



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

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

MATTER OF ABCF-, LLC

DATE: MAR. 29, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an operator of retail sporting goods stores, seeks to permanently employ the Beneficiary as its president and chief executive officer (CEO) under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) § 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 an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity. We dismissed the Petitioner's appeal from that decision.

The matter is now before us on a motion to reopen. In its motion, the Petitioner submits additional evidence and asserts that this evidence better explains the Beneficiary's managerial and executive duties and the Petitioner's circumstances at the time of filing.

Upon review, we will deny the motion.

### I. MOTION REQUIREMENTS

For the reasons discussed below, we conclude that the motion does not merit reopening the proceeding.

#### A. Overarching Requirement for Motions by a Petitioner

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that "the official having jurisdiction may, for proper cause shown, reopen the proceeding." This provision limits our authority to reopen the proceeding to instances where "proper cause" has been shown for such action. Thus, to merit reopening, the submission must not only meet the formal requirements for filing, but the petitioner must also show proper cause for granting the motion.

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “*Requirements for motion to reopen*,” states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

II. DISCUSSION

For the reasons discussed below, we find that the Petitioner has not shown proper cause for reopening the proceeding. The issue before us is whether the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity. In this matter, the new facts on motion consist primarily of additional details regarding the Beneficiary’s asserted duties with the petitioning company. Because we previously issued a full decision on the merits, this decision will focus on the materials submitted on motion, with some discussion of prior facts to give context to the new discussion.

The petitioner filed Form I-140 on October 8, 2013, seeking to permanently employ the Beneficiary as its president and CEO. The Petitioner stated that the Beneficiary would receive dividends rather than a salary. On the petition form, the Petitioner indicated that it had five employees and two vacancies. Specifically, the Petitioner claimed to have a marketing manager, with no subordinates; a vacant e-commerce manager position, with no subordinates; a vacant store manager position; and four shop assistants working at the Petitioner’s two brick and mortar stores.

In denying the petition on November 24, 2014, the Director concluded: “it appears that the beneficiary supervises part-time employees . . . and that the beneficiary’s subordinates have received less than . . . a full-time professional wage.” The Director also stated that “USCIS [U.S. Citizenship and Immigration Services] must question the petitioner’s ability to employ the Beneficiary in a managerial or executive capacity if it lacks sufficient staff to relieve him or her from having to perform primarily non-qualifying duties.” The Director found that the Petitioner did not establish that it seeks to employ the Beneficiary as a manager.

On appeal from the Director’s decision, the Petitioner stated that the Director examined the record from the perspective of the requirements for a manager, despite “overwhelming evidence that the Beneficiary performed executive duties.” We dismissed the appeal on September 18, 2015, stating that the Petitioner had provided vague and inconsistent job descriptions for the Beneficiary; the vacancies at the company appeared to leave the Beneficiary with significant operational

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responsibilities; and the Petitioner had not shown that the Beneficiary qualified for classification as an executive or as a manager.

On motion, the Petitioner details the history of the company from [REDACTED] to 2015, stating that the Beneficiary's executive oversight saw the company through economic challenges such as the recession and competition from a "huge new [REDACTED] Superstore in the vicinity." The Petitioner asserts that the Beneficiary accomplished this, in part, through an emphasis on online sales. The company's performance is not, itself, evidence that the Beneficiary qualifies for classification as an executive. We are constrained by the legal definitions of executive and managerial capacity found in the statute and regulations.

The Petitioner submits a copy of a short article from the [REDACTED] issue of [REDACTED], indicating that the Beneficiary "plans to add social media features to his retail store's Web site." The article supports the assertion that the Beneficiary has taken steps to increase the company's reach through online activity, but we did not dismiss the appeal based on a finding that the Beneficiary lacks the authority to make such decisions for the company.

Also, the article was published after the petition's October 8, 2013 filing date, and even then it refers to the Beneficiary's plans for the future. A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). The Beneficiary's plan to use social media as a marketing tool does not establish that he qualifies for classification as a multinational manager or executive, but even if it did, USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

We have not disputed that the Beneficiary had authority over the company during the period in question, and continues to have that authority now. The definitions of executive and managerial capacity, however, have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The Beneficiary's discretionary authority over the company addresses only the first part of the definitions.

On appeal from the Director's decision, the Petitioner had asserted that the "Beneficiary met each requirement . . . for a multinational executive in the U.S. company" and "has been performing executive duties in the U.S. company," and that the denial was "in error . . . based on failure to provide evidence of managerial duties." Now, on motion, the Petitioner asserts that "it is difficult to distinguish 'executive' from 'managerial' aspects of running the business," and that the Beneficiary's duties "encompassed both managerial and executive tasks."

A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must establish that the

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beneficiary meets each of the four criteria set forth in the statutory definition for either executive capacity or managerial capacity. Having previously filed an appeal based on the assertion that the Director was “in error” for discussing the Beneficiary’s work in a managerial context, the Petitioner’s reversal of course on this subject is not proper cause for reopening the proceeding.

On Form I-290B, Notice of Appeal or Motion, the Petitioner had three choices for the type of motion being filed: motion to reopen; motion to reconsider; or a combination of the two. The Petitioner specified that it was filing a motion to reopen. A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). *See also* 8 C.F.R. § 103.5(a)(2) and (3) (defining a motion to reopen and a motion to reconsider).

In our decision of September 18, 2015, we stated:

The Petitioner claims to operate two separate retail stores, and states that the Beneficiary supervises one Manager for its “brick and mortar stores,” who in turn supervises four shop assistants. . . . [T]his manager earned \$11,969.00, and each shop assistant earned between \$1,417.50 and \$8,590.66 in 2013. . . .

The Petitioner has not demonstrated that it employs a full time store manager or shop assistant staff. Given the nature of the retail business, the Petitioner’s operating levels, and its staffing levels at the time of filing, the subordinate manager would reasonably need to perform the duties of the store manager and the shop assistants in order to keep the retail store staffed. Therefore, the Petitioner has not demonstrated that the Beneficiary performs primarily managerial or executive duties with respect to its “brick and mortar stores” because the Beneficiary does not have a sufficient staff to relieve him of non-managerial or non-executive duties.

We also noted that the Petitioner’s organizational chart referred to an “e-commerce manager,” but that this position was vacant at the time of filing, and therefore the Beneficiary had no subordinates to whom he could delegate the responsibilities relating to the company’s online activities.

Section 101(a)(44)(C) of the Act allows us to consider staffing levels, but requires us to take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The Petitioner, on appeal, asserts that “[s]taffing levels . . . should not be used as a factor in this decision,” because “[t]he economic crisis had brought the company to the brink of ruin” and, therefore, “[a]t the time of filing, the ‘stage of development’ can be likened to that of a newly formed entity.” The Petitioner was established in [REDACTED] more than eight years prior to the petition’s October 2013 filing date. The Petitioner cites no legal authority requiring us to equate economic stress with regression in the company’s “stage of development.”

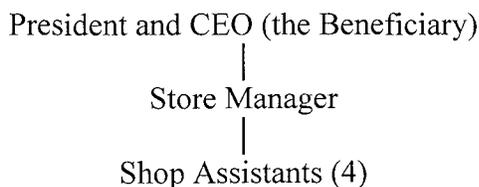
The issue is not whether the company was thriving at the time the Petitioner chose to file the petition. Rather, the issue is whether the Beneficiary was able to primarily perform qualifying managerial or executive tasks. The Petitioner's staffing is directly relevant to this issue, because, as a retail store with an online sales presence, the company needed personnel to handle non-managerial and non-executive functions such as counter sales, purchasing, marketing, and shipping. If the Beneficiary personally performed these tasks, they must be considered non-qualifying duties regardless of the Petitioner's stage of development. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute and will not excuse a beneficiary who spends much of his or her time on non-qualifying duties.

Regarding the store manager who earned less than \$12,000 in 2013, the Petitioner submits copies of Florida Department of Revenue Employer's Quarterly Reports, showing that the individual worked for the Petitioner for only part of the year. The Petitioner contends that the store manager's "salary would have been in excess of \$26,000 had she stayed on for the entire year. This salary is competitive with retail store managers in the area." The Petitioner submits a printout from the Foreign Labor Certification Data Center Online Wage Library, to show that the 2015-2016 entry-level wage for "First-Line Supervisors of Retail Sales Workers" is \$29,619 per year.

The wage and tax information is consistent with the Petitioner's assertion that the store manager worked for the company for only a few months. It does not answer the question of who supervised the retail sales workers in the store manager's absence.

The store manager's name does not appear on the quarterly report for the fourth quarter (October to December) of 2013. Therefore, she left the company before the Petitioner filed Form I-140 on October 8, 2013. (She appears to have left the company early in the third quarter of 2013, during which she earned only \$991.50.) This is consistent with the Petitioner's statement at the time of filing that "[t]he Petitioner is currently recruiting to fill two positions that have recently opened, Manager and Shop Assistant." The Petitioner acknowledges that "[i]t wasn't until August of 2014 that the present manager . . . was found and hired."

The relevant portion of the Petitioner's organizational chart includes the following information:



Thus, the store manager is the only person in the chain of command between the Beneficiary and the shop assistants. The Petitioner, at the time of filing, had no store manager to supervise the sales workers at its two brick-and-mortar stores. Therefore, the Petitioner has not shown that anyone other than the Beneficiary served as the first-line supervisor for the sales staff at the time of filing.

The Petitioner maintains that it employed a store manager “in 2013,” but the evidence submitted on motion shows that the manager left the company before the filing date.

Regarding the Petitioner’s increasing reliance on e-commerce, the organizational chart shows the following information:



The chart does not list any subordinates (whether employed or contracted) below the e-commerce manager. As with the store manager, the e-commerce manager position was vacant at the time of filing, and remained vacant in August 2014. The Petitioner has not shown that the Beneficiary had any subordinate employees or contractors to handle the non-qualifying functions assigned to the e-commerce manager, such as “supplying the online customers with the purchased merchandise.”

Based on the Petitioner’s own information, we previously concluded that the responsibilities for supervising the retail staff and operating the e-commerce function devolved upon the Beneficiary himself at the time of filing. The Petitioner, on motion, has not directly addressed, rebutted, or overcome this finding. Operational duties relating to the provision of goods and/or services are not qualifying managerial or executive duties. Further, a first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. 8 C.F.R. § 204.5(j)(4)(i). The Petitioner has not claimed or established that its shop assistants are professional employees.

As stated above, the Petitioner must establish eligibility at the time of filing the petition. If the Petitioner had no store manager and no e-commerce manager at the time of filing, then its plans to fill those positions in the future do not establish eligibility at the time of filing.

The Petitioner asserts that the Beneficiary oversaw a professional employee, specifically the company’s marketing manager. In our prior decision, we stated:

[T]he marketing manager does not manage or supervise any subordinate employees, and his job duties do not reflect any managerial duties. . . . The petitioner has not demonstrated that the marketing manager position meets the statutory definition of professional. Therefore, we cannot conclude that the marketing manager functions in a professional, managerial, or supervisory role.

The Petitioner, on motion, asserts that the marketing manager position is a professional position that requires a bachelor’s degree. The Petitioner asserts that the position pays \$36,000 per year, although the quarterly reports show that the Petitioner paid the marketing manager \$27,050 in 2013. The shortfall is not due to a mid-year hiring date; the marketing manager’s name appears on all four 2013 quarterly reports, showing payments of \$5,000, \$7,500, \$9,550, and \$5,000 for those quarters.

The Petitioner submits what it calls “[p]rintouts of job announcements for comparable positions all requiring bachelor’s degrees.” One announcement, for an “Online Marketing Manager,” indicates that the position requires a bachelor’s degree. The other announcement, for a “Manager of Email Marketing Services” (and which), states only that a bachelor’s degree is “preferred.” The Petitioner does not demonstrate that these positions are comparable to its own marketing manager position. Both job announcements refer to leadership of “teams,” which the Petitioner does not appear to have. Also, the “Manager of Email Marketing Services” position offers a much higher salary (\$80,000 to \$130,000 per year) than the \$36,000 per year that the Petitioner claims on appeal (or the \$27,050 that the Petitioner actually paid in 2013).

The job announcements submitted on motion do not show that the marketing manager position at the petitioning company is a managerial, supervisory, or professional position. Furthermore, the Petitioner, on motion, does not establish how much time the Beneficiary allocates to overseeing the marketing manager. Even if the Petitioner had established that this subordinate employee is a professional or manager, the record still would not establish that the Beneficiary’s position requires him to primarily perform managerial duties.

The Petitioner has introduced new facts through the materials submitted on motion, but the Petitioner has not shown that these new facts warrant reopening the proceeding or establish the Beneficiary’s eligibility for the immigrant classification sought in this proceeding. The quarterly tax returns shed additional light on the Petitioner’s staffing in 2013, but do not show that the Beneficiary had sufficient subordinate staff to relieve him from primarily performing non-qualifying operational tasks. The documentation regarding the recent growth and development of the Petitioner’s businesses does not address the issues underlying the dismissal of the appeal. The job announcements are of limited relevance, and the Petitioner submitted those announcements in service of a claim (regarding the Beneficiary’s managerial status) that the Petitioner had specifically repudiated on appeal. For these reasons, the materials submitted on motion do not show proper cause to reopen the proceeding.

### III. CONCLUSION

The motion will be denied for the above stated reasons. In visa petition proceedings, it is the Petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The motion to reopen is denied.

Cite as *Matter of ABCF-, LLC*, ID# 16160 (AAO Mar. 29, 2016)