



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

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

In Re: 28103137

Date: AUG. 30, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a restaurant business, seeks to permanently employ the Beneficiary as its executive manager 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 the record did not establish that: (1) the Beneficiary would be employed in the United States in a managerial or executive capacity and (2) the Beneficiary was employed abroad 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).

The statute defines “managerial capacity” as 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).

“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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The primary issue we will address is whether the Petitioner established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

To establish that a beneficiary is eligible for immigrant classification as a multinational manager or executive, a petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definitions at section 101(a)(44)(A) or (B) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in either statutory definition, the petitioner must then prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside other company employees. See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006).

In determining whether the beneficiary’s duties will be primarily managerial or executive, we consider the required description of the job duties, the company’s organizational structure, the duties of the beneficiary’s subordinate employees, the presence of other personnel 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 the business.

On the Form I-140, Immigrant Petition for Alien Worker, and in a cover letter accompanying the petition, the Petitioner indicated that it sought to employ the Beneficiary as its “executive manager,” noting that she would be responsible for its “daily kitchen operations.” The Petitioner stated that it had been seeking “someone who has Chinese culture background, cooking and managerial experience to fill the position and that the Beneficiary is a perfect candidate based on her “strong restaurant background and experience.” At Part 11 of the Form I-140, the Petitioner described her proposed duties as follows:

- Ensuring kitchen staff complies with health authority policies and procedures.
- Training and supervising kitchen staff to maintain [the company’s] standard policies and procedures.

- Maintaining safety and food quality standards.
- Organizing schedules.
- Ordering food inventory to meet daily consumption needs while staying within budget limitations.
- Keeping track of employee hours and providing payroll data and records.
- Developing new dish offerings to meet customer's satisfaction.

This brief job description indicates that the Petitioner intended to have the Beneficiary perform a combination of supervisory duties with respect to kitchen staff at one or both of its restaurant locations,¹ as well as non-supervisory operational and administrative tasks such as developing recipes and ordering inventory. However, the job description did not clearly define the Beneficiary's proposed tasks and the amount of time she would spend on specific duties, nor did it reflect that the position satisfies all four elements of the statutory definitions of managerial capacity or executive capacity at section 101(a)(44)(A) and (B) of the Act.

The petition was not accompanied by evidence demonstrating the nature and scope of the Petitioner's business, its staffing levels, and its organizational structure.² As such, the Petitioner's initial submission did not establish that the Beneficiary's supervisory duties would entail supervising and controlling the work of supervisory, professional, or managerial employees and the authority to hire and fire or recommend these as well as other personnel actions with respect to the employees she would supervise. *See* section 101(a)(44)(A)(ii) and (iii) of the Act. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." *Id.* The Petitioner's description of the Beneficiary's duties did not indicate, in the alternative, that she would be employed as a function manager.³

Finally, despite offering the Beneficiary a position titled "executive manager," the duties described did not fall within the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act. The Petitioner's brief description of duties on the Form I-140 does not convey that the Beneficiary would be involved in directing the management of the organization or a major component or function, establishing its goals or policies, or exercising wide latitude in discretionary decision making, much less primarily performing these high-level tasks.

¹ The Petitioner, which operates two restaurants, provided the address of its [redacted] California restaurant at Part 1 of the Form I-140 and indicated that the Beneficiary would work at that address.

² The Petitioner stated on the Form I-140 that it employed 10 workers as of July 2021 when the petition was filed but did not provide evidence documenting its staffing and management structure.

³ 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).

In a request for evidence (RFE), the Director asked the petitioner to provide a statement clearly describing the Beneficiary's proposed managerial or executive duties, including an explanation of the specific daily tasks involved with the completion of each responsibility and the percentage of time to be spent on individual tasks. The Director also requested: an organizational chart clearly identifying the Beneficiary's proposed position, the job titles, job duties, educational level and salary for persons working in the Beneficiary's immediate department or team; evidence of wages paid to employees (including evidence leading up to the filing of the petition in July 2021); and a description of the company's products and services.

In response to the RFE, the Petitioner provided a copy of an offer letter dated June 1, 2021, stating that it had offered the Beneficiary the position of "Chief Operating Officer" with a proposed start date of July 1, 2021. The letter describes the role as "a senior-level executive who provides management, leadership and vision to ensure the organization meets its short- and long-term objectives." The description includes a list of 14 duties that bear no resemblance to the job description for "executive manager" provided on the Form I-140, and the Petitioner offered no explanation for the discrepancies. For example, the offer letter states that the Beneficiary would be responsible for establishing policies that "improve and promote company vision and culture," evaluating company performance and recommending strategies to improve results, improving operating procedures, designing operating strategies, enhancing the efficiency of operational processes, overseeing recruitment, and overseeing daily business and administrative operations. None of these duties were attributed to the Beneficiary at the time of filing.

Although some of these responsibilities appear to generally paraphrase the statutory definition of executive capacity, as noted by the Director, the description does not identify the nature of the Beneficiary's day-to-day tasks within the context of the Petitioner's restaurant business and therefore does not establish that such tasks would be primarily executive or managerial in nature. 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).

Further, the purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). A petitioner may not make material changes to petition that has already been filed to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Therefore, when responding to an RFE, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to a beneficiary, when the petition was filed, merits classification as a managerial or executive position. *See* 8 C.F.R. § 103.2(b)(1).

Here, the information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather changed the job title and duties. Although the job offer letter ostensibly pre-dates the filing of the petition, the Petitioner did not identify the offered position as "chief operations officer" with the duties listed in the June 1, 2021, letter, when it filed this petition in July 2021. As noted, the Petitioner did not initially attribute any executive or senior management duties to the Beneficiary, but rather indicated that she would be

directly supervising kitchen staff, ordering inventory, enforcing health and safety procedures, handling employee schedules, and developing new dishes. In fact, many of the duties, as initially described, overlap with those later attributed to the company's lead chef positions. The Petitioner offered no explanation and has not resolved this inconsistency 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).

Further, although the Petitioner provided an organizational chart in response to the RFE indicating that the Beneficiary would have four direct reports (two lead chefs and two lead servers) and 24 indirect reports as of December 31, 2022, the record does not document the company's staffing levels or organizational structure at the time it filed this position in July 2021, when the Petitioner claimed only 10 employees and indicated that the Beneficiary's role would involve supervision of only kitchen staff. Although the Director requested evidence of wages paid to employees for the period leading up to the filing of the petition in July 2021, the Petitioner submitted only one IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2022, as well as copies of its IRS Forms W-2 and W-3 for 2022.⁴ This evidence does not meet the Petitioner's burden to establish eligibility for the requested benefit at the time of filing.

Accordingly, the record does not establish the number or types of employees working for the company at the time of filing, or the management structure in place at that time. As such, the Petitioner did not meet its burden to demonstrate that the Beneficiary's claimed supervisory duties would involve the supervision and control of managerial, supervisory, or professional employees, as required by section 101(a)(44)(A) of the Act, nor did the Petitioner claim that her role would include the authority to hire and fire staff or to recommend these and other personnel-related decisions. Further, the initial description indicated that the Beneficiary would perform a mix of supervisory, operational, and administrative tasks, and did not contain sufficient detail to establish that the Beneficiary would primarily perform duties that fall within the statutory definition of managerial capacity.

Because the Petitioner did not document its staffing and structure as of the date of filing, the record also does not establish that the company employed sufficient staff to relieve the Beneficiary from involvement in additional day-to-day non-managerial tasks associated with its kitchen operations. As noted, the Petitioner did not articulate a claim that the Beneficiary would be employed as a function manager and did not identify any duties in its initial description that are consistent with the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. Although the Petitioner submitted a revised job title and list of duties in response to the RFE, this represented a material change to the initial offer of employment and cannot establish eligibility at the time of filing.

On appeal, the Petitioner concedes that it did not sufficiently describe the duties of the offered position, due to a "lack of understanding of the requirements." It submits a revised offer letter dated June 1, 2021 offering the position of COO to the Beneficiary at a salary \$20,000 higher than indicated in the previous version of this letter. This letter significantly expands upon the duties listed in the previously submitted offer letter, and references, for example, the Beneficiary's responsibility to establish business plans for the period 2023 to 2025. Like the letter submitted in response to the RFE, the

⁴ The Petitioner submitted an organizational chart dated December 31, 2022 which identified 28 kitchen and serving staff. In contrast, the company's IRS Form 941 for the fourth quarter of 2022 indicates that it had 15 employees as of December 2022.

description bears no resemblance to the “executive manager” position described at the time of filing. While we do not discount the possibility that the offered position may have evolved over time, the Petitioner must establish that the position, when offered, qualified the Beneficiary for classification as a multinational manager or executive. For the reasons discussed above, the Petitioner has not met this burden. Accordingly, the appeal will be dismissed.

III. ADDITIONAL ISSUES

As noted, the Director also denied the petition based on a conclusion that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(A). Because the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner’s appellate arguments regarding this remaining ground 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).

Finally, we observe that the record as presently constituted does not establish that the Petitioner has a qualifying relationship with the Beneficiary’s claimed foreign employer, notwithstanding the Director’s determination that this requirement was satisfied. To establish a “qualifying relationship,” the Petitioner must show that the Beneficiary’s foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a “parent and subsidiary” or as “affiliates.” *See* section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms “affiliate” and “subsidiary”). Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. *See, e.g., Matter of Church Scientology Int’l*, 19 I&N Dec. 593 (Comm’r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm’r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm’r 1982).

The evidence reflects that the Petitioner is a limited liability company owned in equal proportions by two U.S. citizens. It claims to have a joint venture relationship with the Beneficiary’s foreign employer, a Chinese company qualified to do business in California, whose ownership has not been documented in the record. The Petitioner does not claim to share any common ownership and control with the Chinese company, but instead relies on a joint venture agreement.

A qualifying parent-subsidiary relationship can exist between a contributing company and a joint venture entity if the contributing company owns at least 50 percent of the venture entity and exercises control over the venture. *See* 8 C.F.R. § 204.5(j)(2) (including joint venture entities in the definition of “subsidiary”). Here, while the Petitioner submitted a joint venture agreement executed by the U.S. and Chinese entities, there is no indication that the parties created or intended to create a separate joint venture entity that would serve as a subsidiary of both companies. The evidence indicates that the Beneficiary will be employed in the United States by the Petitioner, which has a contractual agreement with her claimed foreign employer. The contractual joint venture agreement between the foreign and U.S. entity can be terminated. In contrast, entities with a qualifying relationship are permanently tied together through ownership and control, and not limited to a specific venture. *See Matter of Schick*,

13 I&N Dec. 647 (Reg'l Comm'r 1970) (finding that no qualifying relationship exists where the relationship between the foreign and U.S. entities was "purely contractual"). The record therefore contains insufficient evidence to establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer.

While the additional deficiencies discussed above are not grounds for our dismissal of this appeal, the Petitioner will be required to address such deficiencies in any future filings, whether in further pursuit of the instant petition or with regard to any other employment-based petition where a qualifying relationship with the Beneficiary's foreign employer is a requirement for eligibility.

IV. CONCLUSION

The Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.