



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

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

In Re: 28184048

Date: AUG. 30, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a wholesale steel trading and exporting business, seeks to permanently employ the Beneficiary as its “President & 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).

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. 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.

I. LAW

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).

II. ANALYSIS

The issue to be addressed in this decision is whether the Petitioner provided sufficient evidence demonstrating that the Beneficiary would be employed in an executive capacity.¹

The statutory definition of the term “executive capacity” focuses on a person’s elevated position. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of an organization or major component or function thereof. 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.*

The Petitioner must establish that the Beneficiary will be employed in an executive capacity. *See* 8 C.F.R. § 204.5(j)(3). Based on the statutory definition of executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. Section 101(a)(44)(B) of the Act. The Petitioner must also prove that the Beneficiary will *primarily* be engaged in executive 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).

Beyond the Beneficiary’s job duties, we examine the company’s organizational structure, the duties of the 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 the Beneficiary’s actual duties and role in a business. Accordingly, we will discuss evidence regarding the Beneficiary’s job duties along with evidence of the nature of the prospective employer’s business and staffing levels.

A. Job Duties

The petition in this matter was filed in November 2020 and was accompanied by a supporting cover letter in which the Petitioner was described as a stainless-steel exporter whose operation involves the use of metal service centers and a network of logistics, warehousing, and metal distributors located throughout the United States. The Petitioner discussed plans to expand its operation and provided information about [REDACTED] its U.S.-based subsidiary, including the subsidiary’s anticipated role in the Petitioner’s operations and the subsidiary’s projected start in January 2021. The Petitioner stated that while it would focus on imports and exports, its subsidiary would focus on distribution of stainless steel within the construction, agriculture, and manufacturing industries.

¹ The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity.

In discussing the Beneficiary's role within the U.S. organization, the Petitioner provided two job descriptions, including a job duty breakdown listing 17 job duties and their respective time allocations. The second job description states that the Beneficiary "exercises the ultimate executive duties" and discusses those duties within the context of the statutory definition of executive capacity. Although there is some overlap between the two job descriptions, the Petitioner did not explain how they correspond with one another and a number of job duties are listed in one job description or the other, but not both, thus precluding a clear understanding of the proposed job duties. For instance, of the 17 duties listed in the job duty breakdown, none mention forecasting data, meeting with potential clients, creating and overseeing the execution of marketing plans, contracting for warehousing and logistics, or coordinating sales and purchases.

The Petitioner also provided a business plan containing two additional iterations of the Beneficiary's job description. Of those job descriptions lists 15 job duties, which partly overlap with the job descriptions discussed above. The other job description in the business plan apportions a percentage of time to the following six job duties:

- 25% to answering phone calls and emails from employees and from prospective and current "industry partners."
- 20% to meeting with prospective steel buyers and sellers.
- 20% to meeting with staff, individually and collectively.
- 5% to hiring staff.
- 15% to training staff.
- 15% to traveling to conferences.

In response to the Director's request for evidence (RFE), the Petitioner provided yet another iteration of the Beneficiary's job description, adding a seventh job duty – "motivating sales persons [sic] for new business development" – to the above list of six job duties. This new iteration also contains reconfigured time allocations for several of the duties, stating that 10% of the Beneficiary's time would be allocated to the seventh job duty that was newly added while reducing the time previously allocated to answering phone calls and emails from 25% to 20%, and similarly reducing the time allocated to attending conferences from 15% to 10%. We further note that the percentage breakdown that was comprised of 17 job duties allocated no time to answering phone calls and emails, meeting with prospective steel buyers and sellers, or training staff, thus identifying further inconsistencies among the various iterations of job descriptions.

In order to demonstrate eligibility for the immigration benefit sought herein, the Petitioner is required by regulation to "clearly describe the duties to be performed" by the Beneficiary under an approved petition. 8 C.F.R. § 204.5(j)(5). Here, the Petitioner has provided multiple iterations of the Beneficiary's job duties, thereby confusing rather than clarifying what the proposed job duties would be. Although on appeal the Petitioner has resubmitted the 17 job duties that were listed in the initial supporting statement, the record contains unresolved inconsistencies that the Petitioner created by submitting different iterations of job duties to describe the Beneficiary's proposed employment. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating that discrepancies must be resolved through the submission of independent, objective evidence). Because the Petitioner has not adequately conveyed an understanding of the Beneficiary's proposed job duties, we cannot determine what tasks

will comprise the proposed position and thus we cannot conclude that the Beneficiary would be employed in an executive capacity performing primarily executive job duties. *See* section 101(a)(44)(B) of the Act (requiring that one “primarily” perform the enumerated executive duties).

B. Staffing

Next, we will address the Petitioner’s staffing. In support of the petition, the Petitioner provided an organizational chart depicting its staffing hierarchy and that of its U.S. subsidiary. Although the Petitioner claimed eight employees in the petition form, it provided an organizational chart depicting a total of nine employees, including the Beneficiary, who is depicted as head of the petitioning organization and its subsidiary, whose operation is shown to be comprise of five positions below the Beneficiary. The organizational chart shows that the Petitioner’s own staff at the time of filing included a trade manager who was overseeing a quality manager, a controller/CFO who was overseeing an accounts assistant, and an office manager who was overseeing a logistics coordinator and an “export documentation” position, the latter of whom is depicted as overseeing an office assistant. Although the Petitioner stated that it hired an employee to fill the vice president position at the U.S. subsidiary, it is unclear how the U.S. subsidiary would have impacted the Petitioner’s operations at the time of filing given that the subsidiary was not scheduled to commence operations until January 2021. We note that only those facts already in existence as of November 2020 will be considered in determining the Petitioner’s eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1) (mandating that all eligibility requirements for the immigration benefit must have been satisfied from the time of the filing and continuing through adjudication).

Further, the Petitioner provided employee paystubs from August, September, and October 2020 showing that seven paystubs were issued in August and eight were issued in September and October, respectively, even though the Petitioner’s organizational chart listed nine positions, including the Beneficiary. Although the initial supporting statement continued to list [redacted] as its “export documentation” employee, a paystub was not issued to this individual after August 2020, thus indicating that this position was either vacant or eliminated by November 2020, when this petition was filed. In response to the RFE, the Petitioner was given an opportunity to supplement the record with additional wage evidence, such as a payroll summary, Form W-2, wage and tax statements, or other wage evidence pertaining to the Beneficiary’s claimed subordinates. Although the response included an updated organizational chart showing that it had undergone staffing changes since filing the instant petition, the Petitioner did not provide a payroll summary or other wage documents establishing precisely whom it employed and which positions were filled at the time of filing.

On appeal, the Petitioner maintains the claim that it employed [redacted] in the “export documentation” position at the time of filing and continued to do so until July 2021, when that individual’s employment was terminated. However, as indicated above, the submitted paystubs do not show that the Petitioner paid wages to [redacted] after August 2020 and no evidence was provided to substantiate the Petitioner’s claim that it employed [redacted] or that the “export documentation” position was still part of the Petitioner’s staffing structure at the time of filing. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (establishing that supporting evidence is required to demonstrate that a claim is “probably true”). If the Petitioner did not employ an “export documentation” employee, as the record indicates, it is unclear how the operational duties that were previously assigned to that position were redistributed among the Petitioner’s remaining employees

and whether such redistribution impacted the Beneficiary's proposed position at the time of filing. Although the appeal brief includes a list of the Petitioner's claimed employees and their respective job duties, the list indicates that several employees were hired after November 2020. The updated list therefore appears to reflect the Petitioner's staffing structure at the time of the appeal rather than at the time this petition was filed.

While it is reasonable for an organization to undergo staffing and/or organizational changes after filing a petition, the Petitioner must establish that the petition merits approval based on the operation and staffing structure it had in place at the time of filing. 8 C.F.R. § 103.2(b)(1). Thus, despite any organizational developments or operational progress the Petitioner may have experienced since filing this petition, evidence of such developments is of limited probative value as it does not demonstrate that the petition merited approval *at the time of filing*. *Id.*

Further, the fact that a beneficiary will manage or direct a business does not necessarily establish eligibility for classification as multinational executive who would be employed in an executive capacity 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. Section 101(A)(44)(B) of the Act. While a beneficiary may exercise discretion over a company's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making, their actual duties may not be primarily executive in nature. Here, the Petitioner did not provide sufficient evidence establishing whom it employed at the time of filing. As such, we cannot conclude that at that critical time the Petitioner was adequately staffed and thereby able to relieve the Beneficiary from having to allocate his time primarily to non-executive job duties.

III. CONCLUSION

In light of the deficiencies discussed above regarding the Beneficiary's job description and the Petitioner's staffing, we conclude that the Petitioner did not establish that it was prepared to employ the Beneficiary in an executive capacity at the time this petition was filed.

ORDER: The appeal is dismissed.