



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

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

In Re: 18129412

Date: AUG. 03, 2021

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as a company owning and operating a bar and restaurant, seeks to employ the Beneficiary as its president 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 Texas Service Center denied the petition on multiple grounds, concluding the Petitioner did not establish that: 1) there is a qualifying relationship between it and the Beneficiary's former foreign employer, 2) the Beneficiary was employed in a managerial or executive capacity abroad prior to his entry into the United States as a nonimmigrant, and 3) the Beneficiary would be employed in a managerial or executive capacity in the United States.

On appeal, the Petitioner asserts that it and the foreign employer are majority owned by the Beneficiary, thereby qualifying them as affiliates according to the regulations. The Petitioner further submits additional supporting evidence on appeal, including an expert opinion, it contends demonstrates that the Beneficiary acted in an executive capacity in his former position abroad and that he would act in the same qualifying position in the United States.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal. The Petitioner did not sufficiently establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. Since this identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its appellate arguments regarding whether it had a qualifying relationship with the Beneficiary's former foreign employer and whether he was employed abroad in a managerial or executive capacity. *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).¹

¹ We acknowledge that United States Citizenship and Immigration Service (USCIS) records indicate that the Beneficiary was previously approved for L-1A intracompany transferee nonimmigrant visas filed by the Petitioner, a category largely mirroring the immigrant classification for multinational executives or managers. However, each petition filing is a separate

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, 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, that the beneficiary is coming to work in the United States for the same 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).

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue we will address is whether the Petitioner established that the Beneficiary would be employed in an executive capacity in the United States. The Petitioner does not claim on appeal that the Beneficiary would be employed in a managerial capacity in the United States. Therefore, we restrict our analysis to whether the Beneficiary would be employed in an executive capacity.

“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.

When examining the executive capacity of a given beneficiary, we will review the petitioner’s description of the job duties. The petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in an executive capacity. 8 C.F.R. § 204.5(j)(5).

A. Duties

To be eligible as a multinational 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 four of these elements, we cannot conclude that it is a qualifying executive position.

proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). The Director’s decision does not indicate whether they reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same evidence contained in the current record, their approval would constitute an error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Matter of Church Scientology Int’l*, 19 I&N Dec. 593, 597 (Comm’r 1988).

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 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 whether a given beneficiary's duties will be primarily executive, we consider the petitioner's description of the job duties, the company's organizational structure, the duties of a 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 a beneficiary's actual duties and role in a business.

The Petitioner stated it operates a bar and restaurant, and in response to the Director's request for evidence (RFE) and now on appeal, indicates that it had expanded into providing heating and air conditioning (HVAC) services. In support of the petition, the Petitioner listed some of the following duties for the Beneficiary:

- Direct and plan policies, objectives, activities of the Petitioner to ensure effective operations, maximize returns on investment and expand operations,
- Approve a growth strategy for the Petitioner with the objective of making it an independent profitable outfit,
- Ensure that new programs and strategies are effectively communicated,
- Approve long and short-term business goals for the executive vice president in regard to sales, service, finance, business partners, recruiting etc.,
- Approve required operations to evaluate performance of senior management in meeting objectives,
- Lead the executive vice president in determining areas of potential cost reduction, program improvement or policy change,
- Attend business meetings to establish new business contracts and maintain long-term collaborative relationships with key stakeholders, vendors and related organizations with the objective of expanding the number of restaurants,
- Oversee the Petitioner's business relationships and build and strengthen alliances and partnerships,
- Supervise implementation of good corporate governance practices and procedures,
- Monitor and enforce accounting/finance policies and procedures,
- Direct and coordinate the Petitioner's financial and budget activities and maximize investments,
- Ensure that the planned profitability of all products and services sold by the Petitioner is realized by enforcing sound financial management principals,
- Authorize funds to implement macro level policies and programs,
- Direct and oversee marketing, brand positioning, advertising and communication strategies, and
- Lead and development of marketing strategies.

In response to the Director's RFE, indicating that the Beneficiary's duty description was overly broad, the Petitioner provided a different duty description emphasizing the Petitioner's main focus to "revitalize the business through [the] expansion of products and services," specifically through the provision of "HVAC and appliances repair services." However, it is notable that the Beneficiary's

initial duty description, and the evidence provided in support of the petition, did not discuss the Petitioner's provision of HVAC, and related services, suggesting that it and the Beneficiary were not performing tasks specific to this claimed expansion at the time the petition was filed in April 2020. We note that the Petitioner must demonstrate the Beneficiary's eligibility as of the date the petition was filed, as such, we will primarily look to his stated duties at this time. The Petitioner 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).

Beyond the Petitioner's discussion of its new HVAC services, the Petitioner provided duties in response to the RFE largely similar to those provided in support of the petition. For instance, the RFE duties discussed the Beneficiary "exploring new business opportunities," cultivating "relationships with key stakeholders," working with the executive vice president on "potential cost reduction and program improvement plans" and "long and short-term goals," amongst other similar tasks.

The Petitioner submitted a U.S. duty description for the Beneficiary that does not credibly establish he would have been primarily engaged in the performance of qualifying executive-level duties as of the date the petition was filed. The Petitioner submitted generic executive-level tasks and responsibilities that did not sufficiently substantiate his actual daily tasks and his duty description could apply to nearly any executive acting any company within any industry. For instance, the Petitioner provided few specifics and little supporting documentation to corroborate the "plans, policies and objectives" the Beneficiary directed, the investments he oversaw, "new programs and strategies" he was coordinating at the time of the petition, or areas of "cost reduction, program improvement, or policy change" he implemented. Likewise, the Petitioner did not detail or document the problems the Beneficiary resolved through the executive vice president, "new business contracts" he put in place near to the date the petition was filed, "key stakeholders, vendors, and related organizations" he collaborated with, or "business relationships," "alliances," or "partnerships" he oversaw.

In fact, the Beneficiary's duty descriptions include little discussion of the business the Petitioner was operating as of the date the petition was filed, its bar and restaurant location. For instance, the Petitioner stated that the Beneficiary would devote 15% of his time to overseeing, directing, and monitoring marketing policies, including developing marketing strategies. However, the record includes no evidence of substantial marketing activities on the part of the Petitioner; in fact, its 2019 IRS Form 1065 U.S. Return of Partnership Income listed no expenses for marketing related activities, such as advertising or sales. Similarly, the Petitioner's 2018 IRS Form 1065 reflected that it only spent \$100 on "advertisement," and it included no other discernable expenses for marketing activities. Further, the Petitioner did not describe or document the marketing, "brand positioning," "advertising," and "communication strategies," the Beneficiary would be, or was, responsible for in his proposed role. In addition, the Petitioner stated that the Beneficiary would devote 15% of his time to overseeing and monitoring "finance policies," but again, there is little indication what "policies and procedures," "financial and budget activities," and "macro level policies and programs" he would direct related to one bar and restaurant location.

Although we did not expect the Petitioner to articulate and document every executive-level task to be performed by the Beneficiary, it is reasonable to expect that it would provide sufficient detail and documentation to sufficiently corroborate his performance of qualifying duties, particularly since it

asserts he acted in this role in the United States as an L-1A nonimmigrant for approximately four months prior to the date the petition was filed. As such, it would be reasonable to expect that there would be sufficient details and supporting documentation to substantiate the Beneficiary's executive-level tasks during this time, such as his direction of and delegation to his claimed managerial subordinates. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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).

On appeal, the Petitioner provides additional supporting documentation it claims demonstrates the Beneficiary's executive-level duties. However, this evidence is more reflective of the Beneficiary's substantial involvement in non-qualifying operational tasks directly related to the provision of goods and services rather than a focus on the broad goals and policies of the organization. For example, the Petitioner submits two checks written by the Beneficiary for just over \$500 paying for "wine" in February 2020 and another from January 2020, just prior to the date the petition was filed, paying for "beer." These checks suggest the Beneficiary's direct involvement in the operation of the Petitioner's bar and are particularly notable since its organizational chart as of the date the petition was filed included no staff devoted to its bar operations. Beyond this, the Petitioner provided little other supporting documentation related to the Beneficiary's activities near to the date the petition was filed.

In addition, the Petitioner provided substantial documentation indicating the Beneficiary's direct engagement in non-qualifying duties related to its new HVAC business after the date of the petition was filed. For instance, it submits a vendor application form executed by the Beneficiary listing the him as the contact within its billing department, as well as a another "Service Provider Information" sheet again showing him as the company's primary contact for services. Likewise, the Petitioner submitted screenshots of its website which also list the Beneficiary as the primary contact for customers seeking HVAC services. This additional documentation provided on appeal only leaves further uncertainty as to whether the Beneficiary would primarily perform qualifying executive-level duties related to broad goals and policies under an approved petition.

Whether the Beneficiary is an executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" executive. *See* sections 101(a)(44)(B) of the Act. Here, the Petitioner does not credibly articulate and document what proportion of the Beneficiary's duties would be executive functions and what proportion would be non-qualifying. The Petitioner submits evidence indicating the Beneficiary's duties as including both executive tasks and administrative or operational tasks but does not quantify the time he spends on these different duties. For this reason, we cannot determine whether the Beneficiary is primarily performing the duties of an executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Even though the Beneficiary holds a valuable position within the organization, the fact that he will manage or direct a portion of the business does not necessarily establish eligibility for classification as a multinational executive within the meaning of section 101(a)(44)(B) of the Act. The Beneficiary may exercise discretion over some of the Petitioner's day-to-day operations and possess some requisite level of authority with respect to discretionary decision-making; however, the position description alone is insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing and Executive Capacity

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

The statutory definition of the term “executive capacity” focuses on a person’s elevated position. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will “direct the management” of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the organization, major component, or function as the owner or sole managerial employee. 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.*

In support of the petition, the Petitioner provided an organizational chart showing that the Beneficiary would oversee an executive vice president supervising a “Vice President Planning” and a “Vice President Sales & Marketing.” The vice presidents were in turn shown to oversee another level of managers, including a general manager and a sales promotion manager. Below this level, the chart reflected yet another level of managers, including a “senior supervisor server” overseeing a subordinate and a “senior supervisor food runner” supervising an unidentified subordinate. Further, the chart showed a senior executive chef and catering manager overseeing a chef, assistant chef, cook assistant, and dishwasher.

However, certain discrepancies on the record leave question as to the credibility of the Petitioner’s organizational chart and whether it supported a structure including a president, three vice presidents, two other senior managers, and yet other supervisors at its one bar and restaurant location. For example, as discussed, the organizational chart includes no employees devoted to the Petitioner’s bar operations, presumably a substantial part of its business given that it operated a “sports bar.” In fact, the only documentation substantiating the Petitioner’s bar operations involves the Beneficiary apparently completing rather nominal purchases for beer and wine, leaving uncertainty as to his claimed executive-level role. Meanwhile, the Petitioner indicated that the Beneficiary would work closely with the executive vice president on higher level matters, yet there is no evidence of him coordinating with his subordinate or delegating goals and policies to him.

In fact, the Petitioner provided an invoice from March 2020 listing the executive vice president’s name related to approximately \$120 worth of pest control services and another invoice from February 2020 with the executive vice president’s name from a cable company totaling nearly \$550. Further, the duties of the Beneficiary’s lone subordinate, the executive vice president, are also generic like the Beneficiary’s duties, include little detail, again discussing unexplained “strategic plans,” “organizational management,” “policies and procedures,” and “product releases.” The provided

evidence does not credibly demonstrate that the Beneficiary oversees a subordinate vice president performing higher level managerial tasks as claimed.

Furthermore, the chart also included a vice president of sales and marketing and a sales promotion manager, as well as a general manager of its bar and restaurant. However, as we noted, the record includes no supporting evidence that the Petitioner had substantial marketing or promotional activities and its latest IRS Form 1065 reflected that it had no expenses for these claimed operations in the time immediately preceding the date the petition was filed. There is also no indication as to the “local-sales promotion,” “promotional campaigns,” and marketing program and strategies these asserted managers, along with the Beneficiary, would be involved with. In sum, these discrepancies and the vague nature of the duties of the Beneficiary’s claimed subordinates leaves substantial uncertainty as to the credibility of the Petitioner’s organizational chart as of the date the petition was filed, a chart including a president, three vice presidents, two other senior managers, and at least four other supervisors at one bar and restaurant location.

When considering the provided organizational chart in light of the Beneficiary’s generic duties and his apparent non-qualifying operational tasks, it appears more likely than not that he was directly engaged alongside his colleagues in operating its bar and restaurant location as of the date the petition was filed rather than primarily setting goals and policies from an elevated position within the organization. The Petitioner must resolve these inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Lastly, the Petitioner submits an expert opinion on appeal it contends supports a conclusion that the Beneficiary would act in an executive capacity in the United States. However, upon review of this opinion, it provides little additional probative value, as it merely restates the Beneficiary’s duties, the applicable regulations, and the other evidence on the record, and generically declares that he qualifies as an executive. The provided expert opinion includes little additional insight into the Beneficiary’s actual tasks or role and it is not clear what the asserted expert reviewed in making his conclusions about this matter. Further, the opinion does not address the documentation we discuss in this decision, including the substantial documentation provided on appeal reflecting the Beneficiary direct engagement in non-qualifying operational tasks or the discrepancies in the Petitioner’s provided organizational structure.

We may, in our discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int’l*, 19 I&N Dec. 791, 795 (Comm’r. 1988). However, we are ultimately responsible for making the final determination regarding a beneficiary’s eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* We may even give less weight to an opinion that is not corroborated or is in any way questionable. *Id.* Furthermore, merely repeating the language of the statute or regulations does not satisfy a petitioner’s burden of proof. *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).

For the foregoing reasons, the Petitioner has not demonstrated that the Beneficiary would act in an executive capacity in the United States.

ORDER: The appeal is dismissed.