



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

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

In Re: 19939446

Date: MAR. 17, 2022

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Manager or Executive

The Petitioner identifies itself as an “investment and retail trades” operation and seeks to permanently employ the Beneficiary as its general manager under the first preference immigrant classification for multinational executives or managers.¹ *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: 1) it has a qualifying relationship with the Beneficiary’s foreign employer; 2) the Beneficiary’s foreign employer continues to do business; 3) the Beneficiary was employed abroad in a managerial or executive capacity; and 4) the Beneficiary will 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 because the Petitioner did not establish that the Beneficiary will be employed in the United States in an executive capacity.² Because the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner’s appellate arguments regarding the remaining issues. *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).

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

¹ We note that the Petitioner’s supporting cover letter refers to “the temporary nature” of the Beneficiary’s assignment and states that the Beneficiary plans to return to India once he completes “building” the U.S. business. As indicated, however, this matter involves the filing of an immigrant petition, which deals with permanent employment.

² The Petitioner claims that the Beneficiary’s U.S. employment would be in an executive capacity.

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 issue to be addressed is whether the Petitioner provided sufficient evidence in support of its claim that the Beneficiary's proposed position of general manager would be in an executive capacity.³

"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.

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.

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 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.

A. Job Duties

The petition form states that the Petitioner was established in July 2012 and lists the business type as "investment and retail trades." The Petitioner stated that it was generating a gross income of approximately \$426,000 and had a seven-person staff at the time of filing.

In a separate cover letter, the Petitioner provided a job description stating that the Beneficiary will be responsible for the following: 1) planning, developing, and establishing and overseeing the

³ Because the Petitioner does not claim that the Beneficiary would be employed in a managerial capacity, we will only discuss whether the proposed position fits the statutory criteria of executive capacity.

implementation of business and strategic policies and objectives; 2) overseeing production, sales, and the “financial operations”; 3) planning and directing “business activities” and coordinating activities with “other department heads”; 4) building awareness and facilitating client development; 5) recruiting employees and implementing hiring policies; 6) managing accounts payable and receivable; and 7) managing staff, preparing work schedules, and assigning job duties. The Petitioner did not list specific policies or objectives the Beneficiary has or plans to implement, it did not describe its financial operations and hiring policies, nor did it specify what types of business activities the Beneficiary would plan, direct, and coordinate. The Petitioner also did not specify which employees the Beneficiary would manage or clarify which employees within its organization can be deemed “department heads.” In addition, the Petitioner did not explain how the Beneficiary would “manage” accounts payable and receivable or establish that this is an executive, as opposed to an operational, task. Likewise, the Petitioner did not establish that employee recruitment is an executive-level task.

The Petitioner also provided a business plan stating that its “primary goal” was to become “recognized and reputed” in the U.S. tobacco market by importing tobacco products to and exporting similar products from India. The business plan focused exclusively on the Petitioner’s blueprint for buying and selling tobacco products in “all major tobacco stores,” at meetings “with major [U.S.] wholesalers,” and through phone and online orders; the plan did not discuss the Beneficiary’s role in a company whose main source of revenue at the time of filing appears to have been the operation of two gas station/convenience stores.⁴ It is therefore does not appear that the business plan’s job description for the general manager of an importer and exporter of tobacco products conveys critical information about the Beneficiary’s proposed job duties at the time of filing.

After reviewing the evidence, the Director issued a request for evidence (RFE) asking the Petitioner to provide a detailed job duty breakdown for the Beneficiary’s proposed position. The Director asked that the Petitioner refrain from grouping job duties together into joint categories and for the Petitioner instead to list specific daily job duties and indicate what percentage of time the Beneficiary would allocate to each duty.

In response, the Petitioner provided an updated business plan that reflects a different business model that is based on the objective of acquiring “5 to 10 retail business [*sic*] within 5 to 10 years projection.” The Petitioner did not define the Beneficiary’s role in this expansion process, state the specific tasks the Beneficiary would perform, or indicate the portion of time he would allocate to any non-executive job duties that are associated with the anticipated expansion. Furthermore, although the evidence indicates that the Petitioner’s two gas station/convenience stores were adequately staffed, it is unclear who, if not the Beneficiary, would perform the operational tasks associated with the Petitioner’s endeavor to expand its investment holdings by acquiring more retail operations.

Although the Petitioner provided a new job description, it did not elaborate on the Beneficiary’s role or adequately describe the Beneficiary’s job duties within the context of a business whose objective is to acquire and manage retail operations such as gas station/convenience stores and lube centers.

⁴ The record contains leases for business premises, licenses for retail tobacco and food sales, and business invoices for two gas station/convenience store operations located in [REDACTED] Georgia and [REDACTED], Georgia, respectively. Although the Petitioner provided an organizational chart which shows the Beneficiary at the top of an organization that included a third gas station/convenience store in [REDACTED] Georgia, the record shows that the Petitioner sold that business in 2014, prior to the filing of this petition.

Further, the Petitioner did not comply with the Director's instructions for an itemized list of specific daily activities and instead provided a job description that was primarily comprised of vaguely stated job duties that were grouped together with a percentage of time assigned to the group, rather than to individual duties. For instance, the Petitioner stated that 40% of the Beneficiary's time would be spent supervising activities of the management and sales staff by monitoring sales, reviewing budgets and marketing material, approving "various deals," and evaluating "general performance." Although these broadly stated duties convey a sense of the Beneficiary's authority over the Petitioner's business and finances, they provide no meaningful content about the Beneficiary's underlying tasks and the means by which he would monitor sales or the parameters he would use to gauge "general performance," a term that is also vague and requires further elaboration. Likewise, the Petitioner did not clarify what is meant by "various deals" or who would be party to those deals. Also, some of the listed job duties did not adequately represent the Beneficiary's daily activities in the course of a business that was operating two gas station/convenience stores. Namely, the Petitioner did not establish that reviewing budgets and marketing material qualify as activities that are commonly performed on a daily basis within the context of the Petitioner's operation.

The Petitioner allocated another 40% of the Beneficiary's time to establishing and implementing corporate policies and objectives. The Petitioner stated that this duty would include deciding whom and when to hire, determining the quantity and type of products to import and purchase, and setting sales targets and "operational policies for various departments." Again, it is unlikely that hiring and firing personnel or setting sales targets and operational policies are true representations of daily tasks to be performed by the Beneficiary, particularly given that the two gas station/convenience stores it owned and operated at the time of filing were staffed with their own managers. 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).

On appeal, the Petitioner argues that the businesses it operated were "self-contained" and did not require the Beneficiary's daily involvement. This claim, however, does not explain which tasks the Beneficiary would actually perform on a daily or weekly basis and whether the tasks he would primarily perform would be of an executive nature.

According to the key objective described in the amended business plan, the Petitioner seeks to expand its operation by investing in the acquisition of various retail stores. However, the record indicates that at the time of filing the Beneficiary was the only employee available to perform job duties to further that objective, as the remainder of the staff were designated to work at one of the two retail outlets the Petitioner already owned. Given these circumstances, it would appear that the Beneficiary would be required to perform both executive and non-executive functions to further the Petitioner's objective to expand its operation. We note that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in an executive capacity. *See, e.g.,* section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). That said, the fact that the Beneficiary will direct the management of the organization does not necessarily establish eligibility for classification in an executive capacity within the meaning of section 101(a)(44)(B) of the Act. As noted above, eligibility for this classification requires that the duties of

the proposed position be “primarily” executive in nature. Section 101(A)(44)(B) of the Act. While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, his actual duties may not be primarily executive in nature. To make this determination, we rely on specific information about a beneficiary’s specific activities, information that the RFE attempted to elicit and which the regulations require the Petitioner to submit. *See* 8 C.F.R. § 204.5(j)(5).

Here, the Petitioner provided a deficient job description that is so general that it could describe virtually any executive or senior management position with any company. The job description offers only general information that focuses on the Beneficiary’s discretionary authority but says little about the actual tasks he would perform in the course of the Petitioner’s daily business operation. Thus, while we acknowledge that the Beneficiary is the Petitioner’s most senior employee and would therefore have authority to establish plans, policies, and objectives and make decisions regarding its finances and other business matters, the Petitioner has not established that these types of responsibilities would primarily occupy the Beneficiary’s time.

In light of the deficiencies discussed above, we cannot conclude that the Beneficiary would primarily perform job duties of an executive nature.

B. Staffing

Next, 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 an executive 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 petition form shows that the Petitioner claimed seven employees at the time of filing. Although the Petitioner’s initial supporting evidence includes an organizational chart depicting the Beneficiary in the senior-most position, the chart does not appear to reflect the Petitioner’s organization at the time of filing as it includes a [redacted] Georgia retail outfit, which the Petitioner sold in 2014, prior to this petition’s filing in 2015. As such, it is unclear who, aside from the Beneficiary, the Petitioner employed at the time of filing, or which positions the claimed seven employees filled.

In response to the RFE, the Petitioner provided an organizational chart, which shows the Beneficiary at the top of an organization that is comprised of two gas station/convenience store operations. The chart shows that the operations have respective staff of four and six employees, which including a mix of managers, sales associates, and cashiers. The Petitioner did not clarify how these staffing structures would elevate the Beneficiary to an executive position that would primarily involve executive duties. The Petitioner’s updated business plan focuses on the Beneficiary’s role with respect to the objective to expand the Petitioner’s operation by purchasing more retail stores. In furtherance of this objective, the Petitioner refers to a personnel plan that includes a “Department Manager,” a “Marketing Department Manager,” a tobacco department manager, and sales manager. However, these position titles were not included in any of the Petitioner’s organizational charts and there is no evidence that they were filled at the time of filing. A petitioner must establish eligibility at the time of filing; a

petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In general, the Petitioner highlights the fact that the two retail operations it owned at the time of filing were fully staffed, indicating that the Beneficiary would therefore be relieved from having to perform non-executive job duties. We disagree. As discussed earlier, the Petitioner provided only a vague job description and did not specify the actual executive tasks the Beneficiary would perform on a daily or weekly basis within the context of its business operation. The Petitioner also did not establish that the Beneficiary would be relieved from having to perform various operational and administrative tasks, such as paying bills, maintaining financial records, ordering inventory, and handling shipping logistics, all of which are generally required within the context of a retail operation. Lastly, it is unclear who would assume the operational tasks associated with expanding the Petitioner's operation through further investments. The Petitioner did not establish that it has the staff to relieve the Beneficiary from having to perform the underlying non-executive tasks associated with seeking out and purchasing additional retail outfits to expand the Petitioner's operations.

Generally, we find that no single job duty represents the primary portion of a beneficiary's job description. However, 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 an executive capacity where the primary portion of his time will be spent performing executive job duties.

ORDER: The appeal is dismissed.