



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

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

In Re: 20601950

Date: JUN. 07, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Manager or Executive

The Petitioner, a distributor of construction materials and supplies, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) 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 an executive or managerial capacity.

The Director of the Nebraska Service Center initially approved the petition but subsequently revoked that approval on notice, concluding that the record did not establish that the Petitioner would employ the Beneficiary in a managerial or executive capacity. The Director determined that the record contained unresolved inconsistencies regarding the Beneficiary's job duties and the Petitioner's organizational structure which cast doubt on the credibility and probative value of the submitted evidence. The matter is now before us on appeal.

The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Esteime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). This office reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter to the Director for further action and entry of a new decision, consistent with the following discussion.

I. LAW

A. Multinational Managers and Executives

An immigrant visa is available to a noncitizen 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 as a manager or executive 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).

B. Revocation Authority

Section 205 of the Act, 8 U.S.C. § 1155, states: “The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for “good and sufficient cause” where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (quoting *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987)). Notwithstanding the USCIS burden to show “good and sufficient cause” in proceedings to revoke the approval of a visa petition, a petitioner bears the ultimate burden of establishing eligibility for the benefit sought. A petitioner’s burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

II. ANALYSIS

The Petitioner filed the immigrant petition in May 2017 and the Director initially approved it on May 2, 2018. On June 21, 2021, the Director issued a notice of intent to revoke (NOIR), in which he advised the Petitioner that “evidence gathered during the processing of the beneficiary’s Form I-485, Application to Register Permanent Residence or Adjust Status indicates that this petition may have been approved in error.”¹ The Director did not, however, address this evidence in the NOIR or in the revocation decision. Rather, the discussion of evidence in the revocation decision is limited to information submitted with the Petitioner’s initial 2017 filing and in support of its 2021 response to

¹ The record reflects that U.S. Citizenship and Immigration Services (USCIS) interviewed the Beneficiary in September 2018, August 2019, and October 2020 to verify information provided on the Form I-485 and to confirm his eligibility for classification as a multinational manager or executive. The Director of the San Francisco, California Field Office also issued a request for evidence (RFE) in connection with the Form I-485 on September 19, 2019, in which he requested verification of the Petitioner’s business location(s), staffing and organizational structure, business activities, and the Beneficiary’s business-related travel. The Beneficiary responded to the RFE on November 15, 2019.

the NOIR. As noted, the Director revoked the approval of the petition after concluding that the Petitioner did establish that the Beneficiary would be employed in the United States in a managerial or executive capacity, as defined at section 101(a)(44)(A) and (B) of the Act.

In the revocation decision, the Director acknowledged that USCIS reviews the totality of the evidence when examining the claimed managerial or executive capacity of a beneficiary, including the beneficiary's job duties, 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. However, the Director did not reach this analysis of the totality of the evidence and instead, citing *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), questioned the credibility and probative value of the evidence based on certain deficiencies and inconsistencies he deemed to be unresolved.²

On appeal, the Petitioner objects to the Director's determination that there are unresolved material inconsistencies in the record and maintains that Director failed to consider all evidence submitted in support of the petition. For the reasons discussed below, we find the Petitioner's assertions persuasive. Accordingly, we will withdraw the Director's decision and remand this matter for further action.

The record reflects that, at the time of filing, the Petitioner had offices in [redacted] and [redacted] California, but since 2017 or 2018, has based its operations entirely in [redacted]. The Form I-140 indicates that the Beneficiary resides in [redacted] California, near [redacted]. In the NOIR, the Director noted "while not impossible, it appears impractical to manage the organization and direct the staff with two (2) office locations ([redacted] and [redacted] CA) while residing in [redacted] CA." The Director did not further address this issue in the NOIR or suggest evidence that the Petitioner should provide to rebut the finding. The Petitioner's response to the NOIR included an explanation of how the Beneficiary carries out his duties remotely at times and the tools he uses for communication with other company staff. It also provided a chart detailing the Beneficiary's business travel for the period between February 2016 and May 2017, including dates, flight numbers, and hotel reservation numbers for most trips.

In the revocation decision, the Director acknowledged the Petitioner's response and noted that it indicated that the Beneficiary had taken frequent trips to [redacted]. However, the Director determined that the Petitioner failed to provide independent, objective evidence of the Beneficiary's travel to support its assertions and therefore did not adequately rebut the concerns the Director raised in the NOIR.

On appeal, the Petitioner submits additional documentary evidence to corroborate the Beneficiary's business travel in 2016 and 2017, as detailed on the chart included with the NOIR response. Further, prior to the issuance of the NOIR, the record already contained extensive documentation related to the Beneficiary's business travel in 2018 and 2019, which he submitted in response to the RFE issued in September 2019. Although submitted in relation to the Beneficiary's Form I-485, the evidence is part

² A petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Unresolved material inconsistencies may lead an officer to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

of the record of proceeding, and the Director has specifically stated that evidence collected during the adjudication of the Form I-485 has been considered. Therefore, the Director's conclusion that the record contains no documentation to corroborate the Beneficiary's frequent business travel to [] is incorrect. Further, the Director did not indicate in the NOIR what type of evidence was required to address his concerns about the Beneficiary's residence outside normal commuting distance from []. The Petitioner's failure to submit specific evidence that was never requested by the Director cannot be used to discredit its otherwise consistent claim.

The record now contains documentation for the Beneficiary's business travel for the period from 2016 to 2019. As the matter will be remanded, the Director should review this evidence, along with the Petitioner's and Beneficiary's explanations, to determine if the record supports a determination that the Beneficiary is able to perform his duties as CEO while dividing his time between his home and the Petitioner's [] office.

The Director also revoked the approval of the petition, in part, based on a determination that the record contains unresolved inconsistencies regarding the Beneficiary's job duties and his allocation of time to specific tasks and responsibilities. In the NOIR, the Director noted that the Petitioner's initial supporting letter stated that he would spend 50% of his time managing the forecasting and planning of specific business strategies to ensure business growth, 30% of his time monitoring activities of the company through high level communication with direct reports (sales manager, chief engineer, logistics manager), and the remainder of his time on managing unforeseen situations and unplanned meetings.³ The Director advised that "the duties do not create a comprehensible view of the beneficiary's role within the petitioner's business operations" and did not "clearly allocate the beneficiary's time amongst the various daily tasks that would be associated with the broadly described duties." The Director requested a statement that clearly describes the Beneficiary's duties, an explanation of the specific daily tasks that are involved, and the percentage of time spent to be spent on each duty.

In its response, the Petitioner emphasized that its initial description of the Beneficiary's duties was detailed in nature, supported by evidence, and not limited to the brief overview quoted by the Director in the NOIR. The Petitioner nevertheless provided the requested breakdown of how the Beneficiary allocates his time among eight areas of responsibility, noting that: 40% of his time would be spent on developing the company's business strategies and plans to achieve the company's short- and long-term goals (with a list of ten associated tasks); 15% would be spent on leading and motivating his subordinate managerial team (with a list of seven associated tasks); and 10% would be spent on investment decisions that impact company profits. The Petitioner indicated that each of the remaining areas of responsibility would require no more than 8% of his time and would include overseeing operations and activities, ensuring adherence to policies, reviewing reports presented by managers, building relationships with key partners and shareholders, solving problems as they arise, and maintaining a deep knowledge of the industry and market.

³ The Petitioner's letter dated May 5, 2017, included this broad overview of the Beneficiary's responsibilities as CEO, but also included an approximately 10-page narrative discussing his duties within the context of the business, which included examples of specific actions he had taken as CEO during the previous year. The Petitioner also submitted copies of minutes from monthly board of directors' meetings to corroborate the Beneficiary's completion of these actions.

The Director determined that the Petitioner's response to the NOIR "added new managerial duties to the job description while also changing the Beneficiary's allocation of time," and, citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), emphasized that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts." The Director ultimately concluded that "the descriptions of the beneficiary's position provided are of limited evidentiary value and not persuasive on the issue of whether the Beneficiary is employed in a qualifying role." The revocation decision contains no further discussion or analysis of the Beneficiary's job duties.

On appeal, the Petitioner asserts that the job description provided in response to the NOIR was consistent with the initial description of the Beneficiary's CEO role and emphasized that neither description indicates that he would spend a significant amount of his time performing non-managerial or non-executive duties.

After comparing the submitted position descriptions for the Beneficiary's position, we agree with the Petitioner's assertion that they do not contain material inconsistencies. The inclusion of additional details and a breakdown of the Beneficiary's role into more specific areas of responsibility was reasonable in light of the Director's request that the Petitioner elaborate on the information provided previously and did not materially change the responsibilities associated with the position as described at the time of filing. Further, while the Director stated that the submitted job descriptions have "limited evidentiary value" based on perceived unresolved inconsistencies, he appears to have concluded that they have no probative value at all, based on his decision to forego any analysis of those duties or to reach a determination as to whether they are consistent with the statutory definition of managerial or executive capacity.

For the reasons discussed, we conclude that the Director erred by wholly dismissing the Petitioner's descriptions of the Beneficiary's position as inconsistent and by failing to analyze the submitted job descriptions within the context of the totality of the evidence in the record. Such evidence included not only evidence submitted in support of the initial petition and in response to the NOIR, but, as noted by the Director, evidence collected during the adjudication of the concurrently filed Form I-485 through interviews and an additional RFE.

The Director also based his revocation decision, in part, on a determination that there are unresolved inconsistencies in the record relating to the Petitioner's organizational structure. The Director determined that the Petitioner resolved some of these issues in its response to the NOIR but concluded that it did adequately address inconsistencies related to two subordinate employees' job titles. Specifically, the Director noted that the Petitioner's organizational chart identified [redacted] as its sales manager and [redacted] as a sales specialist but provided copies of these individuals' business cards indicating that [redacted] is the company's "business strategist," while [redacted] is the "sales manager." In response, the Petitioner emphasized that a business card is not an official document and that the titles used on the business cards were intended for the purpose of engaging with potential clients and partners at a major trade show. The Petitioner provided copies of both individuals' employment contracts signed in 2016, which identified titles consistent with the Petitioner's organizational chart and other statements and evidence in the record. The Director agreed with the Petitioner that a business card is not an official document but determined that "the altered positions" for these two individuals was "another inconsistency that raised doubt as to the reliability of the evidence submitted."

In addressing the company's organizational structure, the Director concluded that the Petitioner "did not provide independent objective evidence to overcome the [in]consistencies, rather the petitioner tried to explain away the inconsistencies" and that "the inconsistencies noted within the organization's structure cast doubt on the reliability of the evidence submitted." The Director did not mention the employment contracts submitted in response to the NOIR or other evidence in the record reflecting that the Petitioner employed the individuals in the positions identified on the organizational chart. This evidence included many business documents identifying [redacted] as "sales manager." As with the job descriptions, the Director appears to have wholly disregarded evidence related to the Petitioner's organizational structure as lacking in probative value and credibility due to inconsistencies, despite determining that the NOIR response resolved most of those inconsistencies. We agree with the Petitioner that the employees' use of different titles on their business cards does not provide a sufficient basis for disregarding all evidence of the Petitioner's staffing and structure as unreliable.

The Director's determination that the submitted evidence of the Beneficiary's job duties and organizational structure was inconsistent and lacked credibility is not supported by the record and did reflect consideration of all evidence submitted in support of the petition. As this determination led the Director to revoke the approval of the petition without addressing the Beneficiary's job duties within the context of the totality of the evidence, it did not provide the Petitioner with an adequate basis for revocation. An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Accordingly, the Director's decision is withdrawn.

III. BASIS FOR REMAND

Notwithstanding our withdrawal of the Director's decision, we conclude that the record as presently constituted does not establish that the Petitioner and Beneficiary meet all eligibility requirements for the benefit sought. Therefore, we will remand the matter to the Director for further action.

Whether a beneficiary will be employed in a managerial or executive capacity 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. In evaluating whether a petitioner has met this burden, we review the totality of the evidence when examining the claimed managerial or executive capacity of a beneficiary, 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.

As discussed above, the record contains lengthy descriptions of the Beneficiary's duties which have not yet been fully analyzed by the Director. Further, the Director has not yet evaluated the Beneficiary's duties in light of evidence submitted regarding the company's structure, staffing levels, the nature of the business and other relevant factors. The Director will need to review all relevant evidence to determine if the Beneficiary would, more likely than not, be employed in a managerial or executive capacity as defined at section 101(a)(44)(A) or (B) of the Act.

With respect to the company's staffing levels, we note that, at the time of filing in May 2017, the Petitioner documented its employment of seven individuals, including the Beneficiary, a sales manager, a chief engineer, a logistics manager, a bookkeeper, a sales specialist, and warehouse worker/driver. The Petitioner explained that the Beneficiary directly supervises the sales manager, chief engineer, and logistics manager, and that each of these individuals manages their own department, makes decisions regarding departmental operations, and is responsible for performance of their own staff. The organizational chart submitted with the initial filing indicated that the company had vacancies for a second sales specialist, a logistics specialist, and a second warehouse worker and the Petitioner's supporting letter indicated that those positions would soon be filled.

However, the record reflects that by the end of 2017, the number of employees supervised by the Beneficiary had been reduced from six to three, and only the sales manager, logistics manager and bookkeeper remained on the company's payroll. The Petitioner has claimed that its hiring and business expansion plans have been impacted by the Beneficiary's lengthy adjustment of status process. However, this 50% reduction in subordinate staff occurred in 2017, prior to the initial approval of the Form I-140, at a time when the Petitioner indicated that it would be hiring additional employees. The record reflects that the Director was not aware of the staffing reduction when he approved the petition in May 2018. The record does not indicate that the company ever returned to the staffing levels documented at the time of filing or proceeded with the additional hiring planned at that time.⁴ Nor has the Petitioner explained how the Beneficiary's duties, and the amount of time he may be expected to allocate to non-executive or non-managerial duties, were impacted by the reduction in staff.

A company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. See section 101(a)(44)(C) of the Act. However, it is appropriate for USCIS 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006). Based on the evidence of record, we cannot determine that a staff of three subordinates would sufficiently relieve the Beneficiary from significantly engaging in non-executive and non-managerial tasks necessary for the day-to-day operation of the business. As noted, a petitioner's burden for the benefit sought is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

As the matter is being remanded, the Director may issue a new notice of intent to revoke to allow the Petitioner an opportunity to provide additional evidence relevant to the issues discussed above, and any other evidence deemed necessary to demonstrate eligibility for the classification sought.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

⁴ The Petitioner's wage and payroll records indicate that the company had a Texas-based sales employee for part of 2018 who appears to have left the company, and that it hired a marketing employee in early 2019. The Petitioner has not documented evidence of wages paid to employees after the second quarter of 2019.