



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

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

In Re: 27190893

Date: AUG. 10, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, a furniture retail and wholesale business, seeks to permanently employ the Beneficiary as its CEO 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 a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish it would employ the Beneficiary in an executive capacity. The decision reflects that the Director considered the Beneficiary's stated job duties, the nature and scope of the Petitioner's business, and evidence related to its organizational structure and staffing levels in reaching this conclusion. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

On appeal, the Petitioner asserts that the Director failed to apply the preponderance of the evidence standard and reached a decision that "is contrary to law regulation, and prior policy." In this regard, the Petitioner asserts the Director "incorrectly concluded that the Beneficiary's subordinate did not serve in a managerial position solely based on the wage reflected on his W-2." The Petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that it would submit a brief and additional evidence to our office within 30 days of filing the appeal on February 28, 2023. The record reflects that the Petitioner submitted no additional materials to date, and we now consider the record complete.

We adopt and affirm the Director's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). The Director thoroughly reviewed and analyzed the

Petitioner's claim that the Beneficiary would be employed in an executive capacity as defined at section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). The Director evaluated the Beneficiary's position descriptions, evidence of the nature and scope of the Petitioner's business, and documentation relating to the company's staffing and organizational structure, noting that there were unresolved discrepancies in the record relating to some of the subordinate positions. The Director acknowledged that the responsibilities attributed to the Beneficiary generally fall within the statutory definition of executive capacity but concluded that the Petitioner did show that it had sufficient staff to relieve him from involvement in the day-to-day operational, administrative, and other non-executive tasks associated with operating the business. Accordingly, the Director determined that the Petitioner did not meet its burden to establish that the Beneficiary's actual tasks would be primarily executive in nature.

The Petitioner generally challenges the denial by contending that the Director did not apply the preponderance of the evidence standard. However, it does not articulate with any specificity how the Director failed to do so. The Petitioner also asserts that the Director incorrectly determined that one of the Beneficiary's direct subordinates is not a managerial employee based on the wages reported on the employee's 2021 IRS Form W-2. While we agree that a determination regarding the nature of a position is not solely reliant on the employee's reported wages, we note that the Director did not deny the petition based on a conclusion that the Beneficiary would not be supervising subordinate managerial employees.¹ The Petitioner's brief statement in support of the appeal does not otherwise contest the Director's reasoning or conclusions.

Upon review, we agree with the Director that the Petitioner has not established it would employ the Beneficiary in an executive capacity. A petitioner must establish eligibility for the requested benefit at the time of filing and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner, which operates two retail furniture stores, provided an organizational chart at the time of filing in March 2021. The chart shows that the Beneficiary's direct subordinates would include two store managers, each responsible for one of the company's retail locations. The Petitioner indicated one manager supervises three departments (logistics, purchasing and sales) and six store employees in total, while the other store manager supervises three store employees responsible for accounting, sales, and logistics. When the Petitioner responded to a request for evidence (RFE) in October 2022, it submitted an organizational chart indicating that its [redacted] California store had no store manager,² and instead employed two department managers and a total staff of nine employees, while its second store employed only a store manager and an accountant. Although the Petitioner's overall employee count remained between 9 and 12 full- and part-time employees between the time of filing and the date of the RFE response, no explanation was provided for the change in organizational structure. Moreover, the record shows that the stores have comparable operating hours (open daily for over 50 hours per week) and would reasonably have similar staffing needs.

¹ We note that the employee in question, the sales manager at the Petitioner's [redacted] California store location, appears to have worked for only seven months in 2021, which would account for them earning significantly less than their claimed \$30,000 annual salary. An employee list submitted in response to the RFE indicates that this individual was hired in November 2020, and this may have led to confusion regarding their status during 2021.

² The Director observed that the individual originally identified as the store manager of the Petitioner's [redacted] store was identified as a "sales & display specialist" in the Petitioner's RFE response.

Given that one of the Petitioner's furniture stores was staffed by only a store manager and an accountant, the Director determined that the Petitioner did not show it had sufficient staff to relieve the Beneficiary from involvement in the day-to-day operational and administrative tasks of its retail business. As noted, the Petitioner has not addressed this determination on appeal or explained how the Director applied an incorrect standard in adjudicating the petition. We also observe that the record indicates that the Petitioner is engaged in online as well as retail sales and it does not claim that any of its staff perform duties related to its e-commerce functions.

Further we note that the Petitioner submitted position descriptions for subordinate staff which appear to be inconsistent with its operations. For example, the Petitioner indicates that the Beneficiary will supervise store managers who oversee purchasing, sales, marketing, and customer service staff, but at the time it responded to the RFE, it had no store manager position at one of its locations, and no staff for the store manager to supervise at its second location. The position description for the sales manager position indicates that the role requires "a significant amount of travel" (including international travel), "organizing events such as fashion shows," and coordinating sales with "production," a department that does not exist within the organization. In addition, the Petitioner indicates that its part-time retail furniture sales employees perform higher-level duties such as "formulating sales policies, practices and procedures," and researching, analyzing, and disseminating market intelligence information. The lack of realistic, probative descriptions for the subordinate staff, when considered with other inconsistencies mentioned by the Director, undermines the Petitioner's assertion that the Beneficiary would be relieved from significant involvement in the day-to-day operations of its business.

As the Director observed, the fact that the Beneficiary will direct the business and occupy the senior position in the petitioning company does not necessarily establish his eligibility for classification as a multinational executive within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. While the Petitioner submitted a job description that mirrors the statutory definition of executive capacity and indicated that the Beneficiary will have the requisite level of authority with respect to discretionary decision-making, the job description must be viewed along with evidence of the nature and scope of the business and its staffing and organizational structure. Here, the evidence does not support a determination that the Petitioner would, more likely than not, require the Beneficiary to perform primarily executive functions.³ Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

³ Although not addressed by the Director, we acknowledge that the Petitioner provided evidence that the Beneficiary is also the beneficiary of an L-1A nonimmigrant petition that was approved while this petition was pending. Each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions. Therefore, the fact that the Beneficiary was granted L-1A status is not binding, where, as here, the facts do not support approval of the immigrant petition. Further, we are not bound by a decision of a service center or district director. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001).