



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

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

In Re: 23373093

Date: MAR. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a nail salon and spa, seeks to extend the Beneficiary's temporary employment as its president and chief executive officer 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 was employed abroad, and would be employed in the United States, in a qualifying managerial or executive 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 managerial or executive capacity 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)(3)(v)(B). 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.*

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. ANALYSIS

The Petitioner filed its first L-1A nonimmigrant petition on the Beneficiary's behalf in September 2018. The Director approved that petition in January 2019, granting the Beneficiary L-1A status until September 2019.¹ The Petitioner filed an extension petition in September 2019, which the Director denied for abandonment in January 2020. The abandonment denial is not before us; a denial for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15). The Petitioner filed a third petition in December 2021 in an effort to preserve and extend the Beneficiary's L-1A status. The denial of that third petition is the matter before us on appeal.

The approval of the initial September 2018 petition granted the Beneficiary L-1A status for one year, indicating that the 2018 petition was a new office petition. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(3). New office petitions are subject to different eligibility requirements than L-1A petitions for established businesses. *See* 8 C.F.R. § 214.2(l)(3)(v). An extension petition following the approval of a new office petition requires new evidence, rather than just the continuance of prior circumstances. *See* 8 C.F.R. § 214.2(l)(14)(ii). Therefore, the requirements for a new office petition are not the same as the requirements for a subsequent extension petition. U.S. Citizenship and Immigration Services (USCIS) will not defer to prior approvals where, as here, there has been a material change in eligibility requirements. *See, generally*, 2 *USCIS Policy Manual* A.4(B)(1), <https://www.uscis.gov/policy-manual>.

The Director determined that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner specified that the Beneficiary's positions are executive rather than managerial, and therefore we will not consider the requirements of a managerial capacity here.

"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.

If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition of an executive capacity, the petitioner must then 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). In determining

¹ On the latest petition form, the Petitioner acknowledged that the Beneficiary's L-1A nonimmigrant status expired September 10, 2019, more than two years before the Petitioner filed the present petition in December 2021. In the denial notice, the Director noted the Beneficiary's lack of valid nonimmigrant status. We need not discuss this issue here, because maintenance of status is an issue for an extension application, decided concurrently with the extension petition but not subject to appellate review. *See* 8 C.F.R. § 214.1(c)(4) and (5).

whether the beneficiary's duties will be primarily executive, we consider the description of the job duties, the 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 the business.

The petition, when filed, included a job description for the Beneficiary's position and an organizational chart showing the subordinate employees. In response to a request for evidence (RFE), the Petitioner submitted substantial revisions of both the job description and the organizational chart. The Petitioner must meet all eligibility requirements at the time of filing, continuing through the adjudication of the petition. *See* 8 C.F.R. § 103.2(b)(1). New material facts, such as a reorganization of the company, cannot establish eligibility as of the filing date. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

On the petition form, the Petitioner claimed 10 employees. The petition included an organizational chart indicating that the Beneficiary has authority over a manager, who in turn oversees a maintenance worker, ten technicians, and a contracted accountant. One technician's name appears on the chart a second time as a marketer.

In response to the RFE, the Petitioner submitted a different organizational chart showing several substantial revisions:

- The employee previously named as both a "technician" and as a "marketer" is now called the "vice president of administration."
- A second "technician" is now called the "marketing associate."
- A third "technician" is now called the "social media marketer."
- The remaining technicians are now divided into two "senior technicians" and four "technicians."
- The six technicians are shown under the authority of a newly claimed "vice president of operations."
- The new chart does not show the previously shown position of "maintenance."
- The Petitioner newly claimed to use the services of unnamed contractors for marketing and administrative services.

Both versions of the chart must be consistent with the Beneficiary's claimed executive capacity. The reorganization of the company after the issuance of the RFE, including the creation of two new "vice president" positions, cannot retroactively establish eligibility at the time of filing.

Initially, the Petitioner submitted a 13-part job description for the Beneficiary's position. The listed items are broad and generic, with no specific reference to the company's activities. For example, the job description indicates that the Beneficiary would spend 25% of his time "[d]irect[ing] the company's financial status and activities to ensure that business is properly funded, to maximize investment, and to increase economic efficiency," 10% of his time "[n]egotiat[ing] contracts and agreements with suppliers," and 10% of his time "[c]ommunicat[ing] information to subordinate supervisory staff and ensur[ing] that they understand their duties or delegated tasks."

In the RFE, the Director stated that the Petitioner had not established that the Beneficiary performs primarily executive duties. In response, the Petitioner submitted a second version of the Beneficiary's job description. This second description does not expand upon the first version with more details. Rather, it includes a substantively different set of 11 duties and responsibilities. Four of the items refer to the Beneficiary's authority over the newly created vice presidential positions that did not exist in the original organizational chart. The revised job description also refers to new plans for expansion involving branches and franchisees.

Responsibilities such as directing the company's financial activities and negotiating with suppliers have been removed from the Petitioner's job description and added to the job description for the newly designated position of "vice president, administration." As with the reorganization of the personnel structure, the re-delegation of these duties from the Beneficiary to a new subordinate position cannot show that the Beneficiary's position *as originally described* at the time of filing qualified as an executive capacity.

Two newly claimed duties, each said to occupy 10% of the Beneficiary's time, are as follows:

- Establishes and leads strategic partnerships with oversight/regulatory agencies, other agencies, and trade/industry groups to maintain positive working relationships.
- Continue to establish connections with professional organizations and industry, leveraging those relationships to increase reputation.

These two items appear to overlap, and the Petitioner has not shown or documented that the Beneficiary would devote, on average, several hours each week contacting unidentified regulatory agencies, trade groups, and professional organizations. The first version of the job description did not mention these activities.

In the denial notice, the Director concluded that the Petitioner had not established that it would employ the Beneficiary in a primarily executive capacity. The Director determined that the Petitioner's assertions lacked both specific details and sufficient evidentiary support.

On appeal, the Petitioner asserts that it has submitted enough information and evidence to show that the Beneficiary's position qualifies as an executive capacity. The record does not support this assertion.

The Petitioner's appellate brief includes a job description for the Beneficiary's intended position in the United States. This new 17-part job description, however, does not match either of the disparate versions submitted earlier. It indicates that the Beneficiary "[m]anages the selection, termination, development, performance evaluation, and compensation of the Operation Manager, Chief Financial Officer, and Division Directors," positions that do not appear in either of the Petitioner's two very different organizational charts. Another item, the meaning of which is not clear, indicates that the Beneficiary will "[o]versee, coordinate, and drive delivery of the transformational change of activities of future Tploix [sic]."

Above, we have explained why the Petitioner's revision of the Beneficiary's job description cannot establish eligibility as of the filing date. The Petitioner's submission of still another job description on appeal raises more questions without resolving any existing issues.

Citing the organizational chart submitted in response to the RFE, the Petitioner states: "No clearer way could the structure of the organization be demonstrated." Here, too, the Petitioner does not address or explain its substantial revisions of that organizational structure, in which the same person was first described as a "marketer" and "technician," and then as the "vice president, administration" with substantially different responsibilities. We agree with the Petitioner that it has submitted tax and payroll records to establish that it employs about 10 people, but that evidence does not explain the two conflicting versions of the company's structure and the roles of those employees.

The lack of corroborated details, coupled with the changes to the Beneficiary's stated duties and the company's organizational structure, prevents us from concluding that the Petitioner has met its burden of proof to establish that it intends to employ the Beneficiary in the United States in a primarily executive capacity.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established that it seeks to employ the Beneficiary in an executive capacity. Because this issue is sufficient to decide the outcome of the appeal, we will reserve the appellate arguments concerning the Beneficiary's past employment abroad. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.