



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

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

In Re: 28949626

Date: DEC. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, which sells assistive technology and medical devices manufactured by its foreign parent company, seeks to permanently employ the Beneficiary as its vice president (VP) 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner: (1) will employ the Beneficiary in the United States in a managerial or executive capacity, and (2) had been doing business for at least one year prior to the petition's filing date. 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 Director determined that the Petitioner did not establish that it will employ the Beneficiary in the United States in a primarily managerial or executive capacity. The Petitioner states, on appeal: “during all relevant times, [the Beneficiary] is and has been a Manager as defined by the Regulations and Statute.” Therefore, we will consider the Beneficiary’s position in the context of a managerial capacity rather than an executive 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).

In determining whether the beneficiary’s duties will be primarily managerial, we consider the description of the job duties, 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 the business.

Any consideration of a beneficiary’s claimed managerial capacity will require details about the nature and extent of the beneficiary’s authority over, and interaction with, subordinate employees, as well as the roles performed by those subordinate employees.

The Beneficiary worked for the Petitioner in the United States as a sales engineer from February 2010 to July 2015. He then worked for the parent company in South Korea as the sales department director until June 2018, when he returned to the United States in L-1A nonimmigrant status to serve as the Petitioner’s VP.

The Petitioner filed the petition on March 23, 2021. On Form I-140, asked to specify its “Current Number of U.S. Employees,” the Petitioner answered “6.” With the petition, the Petitioner submitted an organizational chart showing the following positions subordinate to the VP:

- Eastern Regional Sales Manager (vacant)
- Western Regional Sales Manager
- ACCUNIQ Division Sales Manager (vacant)
- Accountant and Human Resources Manager
 - Assistant (vacant)

The chart also showed two technical support workers, a repair technician, and a vacant internal sales position, with no indication of who directly managed or supervised those workers. The Petitioner did not submit job descriptions for the staffed positions, and did not explain who performed the duties of the vacant positions.

The Petitioner also provided a job description for the Beneficiary, depicting a different, larger staff:

[The Beneficiary's] duties will continue to include . . . managing and providing supervision of both the business[es] of the company. The Vice President will manage and supervise activities of all managers who in turn will manage others or a function of the company. The Vice President will manage the Director of Sales Engineering who in turn will manage VP of Sales and Marketing and National Sales Director, who in turn will manage approximately 10 employees. The Vice President will also manage the Business Development Management, who in turn will manage the National Sales Manager and two other positions who will be hired soon. In addition the Vice President will manage the Accounting and HR Manager who manages an Accounting Assistant. Approximately 80% of the time is devoted to this duty.

The assertion that the Beneficiary's "duties will *continue* to include" the above responsibilities necessarily implies that the Beneficiary already managed the "Director of Sales Engineering" and the "Business Development Management," although those positions did not exist when the Petitioner filed the petition. Because the job description listed different subordinates than the organizational chart submitted at the same time, the job description does not accurately describe the Beneficiary's duties and role at the company at the time of filing.

In a request for evidence (RFE), the Director stated that several of the subordinate positions named in the Beneficiary's job description did not appear to exist at the petitioning company. The Director also stated that the Petitioner had not shown that any of the Beneficiary's existing subordinates "manage any personnel." The Director requested further evidence of the company's staffing and the Beneficiary's role in managing subordinate employees.

In response, the Petitioner submitted an updated organizational chart, dated January 2023, showing the following subordinate structure, with the annotation "Additional Workers will be hired within [a] few years":

- VP of Sales/Marketing
 - Marketing Staff (vacant)
 - National Account Manager
 - Inside Sales Representative
 - Assistant (vacant)
- Tech Manager
 - Senior Products Tech Support
 - Products Tech Support

The Petitioner submitted payroll records showing that the organizational chart submitted with the petition "showed the [company's] personnel structure . . . as it existed at the time the I-140 was filed." The Petitioner did not, however, explain why the 2021 job description showed a larger and different company structure. The organizational chart, by itself, does not establish that the Beneficiary's VP position was or is primarily managerial.

The Petitioner submitted a revised job description for the Beneficiary, which is broadly similar to the original version but incorporates the subordinate positions shown on the 2023 organizational chart. The Petitioner also submitted job descriptions for the 2023 subordinate positions. The tech support

position is the only subordinate position largely unchanged from the original 2021 organizational chart. As a result, the 2023 submission does not meet the Petitioner's burden of proof to show that the Beneficiary's VP position was primarily managerial at the time of filing in 2021.

The Director denied the petition, stating:

According to the Form I-140, at the time of filing the petitioner employed six individuals. The organizational chart originally submitted with the Form I-140 did not indicate the petitioner employed any individuals in the position of director of sales, engineers, marketing employees, or national sales directors; or that any of the individuals listed in the organizational chart managed any personnel. . . .

. . . .

While the evidence of record shows the petitioner now employs a National Accounts Manager and Inside Salesman, they appear to have been hired after the I-140 was filed. The Petitioner must establish that all eligibility requirements for the immigration benefit sought have been satisfied from the time of the filing and continuing through adjudication. *See* 8 C.F.R. Section 103.2(b)(1).

The Director also stated that the Petitioner did not explain why the 2021 job description referred to several positions that did not exist in the company at that time.

On appeal, the Petitioner states: "Neither the relevant regulations nor statutes forbid the petitioner to be dynamic. It is not unusual for a company's personnel and their duties to change over time." The issue, however, is not that the company reorganized or hired new staff after 2021. The issue is that the Petitioner's initial description of the Beneficiary's duties rested, in significant part, on his claimed authority over positions that either were vacant or did not exist at all when the Petitioner filed the petition in 2021.

The approval of an immigrant petition requires a determination "that the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). The Petitioner must meet all eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Therefore, the job description submitted with the petition must correspond to the Beneficiary's actual duties at the time of filing, rather than projections of what his duties will later entail after the company has grown and reorganized. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. *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).

In 2021, the Petitioner stated that the Beneficiary "will continue" to spend 80% of his time overseeing a subordinate structure that did not exist at the time. Therefore, the job description from 2021 does not meet the Petitioner's burden of proof to establish eligibility at the time of filing. Subsequent changes to the company's structure do not establish that the Petitioner met all eligibility requirements at the time of filing. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998) ("a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements"); *see also Matter of Katigbak*, 14 I&N Dec. 45,

49 (Reg'l Comm'r 1971) (requiring that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition).

The Petitioner has documented its staffing as of the filing date in 2021, but the Petitioner has not fully established the hierarchical structure of that staffing and the nature and extent of the Beneficiary's duties, tasks, and authority over the company's employees in 2021.

For the reasons discussed above, the Petitioner has not met its burden of proof to establish that the Beneficiary's position in the United States was primarily managerial at the time of filing in 2021. We will dismiss the appeal for this reason. Because this conclusion is sufficient to determine the outcome of the appeal, we reserve the issue of whether the Petitioner had been doing business for at least one year at the time of filing.¹

ORDER: The appeal is dismissed.

¹ See *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions 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).