contrary to the Petitioner's understanding, the Beneficiary's current employment, regardless of whether it falls within the parameters of the statutory definition, is not relevant for the purpose of establishing eligibility in this matter.

Further, regarding the Petitioner's reliance on the approval of a previously filed petition, although we acknowledge the procedural aspects that led to the filing of the instant extension petition, we note that

the previously approved petition was filed when the Petitioner was deemed a “new office.” The new office designation is reserved for entities that have been doing business in the United States for less than one year at the time of filing and are therefore subject to regulations that are separate from those that apply to a petitioner filing to extend a petition stemming from an approved new office petition. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F) (defining “new office”). Because there is a material change in eligibility requirements from those that were applicable to the filing of the initial new office petition, we will not defer to the prior approval. *See* 2 USCIS Policy Manual A.4(B)(1), <https://www.uscis.gov/policymanual>.

In addition, the burden to establish eligibility in this matter falls squarely on the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Ho*, 19 I&N Dec. 582, 588-89 (BIA 1988); *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966); *Matter of D-Y-S-C-*, Adopted Decision 2019-02 (AAO Oct. 11, 2019). We are not required to approve applications or petitions where eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *Matter of Church Scientology Int’l*, 19 I&N Dec. 593, 597 (Comm’r 1988). It would be unreasonable for USCIS or any agency to treat acknowledged errors as binding precedent. *Sussex Eng’g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

For the reasons outlined in this decision, the Petitioner has not established that the Beneficiary would primarily perform executive-level duties under the extended petition. As discussed, the Petitioner has provided a job description that does not adequately specify the duties the Beneficiary would perform within the scope of the operation that was in place at the time of filing. Although we acknowledge the addition of a COO to the Petitioner’s staffing as well as the Beneficiary’s updated position title to that of CEO since this petition was filed, only those facts and circumstances that existed at the time of filing will be considered in determining the Petitioner’s eligibility. *See* 8 C.F.R. § 103.2(b)(1). Here, the job description that was relevant at the time of filing is vague and does not adequately disclose the actual tasks that were assigned to the Beneficiary’s proposed position at the time of filing. Although the record establishes a sense of the Beneficiary’s heightened level of discretionary authority over the Petitioner’s business activities and contracted personnel, it does not contain evidence elaborating on the specific actions the Beneficiary would be required to perform within the scope of the Petitioner’s operation at the time of filing.

Because of the noted ambiguities regarding the Beneficiary’s job duties, the Petitioner has not established that the Beneficiary would dedicate his time primarily to performing executive-level tasks.

B. Staffing

Next, we will address the Petitioner’s staffing at the time of filing. When 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.

The Petitioner claimed one employee – the Beneficiary – on its petition form and explained that, with the exception of the Beneficiary, the remainder of its support staff consists of contracted and subcontracted labor. The Petitioner listed the following positions as part of its support personnel at

the time of filing: 1) the Beneficiary in the position of general manager; 2) [redacted] with owner [redacted] as “supervising/general contractor”; 3) a contracted bookkeeper; 4) a professional subcontractor filling the procurement position; and 5) a third-party service provider as the Petitioner’s certified public accountant (CPA). The Petitioner also provided a list of subcontractors who report to [redacted] and are selected based on an individual project’s needs. In addition, the Petitioner stated that it was in the process of filling the position of “projects/construction manager” and claimed that [redacted] would carry out the duties of that position until it is filled.

The Petitioner illustrated its staffing arrangement in an organizational chart which depicts the Beneficiary at the top of the hierarchy, directly overseeing the bookkeeper, CPA, and “projects/construction manager.” The vacant position is depicted as working alongside a position designated as “procurement” while overseeing a “supervising/general contractor,” i.e., [redacted] and his company, and a “backup supervising/general contractor,” a position that would be filled “as needed.” Although [redacted] was listed as general contractor in a separate “Subcontractor List,” this individual was not incorporated into the organizational chart, nor did the Petitioner include him in the supporting statement where its staffing arrangement was first discussed. This omission indicates that the Petitioner did not regularly rely on [redacted] services at the time this petition was filed. The remainder of the chart lists a variety of subcontractors who would be subject to oversight by the “supervising/general contractor.”

In the RFE, the Director observed that the Beneficiary is the Petitioner’s only employee and recognized the Petitioner’s use of contractors and service providers as part of its organizational structure. However, the Director questioned whether the Petitioner’s staffing arrangement was sufficient to relieve the Beneficiary from having to primarily perform non-executive job duties.

In response, the Petitioner provided a statement claiming that its organization is comprised of three divisions, each managed by one of three division managers. [redacted] was listed as manager of the construction and remodeling division, [redacted] as manager of the multi-family units/hotels division, and [redacted] as manager of the landscaping maintenance division. However, the Petitioner did not provide consistent, reliable evidence showing that it was contracting the services of these three individuals at the time this petition was filed. For instance, the Petitioner provide its 2021 transaction report listing the names, dates, and amounts of its expenditures in 2021. However, the report does not include any references to [redacted] and it shows that the first payment to [redacted] did not occur until November 9, 2021, four days after this petition was filed. The Petitioner also provided performance-based contracts for [redacted] as well as IRS Form 1099-NECs showing that all three individuals received non-employee compensation from the Petitioner in 2021. However, only [redacted] was incorporated into the Petitioner’s organizational chart at the time of filing, and only he was specifically included in the initial supporting statement where the Petitioner discussed its staffing arrangement, even though the terms of the performance-based contracts show that all three went into effect well prior to the November 2021 filing of this petition.⁶ The Petitioner must resolve these noted discrepancies with independent,

⁵ The record contains two different spellings of this name; the initial supporting documents list the name as [redacted] but documents submitted later list it as [redacted]. Despite the incongruent spelling, we presume both versions as pertaining to the same individual.

⁶ [redacted] respective contracts show an effective date of January 4, 2021, and [redacted] contract shows an effective date of August 2, 2021.

objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, if [redacted] was contracted to fill the position of “divisional manager construction,” a term that is expressly stipulated in his performance-based contract, it is unclear why the organizational chart that was submitted at the time of filing refers to [redacted] position as “supervising/general contractor.” In addition, the compensation structure states that [redacted] will receive \$24,000 as a fixed retainer, payable in monthly increments of \$2000. However, the Petitioner’s 2021 transaction report shows no payments made directly to [redacted] but rather to [redacted] the company [redacted] is claimed to own. Although the record contains a separate performance-based contract listing the Petitioner and [redacted] as the contracting parties, it is unclear why two separate contracts, both of which were effective in January 2021, were executed with the company and its owner. We also note that neither contract makes any mention of the dual role [redacted] is claimed to have been filling at the time of filing, when it was stated that [redacted] was not only responsible for his primary role as “supervising/general contractor,” but that he was also temporarily assuming the role of “projects/construction manager,” a position the Petitioner indicated it was looking to fill at the time of filing.

In addition, the record contains conflicting evidence regarding [redacted] who was listed as “procurement” in the original organizational chart. Namely, the Petitioner submitted an invoice issued by [redacted] with a handwritten note stating that [redacted] is actually an employee of [redacted] and would therefore be paid by the employer. However, this claim is inconsistent with a performance-based contract in the record, which lists the Petitioner and [redacted] as the contracting parties and does not indicate that [redacted] was executing the contract on [redacted] behalf as her employer. As noted earlier, discrepancies must be resolved through the submission of independent, objective evidence. *See id.*

The RFE response also includes an updated organizational chart, which, even though consistent with the month and year this petition was filed, is markedly different from the organizational chart that was submitted at the time of filing. Namely, the more recently submitted chart depicts an amended staffing structure, which incorporates the previously named division managers – [redacted] – as the Beneficiary’s direct subordinates and shows the Beneficiary at the top of organization holding the position title of CEO. Although the CPA and bookkeeper positions were depicted in both organizational charts, the updated chart does not include a procurement position, which was previously assigned to [redacted] nor does it include a “projects/construction manager” position, which, though previously vacant, was shown as “in hiring process,” thus indicating that at the time of filing the Petitioner intended to fill, rather than delete, that position. Lastly, although the Petitioner claimed that it hired a COO, which would result some job duties being shifted away from the Beneficiary to be performed by the new COO, neither organizational chart includes a COO position as part of the staffing structure.

We note that unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Because the record contains no evidence resolving the above-described anomalies and inconsistencies concerning the Petitioner’s staffing structure, it is unclear how the Petitioner would relieve the Beneficiary from having to primarily perform non-executive job duties and whether the Petitioner had

this ability at the time this petition was filed. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *Matter of Church Scientology Int’l*, 19 I&N Dec. 593, 604 (Comm’r 1988).

III. CONCLUSION

Given the evidentiary deficiencies described above concerning the Beneficiary’s job duties and the Petitioner’s staffing, we conclude that the Petitioner has not met its evidentiary burden of establishing that the Beneficiary’s proposed employment would be in an executive capacity, and the appeal will be dismissed on that basis.

ORDER: The appeal is dismissed.