



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

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

In Re: 12771997

Date: DEC. 22, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a wholesale jewelry company, seeks to permanently employ the Beneficiary as president and general manager under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The instant petition was approved; however, the Director of the Texas Service Center later revoked the approved petition, concluding that the record did not establish that: (1) the Petitioner had a qualifying relationship with the Beneficiary's former foreign employer; (2) the Beneficiary acted in a managerial or executive capacity in his former capacity abroad; and (3) the Beneficiary would act in a managerial or executive capacity in the United States. In addition, the Director determined that the Petitioner and Beneficiary had willfully misrepresented material facts.¹

The Petitioner later appealed the decision and we dismissed the appeal affirming the Director's grounds for revocation but withdrawing the conclusion that the Petitioner and Beneficiary had willfully misrepresented material facts. The Petitioner later filed a combined motion to reopen and reconsider. We dismissed both motions determining the Petitioner did not demonstrate we acted in error in concluding it did not establish that the Beneficiary would act in a managerial or executive capacity in the United States; as this was dispositive of the appeal, we declined to address the other issues discussed in our initial appeal decision. The Petitioner filed a second combined motion to reopen and reconsider and we dismissed both motions again determining that the Petitioner did not demonstrate that our previous decision was in error when concluding that it did not establish that the Beneficiary would act in a managerial or executive capacity in the United States; again as this issue was dispositive of the motions, we declined to reach and reserved the issues of the Petitioner's qualifying relationship between it and the Beneficiary's foreign employer and whether the Beneficiary acted in a managerial or executive capacity in his former position abroad. The matter is again before us on a combined third motion to reopen and reconsider.

¹ A Form I-140 multinational executive or manager petition filed on behalf of the Beneficiary was approved by the Director of the Nebraska Service Center on January 13, 2017. The Director of the Texas Service Center later revoked this approved petition on January 23, 2018, following the issuance of a notice of intent to revoke (NOIR) on August 17, 2017. The Director of the Texas Service Center concluded that the petition had been approved in error and that the Beneficiary was not eligible for the benefit sought.

On motion, the Petitioner contends our previous decision was in error. Upon review, we will dismiss the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that we based our decision on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceeding at the time of the decision. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

A. Motion to Reopen

The Petitioner checked the box on the Form I-290B, Notice of Appeal or Motion, indicating that it was filing a combined motion to reopen and reconsider. However, the Petitioner's brief identifies the motion as only a motion to reconsider and requests that we reconsider our previous decision. Although the Petitioner submits some documentation that does not appear to be previously submitted and resubmits previously provided evidence, the Petitioner does not state new facts and the documentation submitted does not provide new, relevant evidence demonstrating that the Beneficiary will perform primarily in a managerial capacity.²

For example, the Petitioner provides a letter from a customs broker, dated June 26, 2020, confirming that the Beneficiary "is solely responsible for [i]mport of goods made by the company and to pay the U[.]S[.] [c]ustom duties." We do not question that the Beneficiary has this responsibility, but rather whether this responsibility, as well as many others in the record, are operational, non-qualifying tasks and not managerial in nature. This letter does not provide new, relevant evidence establishing how the Beneficiary's interaction with custom brokers is a task that falls within the statutory definition of managerial capacity.³

The Petitioner also submits credit card statements (from 2015 to 2018) and points out that the credit

² As we noted in our previous decisions, the Petitioner does not claim the Beneficiary will be employed in an executive capacity, therefore we restrict our analysis to whether the record demonstrates the Beneficiary will perform in a managerial capacity.

³ "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.

card is in the name of the Beneficiary. The Petitioner, however, does not explain the relevance of the credit card statements and how they demonstrate that the Beneficiary will perform primarily in a managerial capacity.

Similarly, the Petitioner submits emails and invoices⁴ that bear the name of individuals identified as two of the sales agents on the Petitioner's organizational chart. Not only does the Petitioner decline to explain why this information was not submitted on appeal or in support of the other motions filed, the limited number of documents do not establish that the Beneficiary would be relieved from performing many of the routine operational tasks necessary to further develop its business and provide services to its customers, as shown by previous documentation submitted. 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).

As the record on motion does not include new, relevant evidence supported by affidavits or documentary evidence, the Petitioner has not shown proper cause to reopen this matter. Therefore, we will dismiss the motion to reopen. 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

With respect to the motion to reconsider, the Petitioner asserts that: its two versions of the proposed duties are not conflicting descriptions; the various non-qualifying operational duties referenced in our previous decisions are not performed directly by the Beneficiary but through the "sales manager"; the Beneficiary "is the sole personal [*sic*] who is responsible to make the custom duty payment"; although emails to the Beneficiary confirming goods have been sent and to and from the Beneficiary regarding trade shows, the Beneficiary is not involved in non-qualifying duties; and the "marketing manager" position requires a bachelor's degree.⁵

The Petitioner, in support of its assertion that its two versions of the proposed duties do not conflict, provides a side-by-side comparison chart. In the side-by-side description, the Petitioner compares its initial description to the descriptions provided in response to the Director's request for evidence (RFE) and notice of intent to revoke (NOIR). The Petitioner's description in response to the RFE and NOIR elevates the Beneficiary's position to overseeing a marketing manager rather than performing the operational duties necessary for the Petitioner to function. That is, the Petitioner's additional descriptions show that some of the non-qualifying duties have been transferred from the Beneficiary's position to that of the sales/marketing manager position. This conflict accompanied by documentation that shows the Beneficiary performing many of the day-to-day operational tasks of the company demonstrates that the Beneficiary is not relieved from performing many of the non-qualifying duties

⁴ The majority of the documents are dated prior to filing the initial appeal and even prior to filing the petition. The emails appear to be to and from two of the Petitioner's sales agents interacting with customers regarding jewelry repairs, shipping repaired merchandise, invoices and payment, as well as responding to questions regarding shipping details, inventory, and trade shows. The invoices appear to relate to routine office orders and sometimes include a signature of one of the sales agents, who is periodically identified as an authorized signatory.

⁵ The Petitioner refers to this subordinate position as a sales/marketing manager, a marketing/sales manager, a sales manager, and a marketing manager.

necessary for the business. Further, the additional narrative to explain the Beneficiary's duties continues to show the Beneficiary reviewing inventory requirements submitted by the sales department, attending the major trade shows⁶ to study market trends and to develop confidence in new customers, as well as performing the financial and budgetary duties. We also note that the Petitioner uses an identical paragraph to describe three different initial duties, in the side-by-side comparison. This information does not further detail or explain the Beneficiary's initial duties.

As explained in our previous comprehensive decisions, the Beneficiary's non-qualifying operational duties are demonstrated through the documentation submitted. We reiterate here that the Petitioner's initial U.S. duty description set forth non-qualifying operational duties, such as the Beneficiary helping with day-to-day customer interaction, ensuring availability of gemstones, designing jewelry, guiding and directing employees on the design and production of jewelry, examining designs, providing opinions on the alterations, guiding employees on safe shaping and mounting, and attending trade shows. The additional duty descriptions, even with the removal of these operational tasks, does not sufficiently describe the Beneficiary's proposed duties so that we may conclude that the Beneficiary's duties will be primarily be managerial in nature. The Petitioner's continued reiteration to the contrary is insufficient. The record does not include sufficient consistent, probative evidence establishing that the Beneficiary's U.S. duties are primarily managerial in nature.

We also provided a comprehensive analysis explaining that the record did not support the Petitioner's assertion that the Beneficiary's lone asserted subordinate, the sales/marketing manager, qualified as a professional. On motion, the Petitioner reiterates that the sales/marketing manager position requires a bachelor's degree. In addition to repeating the generally described duties of the position, the Petitioner provides an overview of the requirements of a generic marketing manager position. The overview does not refer to the Petitioner's particular marketing manager's duties or describe why a marketing manager in the Petitioner's specific organization requires a bachelor's degree.⁷ The record on motion does not include sufficient evidence to overcome our prior determinations that the Beneficiary's subordinate employee does not primarily perform supervisory or professional duties.

In sum, the Petitioner did not establish that the Beneficiary would act in a managerial capacity under an approved petition. The Petitioner's side-by-side comparison of its descriptions of the proposed position accentuate the conflicting nature of the descriptions. The record does not include sufficient probative evidence or analysis demonstrating that the Beneficiary will perform duties in a primarily managerial capacity, and that our previous decision on this issue was in error. Further, the record does not support the Petitioner's claim that the Beneficiary will primarily oversee subordinate managers or professionals as necessary to qualify him as a personnel manager.

In order for the motion to reconsider to be granted, the Petitioner must overcome all the stated grounds for dismissal set forth in our previous decisions and demonstrate the Beneficiary's eligibility. Since the identified basis for denial is dispositive of the Petitioner's motion, we decline to reach and hereby reserve its arguments regarding whether a qualifying relationship exists between it and the Beneficiary's former foreign employer and whether the Beneficiary acted in a managerial or executive

⁶ We note that the Petitioner claims that the "lesser global trade shows are attended by the sales/marketing representatives," however the record does not include sufficient evidence to support this claim.

⁷ The requirements description refers to a different organization, not the Petitioner.

capacity in his former position abroad. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“courts and agencies are not required to make findings on issues the decision of which is 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).

The Petitioner has not stated sufficient reasons supported by applicable law or policy to establish that our previous decision was incorrect based on the evidence in the record of proceeding at the time of the decision. Accordingly, we conclude that the Petitioner has not shown proper cause to reconsider the matter and we will dismiss the motion to reconsider.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsidering our prior decision. The motion to reopen and motion to reconsider will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.