



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

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

In Re: 19808519

Date: MAR. 9, 2022

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Manager or Executive

The Petitioner is engaged in providing marketing and business development services for [REDACTED] a [REDACTED] entity that sells paper products.¹ The Petitioner claimed three employees at the time of filing and seeks to permanently employ the Beneficiary as its president under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in the United States in a managerial or executive capacity. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. 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 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).

¹ The record contains evidence showing that [REDACTED] and [REDACTED], a Nigerian entity, jointly own the Petitioner with [REDACTED] owning 45% and the latter entity owning 55% of the Petitioner's stock.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The issue to be addressed is whether the Petitioner provided sufficient evidence in support of its claim that the Beneficiary would be employed in a managerial capacity and that he would assume the role of a function manager.

Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Under the preponderance of the evidence standard, the evidence must demonstrate that the [applicant's/petitioner's] claim is "probably true." *Id.* at 376. We will examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

"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.

The term "function manager" applies generally when a beneficiary does not primarily 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. A petitioner claiming that a beneficiary will manage an essential function 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). Upon review of the evidence, we find that the Petitioner has not adequately demonstrated that the Beneficiary meets the criteria described in the third prong of this list.

In determining whether a given beneficiary's duties will be primarily managerial, 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.

A. Staffing

First, we will discuss the Petitioner's organizational hierarchy and staffing. If staffing levels are used as a factor in determining whether an individual is acting in a managerial capacity, we take into account the reasonable needs of the organization in light of the overall purpose and stage of development of

the organization. *See* section 101(a)(44)(C) of the Act. An individual will not be deemed an executive or manager under the statute simply based on their position title or because they direct the organization or manage a function as the owner or sole managerial employee.

The record shows that the Petitioner was established in 2010 and has employed the Beneficiary in the United States as its president since 2011. In a supporting cover letter, the Petitioner stated that the Beneficiary will manage the “marketing, business development, sales support and sales facilitation function” with the assistance of a support staff that includes two employees in the United States – a customer service and administrative assistant and a business development manager. The Petitioner also identified five third-party logistics companies as providers of shipping, delivery, and warehousing services; it claimed that the Beneficiary “receives considerable support from employees of affiliated companies in [redacted] and India” and listed two offshore positions – an assistant manager of operations based out of [redacted] and a documentation assistant based out of India. Although the Petitioner provided stock certificates showing that [redacted], the [redacted] entity, owns 55% of the Petitioner’s stock, it did not provide evidence documenting a staffing arrangement with that entity, nor did it elaborate on or document the nature of its claimed affiliation to the Indian entity, which was the claimed employer of the Petitioner’s documentation assistant.

In response to the Director’s notice of intent to deny (NOID), the Petitioner provided a statement discussing the “import business model” it would use to provide [redacted] with marketing and business development services in the United States in exchange for a fee. This business arrangement is briefly discussed in an informal letter from October 2020, where [redacted] chief executive stated that the Petitioner “is fully responsible for marketing, business development, sales support and sales generation” of [redacted]’ products in the United States. The Petitioner also stated that [redacted] would handle “the operational, financial, logistical, and administrative function.” Although the Petitioner provided a formal agreement specifying the services it would provide and the fee structure that dictates the terms of its compensation, the agreement was executed in June 2018 and therefore was not in effect in March 2018 when this petition was filed. Likewise, the Petitioner provided an agreement showing that it retained the services of an independent sales agent in July 2020, approximately two years after this petition was filed. It is noted that 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). Since neither the service agreement nor the independent sales contract was in effect at the time of filing, these documents would not establish the Petitioner’s eligibility at that time.

Furthermore, the Petitioner has not established that a sales staff comprised of a single employee – in this case the business development manager – was sufficient to relieve the Beneficiary from having to perform critical operational tasks, such as selling and marketing the client’s paper products, to allow him to instead perform primarily in a managerial capacity. According to its 2018 tax return, the Petitioner generated approximately \$3.7 million in gross sales in the year the petition was filed and claims on appeal that it generated “over \$10 million in sales through August 2020,” while paying only \$231,640 and \$195,200 in wages and salaries during the 2018 and 2019 tax years of which approximately \$145,000 accounted for the Beneficiary’s salary. As such, it is reasonable for us to inquire into how the Petitioner was able to achieve these revenue figures if only one employee was performing the sales and marketing function, as appears to have been the case in 2019. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion.

See, e.g., Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner's NOID response also includes an organizational chart depicting a new staffing structure comprised of only the Beneficiary and a business development manager. The chart indicates that the Petitioner eliminated the customer service and administrative assistant position, which had been part of the U.S. organizational hierarchy at the time of filing and continued to be part of the organization into May 2018, according to the Petitioner's 2018 payroll summary. The Petitioner did not further discuss this change or explain who took over the customer service and administrative assistant's job duties, which included generating customer invoices, preparing product samples for the Beneficiary's meetings with clients, performing data entry, and other office and administrative tasks. Despite the Petitioner's claim that it has been adequately staffed to support the Beneficiary in a managerial position since this petition was filed, the record as currently constituted does not support this assertion. As noted above, the record shows that the Petitioner currently consists of the Beneficiary and one other employee; as such, it is not clear that the Beneficiary primarily performs in a managerial capacity as opposed to performing some of the operational tasks that were previously assigned to the defunct position.

As for the remainder of the staff, the new organizational chart shows two employees as part of the "offshore team" and identifies them as "Business Development Manager at [redacted]" and "Documentation Executive at [redacted]"; these new positions appear to have replaced the assistant manager of operations and documentation assistant, both of which were listed among the Petitioner's support staff at the time of filing. The Petitioner did not explain the practical impact of these changes on the organization and provided only one set of job descriptions for the entire "offshore team," rather than specifying the job duties of each position. The Petitioner also did not explain the terms of its staffing arrangement, nor did it provide evidence showing that it has a formal staffing arrangement with an offshore company, namely [redacted], which compensates the employees claimed to be part of the Petitioner's "offshore team."² The record contains email communications that were sent by these [redacted] employees; the emails contain waivers stating that the latter entity "provides market liaison support services" but that it "is not agent of any Seller." Although the disclaimers indicate that [redacted] has a role with respect to the paper products the Petitioner markets and sells, the record contains no documentation clarifying that role. The record equally lacks evidence specifying the relationship between the Petitioner and [redacted] nor does it contain evidence showing the existence of an official staffing arrangement, whereby the latter is contractually obligated to staff the petitioning entity. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

On appeal, the Petitioner references *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016), arguing that its reliance on offshore staffing is similar to that of the petitioner in the cited case and that it warrants a favorable outcome. Because we find that the circumstances in the matter at hand are notably different from those in the cited case, we disagree with the Petitioner's argument. One

² On appeal, the Petitioner provided paystubs for the two employees who are identified on the Petitioner's organizational chart as comprising the "offshore team."

critical distinction is that the record in *Matter of Z-A-* included evidence that an 8-person overseas staff was “exclusively” dedicated to supporting the work of the beneficiary. That record also established that the overseas personnel were employed by a related entity within the “wider” qualifying organization which the petitioner was part of. Neither factor applies in the present matter. Rather, despite claiming that [REDACTED] which employs the overseas personnel, is an affiliated entity, the Petitioner has provided no evidence documenting the nature of the claimed affiliation and thus it has not established that it and [REDACTED] are part of a qualifying organization. There is also no evidence that the overseas staff is “exclusively” dedicated to supporting the U.S. endeavor, nor does the record contain evidence of a contractual arrangement wherein [REDACTED] formally agreed to provide the Petitioner with offshore personnel in exchange for some form of consideration.

In sum, the Petitioner did not elaborate on the Petitioner’s staffing at the time of filing and has instead primarily focused on the staffing changes that have since taken place. *See* 8 C.F.R. § 103.2(b)(1). As such, the record lacks sufficient evidence demonstrating that the Petitioner’s staff at the time of filing was sufficient to support the Beneficiary in a managerial position that would involve primarily managerial tasks. Further, despite claiming that it has and continues to rely on a two-person offshore staff to support the U.S. operation and relieve the Beneficiary from various operational tasks, the Petitioner did not provide sufficient evidence documenting this staffing arrangement. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

In light of the evidentiary deficiencies discussed above, the Petitioner has not met its burden of establishing that the Beneficiary will primarily work in a managerial position. The Petitioner has not adequately addressed how it planned to relieve the Beneficiary from having to perform operational tasks at and subsequent to the time of filing. As such, we cannot conclude that the Petitioner had sufficient personnel to relieve the Beneficiary from having to primarily engage in daily administrative and operational tasks associated with sales, business development, customer support, and delivery logistics.

B. Job Duties

Next, we will address the Petitioner’s description of the Beneficiary’s job duties in his proposed position. *See* 8 C.F.R. § 204.5(j)(5).

In its supporting cover letter, the Petitioner stated that the Beneficiary is responsible for creating and overseeing the implementation of business strategies and directing goals that will further the company’s efforts to expand its U.S. client base. In response to the NOID, the Petitioner provided another job description, which was comprised of ten broader categories with each category further broken down into job duties and the percentage of time the Beneficiary would allocate to each duty. Although the supplemental job description was considerably lengthier and contained more information than the general statement included in the initial supporting statement, many of the listed duties were

vague and focused more on the Beneficiary's discretionary authority than the specific underlying tasks the Beneficiary would actually perform in the regular course of business.

For instance, the Petitioner stated that strategic planning for "growth and diversification," a category to which 15% of the Beneficiary's time would be allocated, is comprised of the following: 1) "Shape the course of the organization . . . and develop a clear picture" of the company's course "over the next 2-3 years"; 2) "Convert the strategic vision into measurable objectives and performance targets"; 3) "Craft a strategic plan with annual sales and marketing budget"; 4) "Set tactical goals/targets on a quarterly basis for the marketing & business development team"; 5) "Plan strategically for actions to respond to changing industry conditions" such as supply and demand and government regulations; 6) "Plan strategically for products diversification based on the supply sources available"; 7) "Brainstorm ideas and inputs with the Board of Directors"; and 8) "Formulate hiring plans" to extend the Petitioner's "marketing reach." Despite conveying a strong sense of the Beneficiary's discretionary authority over the company's business objectives, these job duties lack meaningful content revealing the nature of the actual tasks the Beneficiary would perform on a daily or weekly basis within the context of a two-person sales and marketing operation. The Petitioner did not elaborate on its "strategic vision" or explain how the Beneficiary determines goals and targets.

The Petitioner stated that another 8% of the Beneficiary's time would be spent making financial decisions, which would include establishing annual financial objectives, assessing options based on financial viability, discussing financials with a certified accountant, discussing financial statements and tax returns with the board of directors, and exercising discretion over operational expenses. Again, these duties continue to stress the Beneficiary's discretionary authority, but they provide little insight as to what actions the Beneficiary would undertake in the normal course of business. The Petitioner was similarly vague in describing the Beneficiary's role with respect to sourcing and procurement, stating only that the Beneficiary provides "strategic guidance . . . to effectively source and procure" and directs the pricing and negotiation process.

Further, most of the job duties comprising the category of overseeing marketing and business development also lack adequate detail as to specific tasks underlying the following broadly stated duties: providing the Petitioner's board of directors with "strategic guidance . . . to effectively market" the client's paper products and directing the board "to do market research and groundwork" in preparation to add products to the marketing plan; "direct[ing] the marketing & business development team" to expand the client base and provide them with direction in final pricing and negotiation; planning "for regular offensive moves to strengthen" gain a competitive edge; and "direct[ing] the head of the [o]ffshore team . . . to source products effectively." While these duties indicate that the Beneficiary has oversight and control over the marketing, pricing, and sourcing of the products the Petitioner sells, it is unclear precisely how they translate into daily or weekly tasks within the context of the Petitioner's operation.

The fact that the Beneficiary will manage a business does not necessarily establish eligibility for classification as a multinational manager in a managerial capacity within the meaning of section 101(a)(44)(A) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. To make this determination, we rely on specific information about a beneficiary's actual daily tasks as an important indication of whether their duties are primarily managerial 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). Here, more than 40% of the Beneficiary's job description is comprised of job duties that are vague and preclude an understanding of the actual underlying activities the Beneficiary would undertake. While the job description indicates that the Beneficiary exercises discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority to make decisions about its financial and business matters, the record does not establish that the actual tasks the Beneficiary will perform are primarily managerial in nature. The actual duties themselves reveal the true nature of the employment. *Id.*

In addition, the job description also contains job duties that do not readily qualify as managerial, but rather are more operational in nature. Such duties include conducting client meetings, attending networking events, and communicating with supplier mills and freight forwarding companies.

Although no single job duty represents the primary portion of the Beneficiary's job description, a determination of the Beneficiary's eligibility hinges on a comprehensive analysis, which includes consideration of the entire job description and the organizational hierarchy within which those duties are to be performed. Having applied this wholistic approach in the matter at hand, we find that the record contains evidentiary deficiencies that preclude a favorable determination. As discussed above, the record contains a deficient job description and ambiguities concerning the Petitioner's organizational hierarchy.

In light of these deficiencies, we conclude that the Petitioner has not established that it would more likely than not employ the Beneficiary in a managerial capacity where the primary portion of his time will be spent performing managerial job duties.

ORDER: The appeal is dismissed.