



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

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

In Re: 25493061

Date: MAR. 02, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a wholesale diamond business, seeks to permanently employ the Beneficiary as its general 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 that the record did not establish that: (1) the Beneficiary would be employed in the United States in a managerial or executive capacity; (2) the Petitioner has the ability to pay the proffered wage; and (3) the Petitioner has a qualifying relationship with the Beneficiary's last foreign employer. The Petitioner subsequently filed a combined motion to reopen and reconsider. The Director granted the motion, addressed the arguments and new evidence presented, and issued a new decision denying the petition on the same three grounds. 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.

A petition for a multinational manager or executive must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has the requisite one year of employment abroad in a managerial or executive capacity, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign

employer in a managerial or executive capacity, 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)(A)-(D).

In addition, any petition filed for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

## II. ABILITY TO PAY

The Director denied the petition, in part, based on a determination that the Petitioner did not establish its ability to pay the proffered wage. The Petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that it will compensate the Beneficiary at an annual rate of \$75,000 and must establish its continuing ability to pay this amount from the date it filed the petition in June 2021.

Evidence of a petitioner's ability to pay must be in the form of copies of annual reports, federal tax returns or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2). In determining a petitioner's ability to pay the proffered wage, we will first examine whether the Petitioner employed the Beneficiary at the time of filing. If a petitioner submits documentation demonstrating that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of a petitioner's ability to pay.

The record reflects that the Beneficiary was in the United States in L-1 nonimmigrant status at the time of filing. The Petitioner provided a copy of its IRS Form 1065, Return of Partnership Income, for 2021, which indicates at Schedule K-1, Part III that the Beneficiary received \$75,000 in "Guaranteed Payments for Services" in 2021. Other evidence in the record corroborates that the Petitioner made monthly payments to the Beneficiary equal to this amount in 2021 and that it continued to pay him \$6,250 monthly in 2022. The Director did not consider this evidence in evaluating the Petitioner's ability to pay and based the determination solely on the net income and net current assets reported on its 2021 tax return. However, we find the evidence discussed above sufficient to establish, by a preponderance of the evidence, the Petitioner's ability to pay the proffered wage. Accordingly, the Director's determination with respect to this ground for denial is withdrawn.

## III. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director also denied the petition based on a determination that the Petitioner did not establish that it would employ the Beneficiary in a managerial or executive capacity. We note that the Petitioner has consistently asserted in its supporting statements that the offered position of general manager is in an executive capacity; it has not articulated a claim that the Beneficiary would be employed in a managerial capacity.

"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.

To establish that a beneficiary is eligible for immigrant classification as a multinational executive, a petitioner must show that the beneficiary will perform all four of the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B) of the Act. If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition, the petitioner must then prove that the beneficiary will be *primarily* 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). In determining whether the beneficiary's duties will be primarily executive, 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.

At the time of filing, the Petitioner described the Beneficiary's duties as follows:

- Manages the operation of [the Petitioner's] sale[s] and marketing departments;
- Cooperates with the directors to grow the company . . . ;
- Represents [the Petitioner] during attendance of important functions, business events. . . ;
- Prepares annual budgets, completes risk analysis on potential investments;
- Makes decision regarding hiring/firing staff, payroll, and benefit disbursement;
- Develops [Petitioner's] expansion plan regarding new services, including e-commerce, at national and international levels;
- Trains and manages the managers and assistants;
- Performs financial analysis and review financial and non-financial reports . . . in cooperation with outsourced accountant;
- Works with an outsourced legal counsel regarding any business questions involving legal issues;
- Negotiates with landlords regarding commercial leases;
- Endorses promotional and marketing strategies;
- Establishes internal databases and record management systems. . . ;
- Manages inventory turnover.

An organizational chart submitted at the time of filing indicates that the Petitioner had one employee, a sales executive, who reported to the Beneficiary. The Petitioner provided evidence that this employee was hired in December 2020 and earned \$1800 that month but did not include a description of this individual's duties or evidence of wages paid to him in 2021. Without this evidence, we cannot determine whether or to what extent this employee was available to relieve the Beneficiary from involvement in administrative and operational tasks as of the date of filing. Further, notwithstanding the Petitioner's assertion that one of the Beneficiary's primary duties is managing the operation of its "sales and marketing departments," the organizational chart did not identify these departments. The Petitioner also did not provide evidence that it employs the "managers and assistants" mentioned in the Beneficiary's job description, or evidence that it had contracted the services of an "outsourced accountant" to assist with the company's finance-related activities. The Petitioner's reference to the Beneficiary's oversight or

collaboration with departments, employees, and contractors that are not otherwise documented in the record undermines the credibility of the submitted position description.

While the initial evidence indicated that the Beneficiary had signed the Petitioner's lease agreement, the Petitioner did not indicate that the company was in the process of negotiating for additional locations or otherwise explain why he would be required to "negotiate with landlords" on an ongoing basis, nor did the Petitioner identify the nature or frequency of the Beneficiary's interactions with outsourced legal counsel. In addition, the Petitioner did not explain how duties such as managing inventory turnover and establishing internal databases are executive in nature. Finally, some of the remaining duties are stated in overly general terms that little insight into the nature of the Beneficiary's activities. For example, the Petitioner did not indicate what specific tasks he would perform to "endorse" promotional and marketing strategies or "cooperate with the directors." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. *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).

The Director issued a request for evidence (RFE) advising the Petitioner that additional evidence would be needed to establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. The Director observed that the initial description of the Beneficiary's duties was overly broad and that the initial evidence did not sufficiently document the company's staffing levels and structure. The Director requested that the Petitioner provide: a more specific description of the nature of its business; an explanation of the Beneficiary's specific daily tasks and the percentage of time allocated to each task; a detailed organizational chart identifying the company's structure and staffing levels; information regarding all employees and contractors who report to the Beneficiary; and evidence of wages paid to employees and contractors.

The Petitioner's response to the RFE, submitted in July 2022, included: a letter from the Petitioner which includes a description of the Beneficiary's duties as general manager; a copy of the Petitioner's business plan dated November 2019, which includes the same job description; an updated organizational chart; and evidence of wages paid to employees for all four quarters of 2021 and the first two quarters of 2022.

The Petitioner's updated organizational chart depicts the Beneficiary's oversight of an administrative assistant and an operations manager, who, in turn supervises a sales/marketing manager. The chart also depicts two full-time sales associates who report to the sales/marketing manager. However, the supporting payroll evidence confirms that the only employee on the Petitioner's payroll when the petition was filed in June 2021 was the individual identified as a "sales executive" on the initial organization chart. Further, the evidence indicates that the Petitioner employed this individual intermittently in 2021, as its state quarterly wage reports indicate that he was paid only during the months of January, April, May, June, and November.<sup>1</sup> The Petitioner documented that it hired a second employee (the sales and marketing manager) in November 2021 and that it briefly employed the administrative assistant during the first quarter of 2022. Finally, the evidence shows that the second sales associate and operations manager were hired in June 2022 and July 2022, respectively.

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<sup>1</sup> The record reflects that the Petitioner made no wage or salary payments to employees (other than guaranteed payments to the Beneficiary) during the third quarter of 2021 and similarly reported no payments to subordinate employees for the months of October and December 2021.

The Director's denial decision included a detailed discussion of the evidence related to the Petitioner's staffing. Specifically, the Director emphasized that the Petitioner did not demonstrate that the structure and staffing levels described in the RFE response were in place at the time the petition was filed, and that employees hired later would not be considered in evaluating whether the Beneficiary would be employed in an executive capacity when the petition was filed. *See* 8 C.F.R. § 103.2(b)(1) (stating that a petitioner must establish eligibility for the requested benefit at the time of filing and must continue to be eligible through adjudication). The Director also observed that the evidence did not corroborate that the Petitioner has consistently employed the sole subordinate employee who was on the payroll at the time of filing. Based on this evidence, the Director concluded that the Petitioner did not establish that the Beneficiary would be delegating operational, administrative, and other non-executive tasks to subordinate staff or that he would otherwise be able to allocate his time primarily to executive duties as defined at section 101(a)(44)(B) of the Act.

In its subsequent combined motions to reopen and reconsider, the Petitioner contended that the Director did not consider its organizational hierarchy, the Beneficiary's position in that hierarchy, and the evidence of its overall ability to relieve him from having to primarily perform the day-to-day operational duties of the company. The Petitioner emphasized that the job description provided in response to the RFE was sufficient to establish that the Beneficiary's position is "100% executive in nature." It further maintained that it established that the Beneficiary occupies the senior position in a complex hierarchy, and that the company is "staffed with highly skilled staff members who are available to carry out non-qualifying duties."

As noted, the Director affirmed the denial of the petition, emphasizing that the record does not establish that the subordinate staff who are claimed to relieve the Beneficiary from performing operational and administrative tasks were employed by the Petitioner when it filed the petition in June 2021.

On appeal, the Petitioner asserts that "with respect to the varying number of employees while the petition was pending, the number ranges from 0 to 5 but part of that is due to the uncertainty of the approval of the petition." Nevertheless, the Petitioner asserts that the previously submitted description of the Beneficiary's job duties demonstrates that he performs primarily executive duties consistent with the statutory definition of "executive capacity." For the reasons discussed below, the Petitioner's assertions are not persuasive.

We acknowledge the Petitioner's contention that the Director's decisions did not reflect full consideration of the submitted position descriptions. However, we note that the evidence does not establish that either of the submitted descriptions accurately describes the actual tasks he performed at the time of filing. As discussed above, the initial description of the Beneficiary's duties indicated that he would be directing the operations of separate sales and marketing departments that did not yet exist and overseeing the work of subordinate managers and other staff who had not yet been hired. Likewise, the position description submitted in response to the RFE was originally prepared for a business plan created in 2019 and therefore did not reliably reflect the actual duties the Beneficiary was performing at the time this petition was filed. That same business plan included staffing projections and indicated that the Petitioner would hire a subordinate operations manager, administrative assistant, purchasing/logistics assistant, and two sales representatives during 2020. As of June 2021, the Petitioner's staff consisted of the Beneficiary as general

manager and one sales employee who worked on an intermittent basis and received wages during only one month in the second half of 2021.

Therefore, while the position description provided in response to the RFE was lengthy and included a breakdown with the percentage of time to be allocated to specific tasks, the claimed duties are not supported by other evidence in the record. For example, the Petitioner indicated that the Beneficiary would spend 45% of his time “directing the management of the organization,” noting that this responsibility would include “overseeing the company’s management team,” “meeting with the management team weekly,” “directing an operations manager who in turn oversees front-line employees and contract workers who are responsible for delivering the company’s gem products,” and other duties that including monitoring and overseeing staff. Absent evidence that the Petitioner employed an operations manager, a “management team,” and multiple front-line employees and contract workers, we cannot conclude that it provides is an accurate representation of the Beneficiary’s duties. We must view the position description in the context of the totality of the evidence in evaluating whether the proposed employment is in an executive capacity. This position description was evidently intended to describe the duties the Beneficiary would perform when the company is fully staffed. The record does not contain a description of the Beneficiary’s duties at the time of filing when his sole subordinate was a sales employee who worked only intermittently.

USCIS must consider the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. *See* section 101(a)(44)(C) of the Act. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *See Family Inc.*, 469 F.3d at 1316; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the Petitioner indicates that it has a reasonable need for a staff of at least five subordinates and additional contractors to perform the day-to-day operational and administrative activities of its company and to support the Beneficiary in the claimed executive capacity, but the record indicates that the company had one employee at the time of filing in June 2021, had no employees during most of the remainder of that year.

While the record establishes that the Beneficiary is the managing member of the petitioning company and occupies the senior position, the fact that he will manage or direct a business as its owner or sole supervisory employee does not necessarily establish eligibility for classification as multinational executive as defined in the statute. By statute, eligibility for this classification requires that the duties of a position be “primarily” executive. Although the Petitioner asserts that the Beneficiary primarily performs the high-level duties described at section 101(a)(44)(B) of the Act, it also claims that he does so through subordinate managers and other staff who have not yet been hired by the organization. As noted, the Petitioner must establish eligibility for the requested classification at the time of filing and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). Accordingly, the Petitioner’s claim that it is minimally staffed “due to the uncertainty of the approval of the petition” is not persuasive and does not exempt the Petitioner from its burden to demonstrate that the Beneficiary would be employed in an executive capacity from the date of filing.

For the reasons discussed, the Petitioner has not established that the Beneficiary would be employed in an executive capacity in the United States. Accordingly, the appeal will be dismissed.

#### IV. ADDITIONAL ISSUES

As noted, the Director also concluded that the Petitioner did not establish its qualifying relationship with the Beneficiary's foreign employer. Because the identified basis for denial is dispositive of the appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding 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, although not addressed by the Director, the record does not establish that the Beneficiary has the required one year of employment abroad with a qualifying entity. Where, as here, a beneficiary is already working in the United States for the petitioner at the time of filing, the petitioner must demonstrate that the beneficiary's year of foreign employment occurred in the three years preceding his or her entry as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).<sup>2</sup>

The record reflects that the Beneficiary's initial entry to work for the Petitioner as an L-1 nonimmigrant was on March 10, 2021.<sup>3</sup> Therefore his year of employment abroad must have occurred between March 10, 2018 and March 10, 2021. In its initial supporting letter, the Petitioner stated that the Beneficiary worked for its claimed affiliate in Hong Kong from July 2016 "until his departure for the United States in February of 2020." The foreign entity provided a letter indicating that it employed the Beneficiary in an executive capacity from July 1, 2016 until July 1, 2019.

The record indicates that the Beneficiary graduated from an Indian secondary school in 2016 and enrolled as a full-time undergraduate student at [ ] University in F-1 nonimmigrant student status beginning in the fall semester of 2016. The Petitioner provided evidence that he graduated in May 2019 and was approved for F-1 post-completion optional practical training from July 2019 until July 2020. The Petitioner submitted the Beneficiary's arrival and departure records indicating that he spent 933 days in the United States between March 10, 2018 and his initial entry to the United States in L-1 status on March 10, 2021. As he spent only 162 days outside the United States during the relevant three-year period, he did not accrue the required one year of employment abroad.<sup>4</sup> Further, the Petitioner has not otherwise explained how the Beneficiary worked overseas in a managerial or executive capacity while completing his undergraduate education and post-completion training in the United States. Accordingly, the record does not establish that he meets the one year of foreign

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<sup>2</sup> In promulgating the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B), the former Immigration and Naturalization Service stated: The Service does not feel that Congress intended that nonimmigrant managers or executives who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity, would qualify.

56 Fed. Reg. 30703, 30705 (July 5, 1991).

<sup>3</sup> The Petitioner filed an L-1A nonimmigrant petition on the Beneficiary's behalf on July 13, 2020, and requested that the U.S. Consulate in Mumbai, India be notified upon approval so that the Beneficiary could obtain a visa and be admitted to the United States. The Beneficiary did not depart the United States to apply for his L-1 visa until February 2021.

<sup>4</sup> The arrival and departure records also indicate that the Beneficiary spent most of his time in the United States after commencing his studies in F-1 status in September 2016 and throughout 2017.

employment requirement for this classification. The Petitioner will need to address this issue in any future proceeding in which it seeks the requested benefit.

#### V. CONCLUSION

The Petitioner has not established that it will employ the Beneficiary in an executive capacity in the United States. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.