



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

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

In Re: 15796481

Date: OCT. 21, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner seeks to permanently employ the Beneficiary as its “chief executive officer” under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States and that the Beneficiary had been employed abroad in a managerial or executive capacity prior to his entry as a nonimmigrant. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.¹ We review the questions in this matter *de novo*.² Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the time of the petition for classification and admission into the United States, 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,³ that the beneficiary is coming to work in the United States for the same

¹ See Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

² See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

³ If a beneficiary entered the United States to work for a qualifying entity as a nonimmigrant (for example in an H-1B or other work-authorized status), U.S. Citizenship and Immigration Services will reach back three years from the date of his or her admission to determine whether he or she had the requisite one year of employment abroad. *Matter of S-P- Inc.*, Adopted Decision 2018-01 (AAO Mar. 19, 2018); 8 C.F.R. § 204.5(j)(3)(i)(B).

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 term “executive capacity” is defined as 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.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which clearly describes the duties to be performed by the Beneficiary. Beyond the required description of the job duties, we review the totality of the evidence when examining a beneficiary’s claimed managerial or executive capacity, including the company’s organizational structure, the duties of a beneficiary’s subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a 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 Petitioner’s business, its staffing levels, and its organizational structure.

II. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Petitioner throughout the record identifies the Beneficiary’s position as an executive. It does not claim that the Beneficiary will perform in a managerial capacity. Accordingly, we will analyze the U.S. position under the statutory definition of executive capacity. Section 101(a)(44)(B) of the Act.

The Petitioner is a limited liability company established in [redacted] 2013 in the State of Delaware and claims to operate in [redacted] California. On the Forms 1065, U.S. Return of Partnership Income, for 2016, 2018, and 2019,⁴ it noted it is engaged in trade and sales and designated the applicable business code number as 423990.⁵ On the Form I-140, filed in December 2019, the Petitioner stated that it is a software engineering data management business and designated the NAICS (business) code as 5415.⁶ In the initial letter in support of the petition, the Petitioner stated it wished to continue to employ the Beneficiary in an executive position and stated that it “is a start-up Company that is growing fast; however, at the current stage of growth, it appears more beneficial to organize the Company’s structure around independent contractors”⁷ The Petitioner provided several agreements to demonstrate its use of contractors.

⁴ The Petitioner also included a 2017 IRS Form 1120 for a separate company with a name similar to the name of the Beneficiary’s foreign employer. The relevance of this tax return to the matter at hand is unknown.

⁵ Businesses falling within this code are comprised of establishments primarily engaged in the merchant wholesale distribution of durable goods, with certain exceptions.

⁶ This code refers to establishments primarily engaged in providing on-site management and operation of clients’ computer systems and/or data processing facilities and includes establishments providing computer systems or data processing facilities support services.

⁷ The Petitioner also claimed on the I-140 that it had nine U.S. employees.

A review of the contractors' agreements shows that one of the agreements had expired by the time the petition was filed and three others that did not include work orders or other information substantiating that any work had been performed and paid for under the May 2015, March 2017, and May 2018 agreements. The record also included two expired work orders. Accordingly, the record does not include probative evidence demonstrating the Petitioner's use of contractors when the petition was filed.

In response to the Director's request for evidence (RFE), the Petitioner claimed that it now had five full-time employees and provided payroll records for four⁸ employees for April, May, and June 2020.⁹ As these four individuals do not appear to have been employed prior to April 2020, their employment does not establish eligibility when the petition was filed in December 2019. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing, December 2019, and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

The inconsistencies in the record regarding the nature of the Petitioner's business operations and its claimed employees/contractors when the petition was filed raises questions regarding the Petitioner's credibility. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

A. Duties

To be eligible for this immigrant visa classification as an executive, the petitioner must show that the beneficiary will perform the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(B)(i)-(iv) of the Act. If the record does not establish that the offered position meets all four of these elements, we cannot conclude that it is a qualifying executive position. If the petitioner establishes that the offered position meets all the elements set forth in the statutory definition, the petitioner must also establish 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).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and the Beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. Again, 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.*

⁸ The fifth employee is the Beneficiary.

⁹ The Petitioner does not explain why it claimed it had nine employees on the Form I-140 petition.

We now turn to an examination of the Petitioner's description of the job duties within the context of its claimed business operations.

The Petitioner's initial letter in support of the petition, sets out a vague and generic description of the Beneficiary's proposed duties which does not include the necessary detail to demonstrate what the Beneficiary will be expected to do on a daily basis. For example, the Petitioner indicates that the Beneficiary will "[d]evelop a strategic plan to advance the company's mission and objectives and to promote revenue, profitability, and growth," "[m]onitor all projects and ensure achievement of all revenue objectives; develop and maintain professional relationships with all clients and achieve all business objectives," "build and maintain long-term relationships with clients and key personnel within customer companies," "[d]evelop and implement policies on issues like working conditions, performance management, equal opportunities, disciplinary procedures and absence management," and "[o]versee the fiscal activities of the company including budgeting, reporting and audit." However, reciting a 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. The actual duties themselves will reveal the true nature of the employment. *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). These duties could apply to any chief executive officer in any business and industry; they do not sufficiently substantiate the Beneficiary's asserted role. The Petitioner did not sufficiently describe the plans the Beneficiary will develop, provide the context for the budgets he will manage, or document the working conditions and human resource policies to be developed and set. Likewise, the Petitioner did not provide credible details regarding the clientele to be built and relationships established. The Petitioner has not clearly conveyed the nature of the Beneficiary's primary duties.

Other duties raise concern that the Beneficiary's actual day-to-day obligations are operational, rather than executive in nature. For example, the Petitioner states that the Beneficiary will "[r]esearch[] organizations and companies as well as their needs to identify new leads and potential new markets," "[c]ontact[] potential clients to establish rapport and set up presale meetings," "[a]nalyze a client's business segment and development direction, client's technical and business challenges to be able to build opportunities for further sales within key clients," "[k]eep a proper balance of human resources for all the projects and initiatives, according to the goals of the company; determine staffing numbers, skills and needs to meet the company's objectives," and plan all projects according to required timeframe and in compliance with project policy documents, prepare all resources (time, money, equipment etc.) required to complete the project, put together teams with the right mix of skills, experience and background for each particular client, and ensure that the project deliverables are on time, within budget and at the required level of quality. These duties show the Beneficiary implementing the policies and performing the operational tasks necessary to keep the Petitioner in business, rather than setting the goals and establishing policies. These duties, as well as others, are insufficiently detailed to understand the Beneficiary's role within the context of the company operations and ascertain whether the Beneficiary's tasks are marketing, sales, human resource related, operational, administrative in nature or comprise the duties of an executive as statutorily defined.

The Petitioner also listed projects it claimed that the Beneficiary had worked on which included the name of the customer, a description, and the Beneficiary's responsibilities. For example, the first project identified is labeled with the following information:

Customer: [redacted] California, US

Description: [redacted] is building brand-new, commerce-related applications powered by AI, messaging platforms, and cloud technologies. The New Product Development team at [redacted] uses latest technologies to build these experiences for a new generation of users.

Responsibilities: Onsite communication with the customer; Negotiate and sign contracts; Make decision to engage new team members; Support business trips of team members.

For other customers, the Beneficiary's responsibilities expanded to include planning, monitoring, and reviewing technical infrastructure of the project, managing budget, analyzing and managing project risk, timely creation of invoices to clients upon product delivery or project completion, and cooperating with the client assisting to promote the product in new business segments, among other tasks. Again, these responsibilities for the various companies show the Beneficiary carrying out operational and administrative tasks rather than directing the Petitioner's management and establishing its goals and policies.

Although the Petitioner also vaguely refers to the Beneficiary as working closely and collaborating with the senior management team and financial department, "[m]eet[ing] regularly with the senior team to review, reflect and strategize about how to improve the relationship and serve the client," and "[b]uild[ing] and supervis[ing] the senior management team" the Petitioner did not offer corroborative, consistent evidence regarding the employment of individuals in senior management and financial roles. Nor did the Petitioner sufficiently explain or provide supporting documentation to substantiate the Beneficiary's delegation of duties to the claimed subordinates. As will be discussed further below, without evidence of staff to perform the administrative, financial, human resource, and other operational tasks, it appears that performing the everyday tasks necessary to continue or increase the Petitioner's business would fall to the Beneficiary. The Petitioner has not shown its ability to relieve the Beneficiary from significant involvement in the non-qualifying tasks required to operate its business.

The lack of detail and documentation regarding the Beneficiary's asserted executive-level capacity is particularly notable given that the Petitioner asserts that he has acted in this role in the United States since 2016. The Petitioner has not submitted a sufficiently detailed duty description describing the Beneficiary's actual day-to-day executive-level duties to credibly establish that he would devote his time primarily to qualifying tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive 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).

Even though the Beneficiary may hold a senior position within the organization, this does not necessarily establish eligibility for classification as a multinational executive within the meaning of section 101(a)(44)(B) of the Act. The Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possess the requisite level of authority with respect to discretionary decision-making; however, the position description in this matter is insufficient to establish that his actual duties would be primarily executive in nature.

B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act. Again, as discussed, the Petitioner must demonstrate that the Beneficiary is eligible for the benefit sought as of the date the petition was filed, December 13, 2019, and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

The Petitioner contends that the Beneficiary would act in an executive capacity in the United States which requires the Beneficiary to operate at an elevated position within a complex organizational hierarchy. However, in this matter, there is no supporting evidence in the record demonstrating the Beneficiary's supervision of his claimed subordinates or his delegation of tasks to them. As briefly discussed above, the Petitioner has not established that it had any employees when the petition was filed. Nor does the Petitioner provide credible evidence that it used contractors to perform the duties of the business as the record does not include evidence of viable agreements or payments made to contractors for services rendered. The record also does not include evidence that the Petitioner employed senior management as referenced in the Beneficiary's description of duties. Although the Petitioner provided its organizational chart in response to the Director's RFE, the organizational chart depicts a single tier of positions below the Beneficiary's position. The positions, as depicted on the chart and as described, do not appear to be senior management positions.

The only subordinate tier to the Beneficiary is made up of a head of accounting (who is depicted as a contractor on the organizational chart), an account director, a chief of technology, a marketing manager, and a head of sales. Although the Petitioner also provided a table identifying the position(s) responsible for carrying out certain tasks, many of the tasks appear to overlap with the Petitioner's initial description of the Beneficiary's proposed duties. For example, the Petitioner indicates that the chief technical officer and the account director will set up the team of software engineers and project manager for a project; however, the Petitioner also indicated that the Beneficiary is responsible for preparing resources to complete projects including putting together teams with the right mix of skills, experience, and skills for each project. The record does not include sufficient probative evidence to distinguish the duties among the individuals depicted on the organizational chart and also does not describe a subordinate level of managerial, rather than operational, employees for the Beneficiary to direct.

Also as discussed above, the Petitioner does not provide evidence that these employees were onboard when the petition was filed. In fact, the Petitioner initially and reiterates in response to the Director's RFE that it "is a start-up Company that is growing fast; however, at the current stage of growth, it appears more beneficial to organize the Company's structure around independent contractors" ¹⁰ Such a statement accompanied by the Petitioner's response to the Director's RFE that it now has five employees, appears to be an acknowledgment that the Petitioner lacked employees to relieve the Beneficiary from performing the financial, human resources, marketing, sales, and client relationship duties when the

¹⁰ Although the Petitioner asserts that it is a start-up company, it was established in 2013 and the Beneficiary has held the title of chief executive officer since at least 2016. It is not clear when and if the Petitioner will become an established business rather than a start-up company.

petition was filed. Moreover, if the Petitioner is involved in software engineering data management, the record does not detail employment of individuals or contractors to perform the data management.¹¹ We again reiterate that the Petitioner has not presented evidence to document the existence of contractors when the petition was filed and continuing through adjudication or adequately identified the services they provide to the Petitioner. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In sum, the record lacks credible, consistent evidence demonstrating the nature of the Petitioner's business operations and lacks evidence corroborating the Beneficiary's delegation of tasks and coordination of subordinate senior teams, employees, or contractors. The lack of evidence coupled with the duty descriptions suggesting the Beneficiary's direct performance of non-qualifying operational tasks and his involvement in seemingly all of the operational matters of the business does not establish that the Beneficiary will perform primarily executive duties as required by the statute. The Petitioner here has not established that the Beneficiary would act in an elevated position within a complex organizational hierarchy and direct the management of the company. Further, the record does not establish that he would primarily focus on the broad goals and policies of the organization rather than its day-to-day operations.

III. ADDITIONAL ISSUES

Although we are not making an adverse finding on the following issues, we note these issues must be addressed in any future proceedings. The Petitioner has not established its ability to pay the Beneficiary the proffered wage. The Beneficiary's W-2, and the payroll stubs submitted for the record fail to establish that the Beneficiary has been paid the proffered wage in the past. The Petitioner's tax returns do not reflect sufficient positive income to make up the lack of payment of the proffered wage. This raises concern that the Petitioner does not have the ability to pay the Beneficiary the proffered wage. We also have concern that the Petitioner has not adequately demonstrated the qualifying relationship with the Beneficiary's foreign employer. Although the Petitioner asserts that the Beneficiary and one other individual each own 50 percent of both the Petitioner and the foreign entity, public records raise concern that other individuals may also have an interest in the Petitioner. The Petitioner must address these deficiencies and concerns in future proceedings.

IV. CONCLUSION

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its arguments regarding whether the Beneficiary was employed abroad in a managerial

¹¹ We note that the Petitioner's chart describing the tasks of different positions refers to productive tasks performed by the foreign company through project managers, engineering team lead, and software engineers. The Petitioner also provided a letter from the foreign entity claiming that the Beneficiary continued to work as the foreign entity's chief executive officer even while working in the United States. In that regard, the Petitioner provided a revised organizational chart for the foreign entity showing the Beneficiary as the CEO. The original foreign entity's organizational chart, provided with the petition, depicts another individual in the CEO position. This additional inconsistency must also be resolved with independent, objective evidence pointing to where the truth lies as it raises further concern regarding the Petitioner's credibility. *Ho*, 19 I&N Dec. at 591-592.

or executive capacity prior to his entry as a nonimmigrant. *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). The Petitioner has not established that more likely than not the Beneficiary will be employed in a managerial or executive capacity for the U.S. entity.

ORDER: The appeal is dismissed.