



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

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

In Re: 20596856

Date: MAY. 26, 2022

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as the operator of a franchised restaurant location, seeks to permanently employ the Beneficiary as a food and beverage manager in the United States 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, concluding the Petitioner did not establish that: 1) it had a qualifying relationship with the Beneficiary's foreign employer¹, 2) the Beneficiary would be employed in a managerial or executive capacity in the United States, 3) the Beneficiary was employed in a managerial or executive capacity abroad, and 4) it had the ability to pay the Beneficiary's proffered wage. The matter is now before us on appeal. On appeal, the Petitioner contends it has established the Beneficiary's eligibility as a function manager.

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 since the Petitioner did not 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 with respect to the Director's other grounds for denial. *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 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.

¹ The Director further concluded that the Petitioner and foreign employer were not a part of the same multinational organization based on the determination that it did not demonstrate a qualifying relationship.

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 A MANAGERIAL CAPACITY

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

“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, 8 U.S.C. § 1101(a)(44)(A).

The Petitioner solely contends that the Beneficiary would qualify as a function manager, and not as a personnel manager. The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.” *See* section 101(a)(44)(A) of the Act. The term “function manager” applies generally when a beneficiary does not 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. If a petitioner claims that a beneficiary will manage an essential function, it 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).

When examining the managerial 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 a managerial capacity. 8 C.F.R. § 204.5(j)(5).

A. Duties

To be eligible as a multinational manager, the Petitioner must show that the Beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(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 managerial position.

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 managerial 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 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.

The Petitioner stated in support of the petition that it is a "franchised branch" of the foreign employer and a "premier South Indian chain of non[-]vegetarian restaurants" based in New Jersey. The Petitioner listed the following general duties for the Beneficiary as its proposed food and beverage manager:

- Manage the opening and closing of the kitchen
- Prepare, cook and present food, quickly and efficiently, meeting our standards
- Assist in keeping the kitchen clean, hygienic and tidy, at all times
- Work safely around kitchen equipment and monitor and deal with any maintenance issues
- Manage all kitchen-related office administration and third-party contractors
- Manage and maintain correct staffing levels
- Identify and take an active role in the recruitment of new staff members
- Use food development plan to improve the sales and profitability of the restaurant
- Maintain wastage through correct product measurement
- Maintain personal knowledge by completing in-house training, attending courses and completing workbooks
- Always adhere to all company policies and procedures
- Carry out instructions given by the management team and head office

In addition, the Petitioner listed certain percentages of time the Beneficiary devoted to different broadly cast responsibilities and included underlying tasks within each category:

Quality Control 35%

- While reporting to the Operations Manager, take responsibility for setting the expectation for all kitchen team members to maximize productivity
- Responsible for speed and accuracy of the team
- Responsible for the development and operation of their team to support one of the most critical factors in our success, food quality
- Consistently monitor food temperature of hot food as well as [e]nsuring that our cold good is stored according to standards
- Responsible for food safety
- Perform basic repairs as needed to the kitchen equipment

Kitchen Safety and Equipment Maintenance 15%

- Manage the day-to-day operation, identify and solve real problems, improve performance
- Ensure consistent and accurate records are kept for temperature logs
- Monitor/manage waste daily
- Manage food cost
- Manage inventory rotation and product usage standards
- Communicate with Operations Manager on basic repairs and upkeep to the facility

Personal Management 20%

- Controls the head cook, grill cook, Indian & Tandoor cook and the assistant cooks
- Adept at making all the chettinad food preparations
- Thorough knowledge of our recipes and food preparation procedures
- Promotional readiness and existing ongoing readiness of subordinates
- Training of qualified team members to expand the operational efficiency of all shifts

Daily Operations: Housekeeping Kitchen 20%

- Checking stock levels and ordering supplies
- Helping in any area of the kitchen when circumstances dictate
- Deciding the menu, inventory and material management
- Authorized to decide the menus and their prices for all outdoor catering and in house party orders

Handling Kitchen Order Tickets 10%

- Independently handles the kitchen smoothly during busy hours by helping and passing the kitchen order tickets
- Handles the party orders and outdoor catering orders and assisting to complete in the kitchen without any complaints

The Beneficiary's duties and the submitted supporting evidence indicate his primary involvement in non-qualifying operational duties related to operating the Petitioner's kitchen rather than managerial-level tasks overseeing a defined function within the organization. For instance, the Beneficiary's duties stated that he would be regularly responsible for opening and closing the kitchen, preparing, cooking and presenting food, assisting in keeping the kitchen clean, dealing with maintenance issues, maintaining accurate stocking levels, and managing wastage. Likewise, the Beneficiary's duty description included other apparent non-managerial duties, such as him monitoring the temperature of hot foods, ensuring cold food is stored properly, performing basic repairs to kitchen equipment, keeping temperature logs, handling inventory rotation, and communicating repairs to the operations manager. Similarly, the duty description stated that the Beneficiary would be tasked with being adept at all food preparation and recipes, checking stocking levels, ordering supplies, passing order tickets to the kitchen, and handling and completing party and catering orders.

Whether the Beneficiary is a managerial employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See* sections 101(a)(44)(A) of the Act.

Here, the Petitioner does not document what proportion of the Beneficiary's duties would be managerial functions and what proportion would be non-qualifying. The Petitioner lists the Beneficiary's duties as including some asserted managerial tasks, but many administrative or operational duties, and it does not sufficiently quantify the time he would spend on each. In sum, the Beneficiary's duty description primarily includes non-qualifying operational tasks directly related to preparing foods, keeping the kitchen clean, supplying the kitchen, taking and completing orders, among other similar tasks he either performs or completes alongside his asserted coworkers. For this reason, we cannot determine whether the Beneficiary would primarily perform the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, the Petitioner contends that the Director did not give sufficient "deference" to an expert opinion submitted on the record from a professor of food and beverage and hospitality management. The professor concluded that the Beneficiary's position was that of a function manager. However, the provided expert opinion lists the same duties discussed above reflecting the Beneficiary's primary performance of non-qualifying operational level tasks and provides little detail as to his claimed qualifying managerial level duties. For instance, beyond the discussed duty description, the professor emphasizes the Beneficiary "leading projects," being responsible for assigning tasks to his team members, "spearhead[ing]...development and progress of all initiatives related to kitchen operations," overseeing the "design and execution of strategic planning and processes," and developing new business objectives. In addition, in concluding that the Beneficiary's position would be managerial, the professor points to him managing relationships with third-party vendors, developing and revising project plans and business strategies, and creating and disseminating "strategic roadmaps."

However, the expert opinion and the record includes little detail and supporting documentation to substantiate the Beneficiary's performance of these claimed managerial duties, such as the projects he led, initiatives he spearheaded, strategic plans and processes he designed, business objectives he developed, third-party vendors he coordinated with, or strategic roadmaps he created and disseminated. Although we do not expect the Petitioner to articulate every specific managerial task or document his performance of every managerial duty, it is reasonable to expect that it would provide sufficient credible detail and documentation to properly substantiate his primary performance of qualifying managerial duties. Further, there is no supporting evidence to demonstrate the Beneficiary delegating non-qualifying operational tasks to the asserted employees within his function. This lack of detail and documentation is noteworthy considering the record appears to indicate that the Beneficiary has been acting in his purported managerial role since 2017.² Specifics are clearly an important indication of whether a beneficiary's 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).

Therefore, the submitted expert opinion and other supporting evidence does not sufficiently establish the Beneficiary's asserted managerial position, and we disagree that the Director erred by not giving it proper "deference," as the Petitioner contends on appeal. We may, in our discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in

² The petition was filed in February 2017. The Petitioner submitted IRS Forms W-2, Wage and Tax Statements, for the Beneficiary reflecting that he was paid \$28,050 in 2017, \$46,378.57 in 2018, and \$48,857.14 in 2019. Further, a letter from the Petitioner's accountant submitted on appeal states that the Beneficiary was paid a salary of \$47,138.65 in 2020.

evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988).

Even though the Beneficiary holds as a managerial title and manages or directs a portion of the business does not necessarily establish eligibility for classification as a multinational manager within the meaning of section 101(a)(44)(A) of the Act. 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; however, the position description alone is insufficient to establish that her actual duties would be primarily managerial in nature.

B. Staffing, Function Manager

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 its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act.

The Petitioner submitted conflicting evidence related to its staffing levels leaving substantial uncertainty as to whether the Beneficiary's claimed function existed when the petition was filed, and whether it was, and is, sufficiently staffed to relieve him from primarily performing the non-qualifying operational tasks widely discussed in his duty description. In the Form I-140, the Petitioner stated that it had 25 employees, while an organizational chart submitted in support of the petition showed only 12 employees, including the Beneficiary and the managing partner. The organizational chart also reflected that the Beneficiary would oversee a front office supervisor overseeing a bartender, a cashier, a "busser/runner," and an order taker. Further, the chart indicated that the Beneficiary would supervise a head chef overseeing a "Chettinad Chef" supervising a dishwasher, and that he would also supervise a "Dosa/Parotta Chef" overseeing a butcher/kitchen helper.

However, the IRS Form 941, Employer's Quarterly Federal Income Tax Return dated closest to the time the petition was filed from the fourth quarter of 2016 reflected that it paid wages to only four employees. This leaves substantial question as to who was performing the various operational tasks inherent in the positions listed underneath the Beneficiary, including running the bar, taking payments and orders, delivering food to customers, and preparing food, all duties emphasized in the duty description. Further, the Petitioner provided no supporting evidence to substantiate the employment of contractors to fulfill these operational roles, despite suggesting that it engaged contractors when needed.

In response to the Director's request for evidence (RFE), the Petitioner provided little evidence as to the staffing of its organization, such as a list of its employees and contractors and their duties, as indicated by the Director in the RFE. In fact, the Petitioner submitted additional evidence leaving further doubt as to whether its was sufficiently staffed to support the Beneficiary's claimed function. For instance, the Petitioner provided a state quarterly wage form from the second quarter of 2020 reflecting that it paid wages to only three employees, one being the Beneficiary and the other the front office supervisor listed in its only submitted organizational chart. Meanwhile, an IRS Form 941 from the third quarter of 2020 showed that it had paid wages to only two employees. Again, the record

included no other supporting evidence to support that it employed contractors to operate the restaurant and the Beneficiary's food and beverage function at that time.

The conflicting documentary evidence as to the Petitioner's staffing leaves substantial uncertainty as to whether the Beneficiary had a kitchen and beverage function to oversee as of the date the petition was filed through to this adjudication, a function it claimed included operational level employees to relieve him from non-qualifying tasks. In fact, the expert opinion emphasized by the Petitioner on appeal pointed to "a number of professional-level personnel to carry out the day-to-day operations of the food and beverage function," including an operational manager, branch manager, kitchen manager, several types of cooks and assistants, dishwashers, amongst other typical restaurant employees. However, the submitted evidence, both from the date the petition was filed and thereafter, reflects that the Petitioner had few employees to fulfill these various roles and to make up the Beneficiary's asserted function. Indeed, the expert opinion discusses a subordinate kitchen manager and kitchen supervisor, leaving further uncertainty as to the Petitioner's assertion that it would also require the Beneficiary's food and beverage manager role. Again, the Petitioner must resolve 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). 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).

As noted, the Petitioner only contends that the Beneficiary would qualify as a function manager, and not as a personnel manager. However, as discussed, the Petitioner did not establish that the Beneficiary's claimed function existed when the petition was filed, or thereafter, based on the conflicting and insufficient evidence specific to its staffing levels. Furthermore, even if it demonstrated that the Beneficiary's asserted function existed when the petition was filed, it did not demonstrate that he would be primarily tasked with managerial tasks overseeing a function rather than performing non-qualifying operational duties. See *Matter of G- Inc.*, Adopted Decision 2017-05.

Therefore, for the foregoing reasons, the Petitioner has not established that the Beneficiary would be employed in a managerial capacity in the United States.

ORDER: The appeal is dismissed.