



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 13592965

Date: DEC. 22, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner seeks to permanently employ the Beneficiary as its “chief executive officer” 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 Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States and that the Beneficiary had been employed abroad in a managerial or executive capacity prior to his entry as a nonimmigrant. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.¹ We review the questions in this matter de novo.² Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the time of the petition for classification and admission into the United States, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition,³ that the beneficiary is coming to work in the United States for the same

¹ See Section 291 of the Act; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010).

² See Matter of Christo’s Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015).

³ If a beneficiary entered the United States to work for a qualifying entity as a nonimmigrant (for example in an H-1B or other work-authorized status), U.S. Citizenship and Immigration Services will reach back three years from the date of his or her admission to determine whether he or she had the requisite one year of employment abroad. Matter of S-P- Inc., Adopted Decision 2018-01 (AAO Mar. 19, 2018); 8 C.F.R. § 204.5(j)(3)(i)(B).

employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. See 8 C.F.R. § 204.5(j)(3).

The term “executive capacity” is defined as 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.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which clearly describes the duties to be performed by the Beneficiary. Beyond the required description of the job duties, we review the totality of the evidence when examining a beneficiary’s claimed managerial or executive capacity, including the company’s organizational structure, the duties of a beneficiary’s subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary’s actual duties and role in a business. Accordingly, our analysis of this issue will focus on the Beneficiary’s duties as well as the company’s staffing levels and reporting structure.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner, a corporation organized in May 2015 in the State of California, operates a restaurant and trucking business. The Petitioner at one time operated a restaurant in [redacted] California, however the Petitioner did not include evidence of this restaurant’s ongoing operations when the petition was filed. On appeal, the Petitioner stated that at the time of the Director’s request for evidence (RFE), the [redacted] restaurant had ceased operations.⁴ Similarly on appeal, the Petitioner noted that a second restaurant located in [redacted] California, had limited operations when the Director issued the RFE.⁵ The Petitioner also registered a trucking business in July 2018 and provided evidence that it had purchased five commercial trucks during the same time period.

We note here that the Petitioner initially does not identify whether the Beneficiary’s U.S. position is a managerial or an executive position. On appeal, however, the Petitioner clarifies that the proposed position is an executive position. Accordingly, we will analyze the U.S. position under the statutory definition of executive capacity. Section 101(a)(44)(B) of the Act.

To be eligible for this immigrant visa classification as an executive, the petitioner must show that the beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all

⁴ Although the Petitioner does not provide an exact date for the cessation of operations, it does not appear to claim that the [redacted] restaurant was operational when the petition was filed on February 19, 2019.

⁵ The record includes evidence that the Petitioner employed eight individuals to work in the [redacted] restaurant the first quarter of 2019, the quarter in which the petition was filed, employed seven individuals to work in this restaurant the second quarter of 2019, and one individual in the third and fourth quarters of 2019. The employment documents do not indicate the exact dates the employee(s) worked in each month of the quarter or whether the work was part-time or full-time.

four of these elements, we cannot conclude that it is a qualifying executive position. If the petitioner establishes that the offered position meets all the elements set forth in the statutory definition, the petitioner must 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).

We also emphasize that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing, February 19, 2019, and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

A. Duties

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the Beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. Again, a beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

The Petitioner’s initial letter in support of the petition, sets out a vague and generic description of the Beneficiary’s proposed duties. In response to the Director’s RFE, the Petitioner provided the same description with the same allocation of the Beneficiary’s time (totaling 100%) and also added similarly generic duties the Beneficiary would perform in relation to the transportation business. The Petitioner does not specify that the Beneficiary will spend all of his time on the transportation business although the transportation duties themselves also total 100 percent of the Beneficiary’s time. Additionally, the Petitioner’s broad overview of the Beneficiary’s average day in the office shows the Beneficiary’s “meetings” relate primarily to the transportation business operations. We observe that when the Petitioner responded to the Director’s RFE on December 31, 2019, the Petitioner’s restaurant business does not appear operational.

Additionally, the Petitioner’s initial description of duties does not include the necessary detail to demonstrate what the Beneficiary will be expected to do on a daily basis. For example, the Petitioner indicates that the Beneficiary will “[f]ormulat[e] and direct[] the U.S. corporate operation, marketing, and financial policies and strategies . . . ” and will “[d]irect[] business development efforts to ensure the business growth of [the Petitioner] and supervis[e] the establishment, development and maintenance of a network of top-level business relationship [sic].” However, 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. The actual duties themselves will 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).

The Petitioner also states that the Beneficiary will direct and assign projects, directives, and instructions to subordinate managers, will oversee marketing efforts, will confer with administrative personnel, will monitor the development of human resource policies, will supervise the planning and development of policies, and oversee the division or department budget requests. However, the record does not include evidence that the Petitioner employed anyone to perform marketing efforts, administrative tasks, human resources tasks, or financial and budgetary tasks, when the petition was filed. The Petitioner does not explain these duties within the specific context of its organizational hierarchy and its business operations as the hierarchy and business operations existed when it filed the petition. As will be discussed further below, the Petitioner has not established that it has sufficient subordinate staff to manage and perform the day-to-day company functions, the Petitioner claims the Beneficiary will oversee, supervise, or direct.

The Petitioner's additional description of the Beneficiary's duties related to the transportation business shows the Beneficiary performing what appear to be operational tasks necessary to conduct business. For example, the Beneficiary will plan, improve, and optimize routes, will allocate resources according to transportation demand, and will ensure that the transportation schedules are completed. The record does not include probative evidence of transportation business workers who would perform these non-qualifying but necessary tasks. Further, the Petitioner notes that the Beneficiary will also make decisions on all major operational matters, seek external resources, establish strategic alliances, sign contracts, negotiate business deals, and participate in decision-making of the board of directors. However, even though the Beneficiary may exercise "wide latitude in discretionary decision making" in performing these tasks, such discretionary decision making alone is insufficient to establish that his actual duties would be primarily executive in nature. Rather it appears the Beneficiary is performing the necessary day-to-day duties to continue the Petitioner's business operations.

On appeal, the Petitioner also refers to several business actions the Beneficiary performed to transition the business from a restaurant business to a transportation company, such as signing leases, filing fictitious business name statements, and obtaining certificates of title and DMV registration for trucks purchased. These tasks are the ordinary and necessary tasks necessary to conduct the Petitioner's new business. As noted above, that the Beneficiary may perform these tasks as an owner or sole managerial employee does not establish that the Beneficiary will "direct" the organization or will primarily perform executive duties for the business.

To demonstrate executive capacity, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities and the Petitioner must prove that the Beneficiary will be primarily engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner's other employees. See, e.g., *Family Inc.*, 469 F.3d at 1316. The Petitioner has not established that it was a sufficiently complex organization, when the petition was filed and continuing throughout the pending adjudication, to support the Beneficiary in a primarily executive capacity.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act. Again, as discussed, the Petitioner must demonstrate

that the Beneficiary was eligible for the benefit sought as of the date the petition was filed, February 19, 2019, and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

The Petitioner's organizational chart submitted with the petition shows a general manager reporting to the Beneficiary and three divisions in turn reporting to the general manager.⁶ The office division includes a human resources employee, an accountant, and an assistant general manager. The Petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2019 does not identify the individual in the general manager position, the individual listed as the part-time accountant, or the individual listed as the human resources employee. The only individual listed on the Form 941 in the office division is the assistant general manager.⁷ This individual is not listed on the Forms 941 for the second, third, or fourth quarter of 2019. The [redacted] restaurant division is depicted on the organizational chart as including a kitchen manager/chef, an assistant manager, and ten position staff; the Form 941 for the first quarter of 2019 identifies eight position staff as well as the kitchen manager/chef and assistant manager. The Form 941 for the second quarter of 2019 includes the same individuals less one staff position. The third and fourth quarter Forms 941 delete the kitchen manager/chef and assistant manager and identify only one paid staff position. The organizational chart for the transportation division lists 10 drivers but the record does not include any documentary evidence supporting their employment during the 2019 year.

The Petitioner's staff when the petition was filed and for the subsequent quarter, is primarily concerned with operating the now closed restaurant. The record includes perfunctory descriptions, or no descriptions at all for these positions. The Petitioner has not shown how these individuals relieve the Beneficiary from significant involvement in the operational tasks required to operate the business. The record does not include evidence of individuals who performed the financial and administrative tasks of the restaurant division when it was open and who organizes the trucking division's routes and schedules and performs the financial and administrative tasks of this division.

In response to the Director's RFE, the Petitioner submitted an organizational chart showing the general manager reporting to the Beneficiary. The Petitioner claimed the general manager was hired "to assist [the Beneficiary] with supervising major functions in its restaurant business." The record does not include corroborating evidence of when this individual was hired and does not include evidence on the Forms 941 that she was paid in the first and second quarter of 2019, the period of time when the Petitioner had a limited restaurant operation.⁸ Additionally, although the Petitioner included a list of this individual's duties in response to the Director's RFE, the duties described are general and are insufficient to establish this individual would primarily perform managerial duties. On appeal, the Petitioner added a yet more generic description of this position, indicating the general manager would be involved in setting company goals and objectives, implementing policies and plans, supervising other lower-level management employees, and conducting performance reviews, as well as participating and making decisions in directing future expansion efforts. The record, however, does not include probative evidence demonstrating that the Petitioner had a sufficient number of lower-level

⁶ The Petitioner includes this organizational chart on appeal and labels it the 2019 organizational chart. The Petitioner also includes a revised organizational chart it labels as the 2020 organizational chart, which deletes the restaurant division and adds a repair logistics company and a management company as part of the transportation division.

⁷ The Petitioner does not include a position description for the individual employed as the assistant general manager.

⁸ The Petitioner on appeal asserts that the general manager had been in place since 2016; the Petitioner, however, does not explain the failure to include this individual on the Forms 941 for the first and second quarter of 2019.

management employees for the individual in this position to supervise. Further, the duties do not reflect the condition of the organization when the petition was filed and continuing throughout the pendency of the adjudication.

When examining the executive capacity of a beneficiary, USCIS reviews the totality of the evidence, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of a petitioner's business, the employment and remuneration of employees, and any other evidence contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy and artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive position. In this matter, when examining the totality of the record, the Petitioner has not established the Beneficiary's actual role in the business is primarily in an executive capacity as defined in the statute and regulations.

III. ADDITIONAL ISSUES

Although we are not making an adverse finding on the following issues, we note these issues must be addressed in any future proceedings. The Petitioner has not established the source of funds it used to pay the Beneficiary retroactively in support of its revision to the Beneficiary's 2018 IRS W-2. The Petitioner's 2018 tax returns reflect negative income after paying the Beneficiary significantly less than the proffered wage. These issues raise concern whether the Petitioner has the ability to pay the Beneficiary the proffered wage. We also note that on appeal, the Petitioner states that the Beneficiary made a \$51,000 investment into the Petitioner giving him a 51 percent ownership interest. However, the stock certificates submitted and the Petitioner's previous assertions identify a different individual owning 51 percent of the Petitioner. The new claim on appeal, if true, impacts the Petitioner's qualifying relationship with the Beneficiary's foreign employer.⁹ Finally, we point out that the current record does not include evidence that the foreign entity, a restaurant, continues to do business, a necessary element to establish that the Petitioner is a multinational company and thus eligible to petition for this immigrant visa. The Petitioner must resolve these deficiencies and inconsistencies in future proceedings.

IV. CONCLUSION

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its arguments regarding whether the Beneficiary was employed abroad in a managerial or executive capacity prior to his entry as a nonimmigrant. 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

⁹ The Petitioner previously claimed that [redacted] owned 51 percent of both the Petitioner and the Beneficiary's foreign employer, thus establishing the required qualifying relationship.

Petitioner has not established that more likely than not the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity.

ORDER: The appeal is dismissed.