



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

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

In Re: 8818324

Date: JULY 13, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as a seller of furniture products, seeks to permanently employ the Beneficiary as its president 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 on multiple grounds. The Director concluded the Petitioner did not establish that: (1) it had been doing business as defined by the regulations for more than one year prior to the date the petition was filed; (2) the Beneficiary would be employed in a managerial or executive capacity in the United States; (3) the Beneficiary was employed abroad in a managerial or executive capacity prior to his entry as a nonimmigrant; and (4) it had the ability to pay the Beneficiary's proffered wage as of the date the petition was filed. The Petitioner later filed a motion to reopen and a motion to reconsider that the Director granted; however, he affirmed his denial of the petition on the same grounds. In addition, the Director determined the Petitioner did not demonstrate that the Beneficiary would be an employee of the Petitioner or that it would have an employer-employee relationship with him.

On appeal, the Petitioner asserts it submitted "a multitude of evidence" to establish that it was doing business as defined by the regulations well before one year prior to the date the petition was filed, emphasizing submitted invoices and tax documentation. Further, the Petitioner contends it submitted sufficiently detailed duty descriptions for the Beneficiary, contrary to the Director's conclusions, that demonstrate he would act in a managerial or executive capacity in the United States and that he acted in a managerial capacity abroad. Lastly, the Petitioner states it provided evidence indicating that the Beneficiary was paid his proffered wage through revenues received through its closely held limited liability company.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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 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. U.S. EMPLOYMENT IN AN MANAGERIAL OR EXECUTIVE CAPACITY

The sole issue we will address is whether the Petitioner established that the Beneficiary would act in a managerial or executive capacity in the United States. On appeal, and throughout the record, the Petitioner confusingly references both the Beneficiary's executive and managerial capacity but does not clearly indicate which he qualifies under. For instance, on appeal the Petitioner states that the Beneficiary "meets the definition of an executive capacity" and that he "would be employed in a qualifying executive capacity," but also cites Section 101(a)(44)(A) of the Act related to managerial capacity. Further, the Petitioner states on appeal that the Beneficiary's "responsibilities will primarily consist of managerial duties associated with the development of the Petitioner." As such, we will address both whether the Beneficiary would be employed in a managerial or an executive capacity.

A petitioner claiming that a beneficiary will perform as a "hybrid" manager/executive will not meet its burden of proof unless it has demonstrated that the beneficiary will primarily engage in either managerial or executive capacity duties. *See* section 101(a)(44)(A)-(B) of the Act. While in some instances there may be duties that could qualify as both managerial and executive in nature, it is the petitioner's burden to establish that the beneficiary's duties meet each criteria set forth in the statutory definition for either managerial or executive capacity. A petition may not be approved if the evidence of record does not establish that the beneficiary will be primarily employed in either a managerial or executive capacity. Regardless, the Petitioner's continued ambiguity as to the Beneficiary's employment leaves initial uncertainty as to its assertions.

"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).

"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.

When examining the managerial or executive capacity of a given beneficiary, we will review the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in a managerial or executive capacity. 8 C.F.R. § 204.5(j)(5). Beyond the required description of the job duties, we examine 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.

A. Duties

Based on the statutory definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. The Petitioner must also prove that the Beneficiary will be *primarily* engaged in managerial or 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); *Champion World*, 940 F.2d 1533.

The Petitioner stated that the Beneficiary's former foreign employer in China, established in 2001, ran a business designing and producing "various furniture products." The Petitioner further indicated it was formed in March 2016, that it was engaged in "the distribution and sale of furniture products under its own trademark '[redacted]' and '[redacted]'" and that it was "successfully accepted by [redacted] as its authorized supplier." In support of the petition in December 2017, the Petitioner submitted the following duties for the Beneficiary as its asserted "president and manager":

- Manage and supervise the daily operation of the Petitioner, manage the essential functions of the Petitioner. All staff under all departments (warehousing and shipping, accounting and administration, and sales), and the independent contractor sales are under [the Beneficiary's] management and supervision. He has the absolute authority to hire, terminate, evaluate and promote any personnel in the Petitioner based on their job performance, qualifications and contributions. – 50% of his time.
- Direct and supervise activities of the Petitioner's operations, purchase & sales, accounting, and logistics to carry out effective daily operations of the Petitioner. The sales manager has to report to [the Beneficiary] about the sale status, and [the Beneficiary] can make the final decision about the sales strategies, and also direct the sales manager and the independent contractor sales to conduct [the Beneficiary's] sales directions. The sales and marketing department has to report to the [the Beneficiary] about the updated status and [the Beneficiary] will make the final decision of how to adjust its marketing strategies and decide which products should be ordered more and

which products should be reduced more. [The Beneficiary] will also direct the Foreign Company about how to improve the products to fit the U.S. market and adjust the quantity and quality of the importing products to the U.S. – 30% of his time.

- Conduct and lead regular meetings with the Petitioner’s staff, listen to their reports, and evaluate internal operation conditions. Manage the Petitioner’s departments by settling the goals policies and strategies to all personnel under the department and supervise them to achieve the goals and comply with the policies. Direct the utilization of financial reports and activity data to determine the company’s business progress, devise improvements and designate further strategies for business advances. Meet local business leaders and executives in the trade to build up the business network and seek more business opportunities for the Petitioner. – 20% of his time.

However, later in response to the Director’s request for evidence (RFE) asking for additional detail as to the Beneficiary’s daily tasks, the Petitioner submitted the following U.S. duty description in December 2018:

- [The Beneficiary] shall need to supervise our daily operation and works through the three departments. Daily, our sales department organizes the orders and then forwards to our shipping and warehouse staff to handle loading and delivery of the furniture products to our customers, and deliver to [redacted]’s designated warehouse. Our accounting department needs to record the orders and invoices for our internal accounting data. Our sales and marketing staff need to manage the online sales such as updating the products, prices, handling of orders and inquiries from the customers. Our departments’ supervisors and the staff under them involve the daily jobs, and [the Beneficiary] supervises them to ensure and control that the daily flow from sales, document operation and logistics and accounting run smoothly in according to our internal policies and procedures. [The Beneficiary] can decide to make any adjustment to our regular procedures if necessary. [The Beneficiary] also needs to handle the urgent or sudden matters and make final decisions. He can call any urgent meeting with the supervisors to deal with any important or urgent issues, and to make the decision to resolve them. The typical one is the complaint for the infringement of the copyright or trademark of our furniture products from [redacted] which can happen any time. [The Beneficiary] must act very fast to meet with the supervisors and other staff if necessary to resolve the issue quickly, otherwise [redacted] can have authority to close our company’s account. All supervisors must report to [the Beneficiary] about any special issues in the daily operation, and get [the Beneficiary’s] decision on them. – 65% of his time.
- [The Beneficiary] has the authority to hire and fire any supervisor, and can instruct or recommend the supervisors to hire and fire any staff under them. In fact, all supervisors were directly interviewed by [the Beneficiary] and he decided to employ them. [The Beneficiary] needs to hold regular meeting with the supervisors and other staff. [The Beneficiary] also need[s] to evaluate the performance of the supervisors to decide their promotion, demotion and salary increase. The supervisors’ recommendation to promote the general staff must be consented by [the Beneficiary]. [The Beneficiary]

can also have authority to set up new departments or restructure our departments if necessary. – 25% of his time.

- [The Beneficiary] needs to set our sales and marketing strategies and plan for the sale and marketing department to follow. He also sets and change[s] from time to time if necessary our internal operational procedures and policies so that he can better manage our company to improve our operation. [The Beneficiary] needs to meet our major customer and vendors such as [redacted]'s representatives to deal with the sales and shipping and sign contracts with them. – 10% of the time.

We note as a preliminary matter that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). As such, the Petitioner must clearly describe the Beneficiary's duties as of the date the petition was filed in December 2017. However, the Petitioner has submitted two fundamentally different duty descriptions leaving substantial uncertainty as to the Beneficiary's actual duties as of the date the petition was filed.

For instance, the Petitioner's initial duty description emphasized the Beneficiary's sales and marketing activities, direction of a sales manager and "independent contractor sales," and focus on sales and marketing strategies, indicating this would make up 30% of his time. In contrast, the Beneficiary's duty description provided in response to the RFE made little mention of these activities and did not discuss independent contractor sales representatives. In fact, the Beneficiary's RFE duty description focused more on ordering, shipping and warehouse activities, noting this would consist of 65% of his time. Meanwhile, the Beneficiary's commitment to these ordering, shipping and warehouse activities was not reflected in his initial duty description. Likewise, the Petitioner's first duty description stated that the Beneficiary would continue to manage the foreign employer and "improve products to fit the U.S. market," whereas the latter duty description made no mention of this responsibility with respect to the foreign entity. Lastly, the Beneficiary's RFE duty description highlighted dealings with [redacted] accounting matters, department supervisors, and copyright and trademark issues, none of which were mentioned in the first duty description.

Although we acknowledge that some difference between the aforementioned duty descriptions would be logical, given that the Director requested more detail as to the Beneficiary's proposed daily tasks, the Petitioner submitted substantially different duty descriptions from the petition to the RFE. These discrepancies leave substantial uncertainty as to the Beneficiary's actual duties as of the date the petition was filed. The Petitioner must resolve inconsistencies and ambiguities 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).

Furthermore, the Petitioner provided extensive supporting documentation indicating the Beneficiary's direct involvement in non-qualifying operational tasks. For example, the Petitioner submitted substantial documentation dated near to and after the date the petition was filed indicating the Beneficiary's likely performance of non-qualifying operational tasks, including [redacted] receipts reflecting his signature, an invoice dated in October 2017 with a notation from him that payment had been received by check, and several invoices from a shipping company from late 2017 including his name as a contact. Likewise, the Petitioner provided a shipping invoice from January 2018, after the

date the petition was filed, including the Beneficiary's signature and bank account records with checks written and signed by him for payment to various vendors as well as small expenses such as its propane, insurance, and cable bills, and an automobile loan payment. These examples only represent some of the numerous supporting documents provided by the Petitioner that reflect the Beneficiary's direct involvement in non-qualifying duties. In sum, the submitted supporting documentation strongly supports a conclusion the Beneficiary's primary performance of non-qualifying operational level tasks as of the date the petition was filed and thereafter. In contrast, the Petitioner submitted no supporting evidence to substantiate the Beneficiary's delegation of these non-qualifying tasks to his asserted subordinates.

Whether the Beneficiary is a managerial or executive employee turns on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the Petitioner does not document what proportion of the Beneficiary's duties would be managerial or executive functions and what proportion would be non-qualifying. The Petitioner provided substantial documentation indicating the Beneficiary's direct involvement in non-qualifying operational tasks but does not quantify the time he would spend on these different duties. For this reason, we cannot determine whether the Beneficiary would have primarily performed the duties of a manager or an executive as of the date the petition was filed. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, to the extent the Petitioner discussed asserted qualifying managerial or executive level tasks in his conflicting duty descriptions, these duties were generic, and it provided no supporting documentation to corroborate them. For instance, the Petitioner did not detail or substantiate with documentation the sales or marketing strategies the Beneficiary implemented, the products he ordered improved for the U.S. market, or the "internal operation conditions," goals, or policies he set. Similarly, the Petitioner did not discuss with specificity or support with the documentation the "regular procedures" or internal policies the Beneficiary implemented or the "important or urgent issues" he handled. This lack of specificity and supporting documentation is particularly noteworthy since the Petitioner indicates that the Beneficiary has been acting in his proposed role in the United States throughout late 2016 into 2018 on B-1 and B-2 nonimmigrant travel visas.

In reviewing the totality of the record, the Petitioner has not submitted a sufficiently detailed duty description describing the Beneficiary's actual day-to-day managerial and 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 managerial or 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 holds a senior position within the organization, the fact that he will manage or direct the business does not necessarily establish eligibility for classification as a multinational executive within the meaning of section 101(a)(44)(A) and (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 alone is insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we take into account the reasonable needs of the organization, in light of its overall purpose and stage of development. *See* section 101(a)(44)(C) of the Act.

Again, as discussed, the Petitioner must demonstrate that the Beneficiary was eligible for the benefit sought as of the date the petition was filed in December 2017. As such, we will look to the Petitioner's staffing and organizational structure at this time, rather than the latter organizational charts provided in response to the RFE or on motion.

In support of the petition, the Petitioner provided an organizational chart reflecting that the Beneficiary oversaw five "independent sales" contractors and sales and marketing, warehouse and shipping, and accounting and administration departments. The sales and marketing department was shown to consist of two employees, and sales supervisor and a marketing analyst. In addition, each of the warehouse and shipping and accounting and administration departments were shown to include a "sales supervisor."

As discussed, the Petitioner only vaguely indicates on appeal that the Beneficiary would act in a managerial capacity through his oversight of subordinates. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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.* If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2). As the Petitioner does not explicitly assert that the Beneficiary would act as a function manager, we will only analyze whether he would qualify as a personnel manager as claimed.

The Petitioner has not sufficiently demonstrated that the Beneficiary would act as a personnel manager supervising subordinate supervisors. For instance, the organizational chart provided as of the date the petition was filed did not reflect that he oversaw any subordinate managers. In fact, the duty descriptions provided for each employee indicated that they all reported to the Beneficiary only, suggesting that he would act, at most, as a first line supervisor. Further, the Petitioner provided little supporting documentation to substantiate the Beneficiary's delegation of duties to his subordinates or his personnel authority over them. Therefore, the Petitioner did not establish that the Beneficiary would have acted as a personnel manager as of the date the petition was filed.

Next, we will analyze whether the Beneficiary would qualify as a personnel manager based on his supervision of subordinate professionals. To determine whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term

profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor’s degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

The Petitioner has not sufficiently demonstrated that the Beneficiary would qualify as a personnel manager based on the supervision of subordinate professionals. Indeed, the Petitioner did not articulate that any of the Beneficiary’s subordinates were professionals as defined by the regulations. The Petitioner also did indicate or document that the Beneficiary’s claimed subordinates held bachelor’s degrees. In addition, it only provided brief duty descriptions for each asserted position subordinate to the Beneficiary and these duties reflected their engagement in operational and logistical matters related to the sale, shipping, and stocking of furniture as well as other basic administrative and bookkeeping tasks with no apparent professional level tasks. Further, the Petitioner does not discuss how a bachelor’s degree is required for any of the positions subordinate to the Beneficiary. It is also noteworthy that the Petitioner provided little evidence to substantiate its engagement of the five claimed independent contractor sales representatives and did not assert that they qualified as professionals as defined by the regulations. Likewise, the Petitioner provided little supporting documentation to corroborate the Beneficiary’s personnel authority over any of his subordinates or his delegation of duties to them. As such, the Petitioner did not sufficiently demonstrate that the Beneficiary would qualify as a personnel manager based on his supervision of professional subordinates as of the date the petition was filed.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of an organization or major component or function thereof. Section 101(a)(44)(B) of the Act. To show that a beneficiary will “direct the management” of an organization or a major component or function of that organization, a petitioner must show how the organization, major component, or function is managed and demonstrate that the beneficiary primarily focuses on its broad goals and policies, rather than the day-to-day operations of such. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the organization, major component, or function as the owner or sole managerial employee. 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.*

The Petitioner also did not demonstrate, as asserted, that the Beneficiary would have been employed in an executive capacity as of the date the petition was filed. The Petitioner provided state employer’s quarterly wage documentation from the fourth quarter of 2017, corresponding with the date the petition was filed, reflecting that during this quarter it employed the claimed sales supervisor, marketing analyst, one warehouse and shipping employee, and an accounting and administration employee. However, this documentation indicated that the warehouse and shipping employee was only employed part-time and further reflected that by December 2017 the Petitioner only had two employees. Meanwhile, the Petitioner did not provide state quarterly wage forms for the first quarter of 2018 and those forms corresponding with the second quarter of 2018 showed it only had two employees, neither of whom were shown as previously employed in the December 2017 state quarterly wage form.

Further, as noted, the Petitioner provided no supporting documentation to substantiate that it regularly engaged independent contractor sales representatives as claimed. Therefore, the supporting tax documentation and other evidence leaves substantial question as to whether the Petitioner's organization was sufficiently developed as of the date the petition was filed to support the Beneficiary within a complex organizational hierarchy.

In fact, as previously discussed in this decision, the Petitioner provided substantial supporting documentation, such as invoices, shipping documentation, banking records, and other such documentary evidence, demonstrating the Beneficiary's direct involvement in the non-qualifying operational matters of the business. Meanwhile, the Petitioner submitted no supporting evidence reflecting the Beneficiary's performance of executive-level tasks related to directing the company's management or setting its broad goals and policies. Therefore, the Petitioner did not properly demonstrate that the Beneficiary would have acted in an executive capacity as of the date the petition was filed.

For the foregoing reasons, the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity under an approved petition.

III. ADDITIONAL ISSUES

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its arguments regarding whether: (1) it had been doing business as defined by the regulations for more than one year prior to the date the petition was filed; (2) the Beneficiary was employed abroad in a managerial or executive capacity prior to his entry as a nonimmigrant; (3) it had the ability to pay the Beneficiary's proffered wage as of the date the petition was filed; and (4) it had a employer-employee relationship with the Beneficiary. *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).

ORDER: The appeal is dismissed.