



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

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

In Re: 19803702

Date: MAR. 28, 2022

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Manager or Executive

The petition form states that the Petitioner is engaged in the business of “sale of herbal products, importing of toys, restaurant”¹ and seeks to permanently employ the Beneficiary as its “executive director” 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 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.

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

¹ In a supporting cover letter, the Petitioner’s general manager stated that the Beneficiary will “divide” his time between operating a restaurant – its most recent acquisition – and engaging in the wholesale or health and herbal products and teas, which was claimed to be the “primary business.” The general manager indicated that the Petitioner was in the process of determining “initial feasibility” of the toy importing venture and was not actively engaged in business pursuits associated with that venture at the time of filing.

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).

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.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner initially referred to the Beneficiary's proposed position as "managerial/executive," claiming that the position incorporates elements of both statutory definitions. However, a petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each set of criteria as put forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity. In this instance, although the Petitioner has claimed that the Beneficiary's duties would be "both executive and managerial," the statement provided in response to the request for evidence (RFE) states that "[w]e consider [the Beneficiary]'s duties to be primarily executive in nature. Accordingly, in this decision, we will address the issue of whether the Petitioner provided sufficient evidence demonstrating that the Beneficiary's proposed position would be 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.

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. 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 states that the Petitioner was established in 2015 and had a six employees at the time of filing. However, in a supporting cover letter, the Petitioner claimed that it “currently employs 11 workers.” The Petitioner also depicted an 11-person staff in its organizational chart, which shows a four-tier staffing structure. The Beneficiary is depicted at the top tier followed, by the general manager at the second tier, who is depicted as overseeing a third-party accountant, a warehouse clerk, a buyer, and a sales manager, all depicted at the third tier of the hierarchy; the fourth tier depicts two full-time and three part-time salespeople, all subordinate to the sales manager.

The Petitioner did not provide evidence to substantiate an 11- person staff at the time of filing, a claim which, as noted, is inconsistent with information contained in the petition itself. Rather, the Petitioner provided wage and tax documents that also highlight the staffing inconsistency. Namely, the Petitioner’s third quarterly tax return for 2019 shows that seven employees were claimed during the three-month period that includes the month this petition was filed; likewise, the Petitioner’s 2019 payroll journal also lists seven employees, which is consistent with the seven Form W-2s, Wage and Tax Statements, the Petitioner issued to its employees in 2019. The Petitioner has neither acknowledged nor resolved these inconsistencies in the record with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The supporting cover letter also includes information about the Beneficiary’s proposed position, stating that it will involve controlling business operations for “60-70%” of the Beneficiary’s time and managing “business acquisitions” for the remaining “30-40%”; regarding the latter, the Petitioner point to its acquisition of a 52% ownership interest in a restaurant business and stated that the Beneficiary’s focus would be overseeing the management of a restaurant, its only “acquisition” at the time of filing. The Petitioner stated that the Beneficiary would execute this role by assuming the following responsibilities: Directing and overseeing budget and finances; negotiating contracts; formulating goals and strategies towards business development and setting financial goals; planning and overseeing “administration of weekly management”; setting policies for employee compensation, business development, and marketing; establishing or modifying “business procedures” and “marketing procedures” and directing restaurant promotion; and conducting budget oversight through monthly and annual budget reviews.

The Petitioner also discussed its intent to “diversify existing business,” indicating that the Beneficiary’s decision-making role will be critical in this pursuit. The Petitioner also stated that the Beneficiary would have ultimate authority over all personnel matters, including hiring, firing, and setting work schedules with respect to its herbal supplement business and the restaurant. However, the Petitioner did not establish that overseeing the Petitioner’s restaurant is consistent with the statutory definition of executive capacity, nor did it provide an organizational chart showing how the existing investment fits within its organizational hierarchy. Further, the Petitioner did not demonstrate that its staffing structure at the time of filing was adequate to relieve the Beneficiary from having to perform the non-executive duties associated with its endeavor to expand and diversify its existing business. Although the Petitioner indicated that the general manager would be tasked with researching and investigating potential business ventures to determine “initial feasibility,” the general manager’s job description indicates that managing the Petitioner’s herbal supplement business would be the general manager’s focus; the job description made no mention of job duties outside the realm of managing the herbal supplement business. Likewise, the remainder of the Petitioner’s staff at the time of filing was similarly tasked with duties that strictly pertained to the herbal supplement business, thereby leaving

us to question who would conduct the research and perform other operational tasks that may be necessary for the Beneficiary to determine the feasibility of an investment. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376. 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).

Regarding the Beneficiary's primary role of controlling business operations, the Petitioner stated that the Beneficiary would assume responsibility over supply markets, sales and marketing, and "business processes and specifications" and listed job duties associated with each of these three elements. It stated that the Beneficiary's responsibility over supply markets would involve inspecting markets and suppliers in [] and on the east coast by making yearly visits to "major customers and important suppliers," attending trade shows, and gauging market demand by reviewing reports created by the sales manager, buyer, and general manager. The Petitioner went on to discuss the Beneficiary's responsibility over sales, marketing, and finances, stating that the Beneficiary will be required to do the following: Review monthly company data, such as sales reports, financial statements, and research summaries created by subordinate staff; analyze marketing trends; make "corporate decisions"; adjust sales strategy based on recommendations from the general manager; assess staff performance; and "direct" the general manager to make new plans that correspond with adjusted sales targets and profits. Lastly, with respect to "business processes and specifications," the Petitioner stated that the Beneficiary would "direct" the general manager to implement "adjustments," review documents, "verify" that employees are complying with "the company's business processes and corporate objectives," and modify the company's "personnel programs."

After reviewing the record, the Director issued a notice of intent to deny (NOID) which questioned the whether the Beneficiary would be employed in a managerial or executive capacity. Although the Director acknowledged the Beneficiary's discretionary authority, he highlighted the general lack of clarity as to the Beneficiary's job duties and lack of details explaining how he would direct the management of the organization. The Director also noted that the record lacks evidence that the Petitioner has "official or written policies or goals" and thus questioned whether meets the prong of the statutory definition of executive capacity that requires a beneficiary to establish the organization's goals and policies. In general, the Director determined that there was a lack of evidence that the Beneficiary would be employed in an executive capacity and that he would perform primarily executive-level job duties within the context of the Petitioner's operation.

In response, the Petitioner reiterated the claim that the Beneficiary's duties would be primarily executive and that in assuming an executive role he would set the company's policies and goals, be responsible for discretionary making decisions, and direct the management of "daily functions," such as sales and marketing of products, without having to perform the non-executive duties of those functions. Although the Petitioner offered a sample list of actions the Beneficiary executed in 2020 to show that the Beneficiary will "plan, direct and control" the herbal supplement operation, it did not specify the Beneficiary's daily or weekly activities and listed multiple items that were vague and not conducive to an understanding of the Beneficiary's actual tasks within the context of the Petitioner's operation. For instance, the Petitioner stated that the Beneficiary made investment decisions, created a financial plan consistent with "the pricing tax system," and managed costs based on human resources

plans. However, it identified only one investment decision – the decision to invest in a restaurant – and provided no information about its current human resources plan or the Beneficiary’s financial plan, nor did it define “the pricing tax system” or explain the relevance of such a system to the U.S. operation. The Petitioner stated that the Beneficiary reviewed pay and bonus structures to understand “trends in U.S. employment” and made changes to the existing “personnel system,” but it did not describe its existing “personnel system” or explain how an understanding of employment trends is relevant to the Beneficiary’s executive’s responsibility to direct the management of the organization and create its goals and policies. The Petitioner’s claim that the Beneficiary adjusted “division of roles” to create personnel plans consistent with “corporate strategy” is also vague and conveys no meaningful information about the Beneficiary’s actual tasks, as the Petitioner did not define its “corporate strategy,” explain the process for adjusting employees’ roles, or identify the factors considered in making those adjustments and creating personnel plans. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or 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).

The Petitioner also stated that the Beneficiary took time to review reports containing various data to gauge market demand, adjust monthly and quarterly sales strategies and targets, create budgets, and assess staff performance. Although understanding relevant data may be a prerequisite for making certain business decisions, the Petitioner did not establish that reviewing market trends, adjusting sales strategies and targets, or creating budgets would be among the types of activities the Beneficiary would undertake on a daily or weekly basis, or that the Petitioner’s needs would be best served if the Beneficiary were to perform these activities as a routine part of his regular work week. The Petitioner also stated that the Beneficiary would “review and conform” its “business processes and specifications.” Although the Petitioner provided a document describing the elements of its business process, the Beneficiary’s role in this process appears to be limited and the record does not indicate a practical need for the Beneficiary to take action regarding the business processes and specifications as part of a daily or weekly routine. Likewise, the Petitioner’s claim that its business processes will require the Beneficiary to make personnel decisions and “adjust personnel programs” is not accompanied by evidence that he will engage in these activities in the routine course of business, particularly given the claim that the Beneficiary’s role is to provide the general manager with “monthly guidance” on these issues, thus indicating that the general manager will make the adjustments.

In addition, the Petitioner provided a list of business decisions the Beneficiary made in his capacity as the executive director and president, including which new products to sell, which staffing adjustments should be made, which business to invest in, and which business goals to incorporate in a two-year plan, which was also subject to the Beneficiary’s approval. However, the Petitioner did not elaborate on the underlying tasks the Beneficiary performed as part of this decision-making process or state how much time the Beneficiary would devote to decisions like these in the regular course of business. Further, although the Petitioner referred to the Beneficiary’s active role in issuing directives to the U.S. staff “to research potential businesses” for future investments, the Petitioner appears to have had no designated employees to carry out such directives at the time of filing. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376. Given the staffing ambiguity described herein, there is insufficient evidence to show that the Beneficiary’s role in the Petitioner’s expansion endeavors would be limited to merely making executive decisions on the basis of research and analysis presented to him. As such, we cannot rule

out the possibility that the Beneficiary's role would include operational tasks, such as gathering the data necessary to make a feasibility determination.

On appeal, the Petitioner asserts that it demonstrated the Beneficiary's final decision-making authority over company functions. However, 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. 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. 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.*

Here, 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, these elements alone are not sufficient to establish that the Beneficiary's actual duties would be primarily executive in nature. To make this determination, we rely, in part, on a detailed description of the beneficiary's job duties, information that each petitioner is required to submit. *See* 8 C.F.R. § 204.5(j)(5). Although the Petitioner argues that it adequately explained how the Beneficiary would oversee and direct the general manager, we disagree. Despite highlighting the Beneficiary's unfettered authority over the Petitioner's finances, business matters, and personnel, the Petitioner's supporting evidence includes a deficient job description that lacks critical information about the specific activities that would be part of the Beneficiary's routine in the daily or weekly course of the Petitioner's operation. Job duties, such as formulating budgets and financial forecasts, establishing and revising business strategies, and reviewing performance reports, are so general that they are devoid of meaningful content and could be attributed to virtually any executive or senior management position with any company that sells products or services. While we acknowledge that the Beneficiary is the Petitioner's most senior employee and therefore has authority to establish policies and objectives and make decisions regarding all aspects of the business, the Petitioner has not established that these executive responsibilities would primarily occupy the Beneficiary's time.

Finally, we note that 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 lacks an adequate job description and contains ambiguities concerning the Petitioner's organizational hierarchy. As such, 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 would be spent performing executive job duties.

ORDER: The appeal is dismissed.