



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

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

In Re: 25693970

Date: MAR. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a software development company, seeks to temporarily employ the Beneficiary as its CEO and project manager under the L-1A nonimmigrant classification for intracompany transferees. 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 Texas Service Center denied the petition, concluding that the record did not establish that the Beneficiary would be employed in the United States in a managerial capacity. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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 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.* The petitioner must also establish that the beneficiary’s prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. ANALYSIS

The sole issue we will address is whether the Petitioner established that the Beneficiary will be employed in the United States in a managerial capacity. The Petitioner does not claim that the

Beneficiary will be employed in an executive capacity.

“Managerial capacity” means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; 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; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

A. Duties

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.

If the Petitioner establishes that the offered position meets all elements set forth in the statutory definition, the Petitioner must 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 the Beneficiary’s duties are primarily managerial, we consider the description of the Beneficiary’s job duties, the Petitioner’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 Petitioner’s business, and any other factors that will contribute to understanding the Beneficiary’s actual duties and role with the petitioning organization.

The Petitioner is a software development company established in 2016 that specializes in the development of customer web-based and handheld applications for other businesses. The Petitioner stated that the company’s function “is to assist corporations, government entities and charitable organizations worldwide to solve major business problems.” The Petitioner further indicated that its focus “is on creating applications that require the capture and processing of data,” and that it “provides application functionality that is well tested for all user scenarios.”

The Petitioner explained that the Beneficiary has served as its Chief Technology Officer since 2016,¹ and indicated that he will serve in a managerial capacity “because he will have sole oversight and responsibility for critical company functions, and because he will manage professional engineers.” The Petitioner further stated that the Beneficiary “will (1) hire employees (including Chief Financial Officer, a Chief Technical Officer, and a Vice President of Sales), (2) engage in day-to-day management of employees, (3) manage the software development process, (4) oversee the development of new U.S.-based customer relationships, and (5) strengthen existing relationships with current U.S.-based customers. [The Beneficiary] will continue to operate as CTO of the international subsidiary company, and remotely manage the Belarus-based employees of [the foreign entity].”

¹ The Petitioner claims that the Beneficiary has managed the U.S. company in this position on a remote basis since 2016.

In addition, the Petitioner stated that the Beneficiary's main goal in the U.S. will be to set the vision for the Petitioner's expanded operations, scale the company's growth, and attract and retain talent. The Petitioner claimed that his duties will include the following:

Employee Hiring and Management

- Recruit, interview, hire, and supervise 3-5 employees (initially) for expanded United States operations. (5%)
- Continue direct management of 3-4 professional technical employees in the Belarus office. (5%)
- Develop, improve and implement policies and training programs for both U.S. and Belarus office. (5%)
- Evaluate employees, and determine staff salaries, work assignments, and promotions. (5%)
- Set priorities for employees in Belarus office and U.S. office, and schedule project resources. (10%)
- Manage the development team to ensure that client contract obligations are met, that software is bug free, and that clients are satisfied. (5%)
- Oversee new client relationships and contacts. (10%)

Business Development

- Perform analysis of competition in the worldwide markets with a focus on the Americas, and monitor industry trends and customer feedback to determine direction of products and services. (10%)
- Oversee company expansion within the United States, including logistics and budget, and implement plans. (20%)
- Manage existing client relationships. (20%)
- Oversee negotiation of software development contracts. (5%)

The Petitioner also submitted an organizational chart, demonstrating that the U.S. entity has no active employees, and a business plan for the U.S. entity.

In response to the Director's request for evidence (RFE), the Petitioner provided additional details regarding the Beneficiary's claimed duties and asserted that more than 50% of the Beneficiary's duties would constitute managerial tasks. The Petitioner also provided job descriptions for the proposed positions of Chief Financial Officer, Chief Technical Officer, and Vice President of Sales, as well as the resume of the Art Director/Fronter Developer in the Belarus office. The Petitioner also claimed in response to the RFE that the Beneficiary will maintain oversight of the organization's international technical teams.

In denying the petition, the Director determined that the Petitioner had not submitted sufficient evidence to establish that he would be engaged in primarily managerial duties in the United States. Specifically, the Director noted the absence of corroborating documentary evidence to support its claims. Upon review, we agree with the Director's determination.

The above discussed duties suggest the Beneficiary's direct involvement in the business development and marketing services of the U.S. entity and leave uncertainty as to whether he will primarily perform qualifying managerial duties. Again, the Petitioner must prove that the Beneficiary will *primarily* engage in managerial duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d at 1316. We acknowledge that the Petitioner states that the Beneficiary will continue to manage and supervise technical projects and oversee subordinate professionals abroad who it claims will relieve him from primarily performing non-qualifying operational duties. However, the Petitioner has provided little supporting documentation to substantiate this assertion. Although the Petitioner submits additional evidence on appeal, including the Beneficiary's handwritten statement of duties and copies of email correspondence with various foreign employees, this evidence does not demonstrate his claimed personnel authority over professional subordinates, his direction of them, and his delegation of non-qualifying duties to them. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. Without sufficient supporting evidence, the Petitioner has not sufficiently established that the Beneficiary will primarily engage in qualifying managerial tasks, as opposed to non-qualifying duties directly related to the business development and marketing duties associated with the U.S. entity.

Moreover, the record demonstrates that the U.S. entity currently has no employees to relieve the Beneficiary from performing non-qualifying tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services for an entity that is not a new office 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).

B. Staffing

If staffing levels are used as a factor in determining whether an individual was acting in a managerial or executive capacity, the reasonable needs of the organization are taken into account in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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." *Id.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The Petitioner provided general organizational charts related to the composition of the U.S. office as well as its foreign affiliates. As noted above, the U.S. organizational chart indicates that despite its incorporation in 2016, it had no employees at the time of filing. According to the Petitioner, the Beneficiary will hire a Chief Financial Officer, Chief Technical Officer, and Vice President of Sales,

and ultimately oversee those positions. The Petitioner further claimed that the Beneficiary will “continue [the] direct management of 3-4 professional technical employees in the Belarus office,” and “will maintain oversight of [the organization’s] international technical teams responsible for carrying out the technical development work of [the Petitioner’s] organization.”

First, the Beneficiary cannot qualify as a personnel manager based on the oversight of subordinate supervisors or managers abroad, as the provided foreign organizational charts are vague and do not reflect that he will continue to supervise these employees. On appeal, the Petitioner emphasizes that the Beneficiary will continue to supervise professional subordinates and that he holds personnel authority over them, and submits additional evidence in support of the claimed foreign staffing levels such as pay stubs, CVs, and position descriptions for several claimed subordinates. Although we acknowledge the Petitioner’s submission of this new evidence on appeal, the Petitioner neglected to provide this evidence when it was first requested in the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director’s request for evidence. *Id.* Under the circumstances, we need not and do not consider the sufficiency of the newly submitted evidence.

To determine whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining “profession” to mean “any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). Section 101(a)(32) of the Act, states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor’s degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

The Petitioner, however, did not submit supporting documentation to corroborate that he oversaw teams of professionals abroad who relieved him from performing non-qualifying operational duties directly related to the provision of services to clients, nor did it provide supporting evidence to demonstrate that he held personnel authority over subordinate professionals. Further, although the Petitioner provided general duty descriptions for the various professional positions the Beneficiary was claimed to supervise, it also did not submit other substantiating evidence, such as documentation to establish that these employees held bachelor’s degrees. The Petitioner submitted insufficient evidence reflecting the Beneficiary’s authority to delegate non-qualifying operational duties to his claimed subordinates abroad. Therefore, the Petitioner did not sufficiently establish that the Beneficiary will act as a personnel manager by virtue of supervising foreign subordinate employees.

Regarding the staffing of the U.S. office, the Petitioner confirmed that there are currently no employees and the Beneficiary will be tasked with recruiting and hiring personnel. The Petitioner, however, 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). A visa petition may not be

approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Here, while the Petitioner asserts that the Beneficiary will ultimately hire numerous employees to relieve him from performing non-qualifying tasks, the record at the time of filing does not establish that the Beneficiary will be primarily managing the organization, or primarily managing its business development and marketing functions. Rather, the record indicates that the Beneficiary will primarily be engaged in the performance of non-qualifying marketing and related tasks until such time that a subordinate staff of managers or professionals is hired to relieve him.

On appeal, the Petitioner asserts that the Beneficiary's reliance on support staff abroad is akin to the fact pattern in *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016). We disagree. *Matter of Z-A-* involved a beneficiary whose managerial responsibilities encompassed "eight staff members within the parent company's headquarters office in Japan [who] exclusively support the Beneficiary's work" (emphasis added). *Id.* at 2. In addition to not establishing that the claimed foreign subordinates are professionals, the Petitioner has also not shown that they function as his subordinates in the same way as the subordinate staff members in *Matter of Z-A-*. If a petitioner claims that it has a reasonable need for foreign staff to perform some of the operational tasks associated with its U.S. business, it has the burden of documenting those foreign employees and the duties they perform for the U.S. entity. *Id.* As noted above, the provided foreign organizational charts are vague and do not reflect that the Beneficiary will continue to supervise these employees. Although the Petitioner supplements the record with new evidence regarding the staffing of its foreign offices on appeal,

The Petitioner also did not establish that the Beneficiary managed an essential function pursuant to section 101(a)(44)(A)(ii) of the Act. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily manage, as opposed to perform, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

The Petitioner claimed that the Beneficiary will be managing the software development process/department and the sales organization that focuses on selling the Petitioner's software development services to U.S. customers. According to the Petitioner, both of these functions are essential "because the company develops software services, and to make money the services need to be sold to customers." The Petitioner claimed that the Beneficiary will manage these functions as well as oversee the personnel "based both in [its] foreign affiliate offices and in the U.S. office (once hired) that will carry out the performance of the function."

The Petitioner did not sufficiently demonstrate that the Beneficiary will act as a function manager. As we have noted, the Petitioner provided evidence indicating the Beneficiary's performance of non-qualifying operational duties directly related to the company's marketing and business

development. Again, the Petitioner did not submit supporting documentation to substantiate that the Beneficiary was primarily engaged in managing a function rather than performing it. The Petitioner claims that the Beneficiary manages teams of professionals abroad who relieve him from performing non-qualifying operational tasks, but it provided little evidence to substantiate the Beneficiary's direction of these employees or his delegation of tasks to them. Therefore, the Petitioner has not sufficiently established that the Beneficiary's function is well defined and that he has senior level discretionary authority over it.

III. CONCLUSION

For the foregoing reasons, the Petitioner has not established that the Beneficiary will be employed in a managerial capacity.

ORDER: The appeal is dismissed.