U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28185172

Date: AUG. 18, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Multinational Managers or Executives)

The Petitioner, a cellular phone retailer, seeks to permanently employ the Beneficiary as its controller under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in a managerial or executive capacity.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner will employ the Beneficiary in the United States in an executive capacity, and that the Beneficiary has been employed abroad in a managerial or executive capacity. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

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. ANALYSIS

The Director determined that the Petitioner did not establish that the Beneficiary has been employed abroad, and will be employed in the United States, in an executive capacity. The Director did not discuss the separate requirements for a managerial capacity.

"Executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

If a petitioner establishes that the offered position meets all four elements set forth in the statutory definition, the petitioner must then prove that the beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether the beneficiary's duties will be primarily executive, we consider the description of the job duties, the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

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

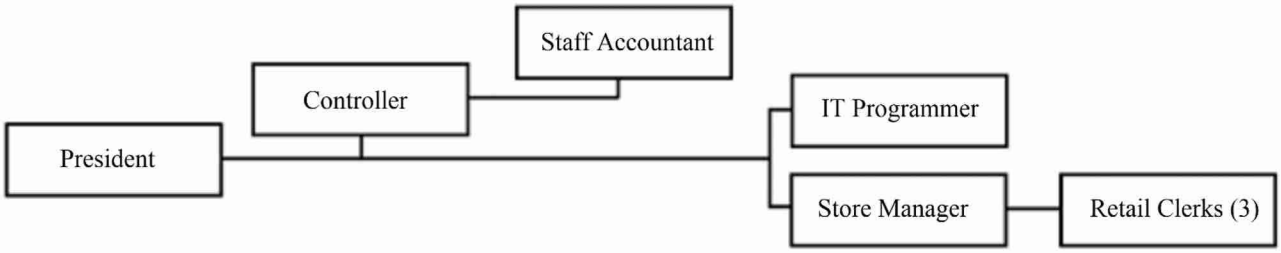
Accordingly, we consider evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

The Director determined that the Petitioner had not shown "that the beneficiary directs the management of the organization or a major component or function of the organization." We agree, for the reasons explained below.

The Petitioner submitted a job description indicating that the Controller is "[d]irectly responsible for the leadership financial management [sic] of the operations of the business" and "[d]eveloping and implementing sales strategies." The job description listed such responsibilities as "[c]oordinating the entire operation of the management staff" and "[r]ecruiting, training and motivating management staff." One listed responsibility refers to "[s]taying updated on all trends in the leather industry," although the Petitioner sells cell phones rather than leather goods. This reference to an unrelated industry raises questions about the origin and accuracy of the unsigned job description.

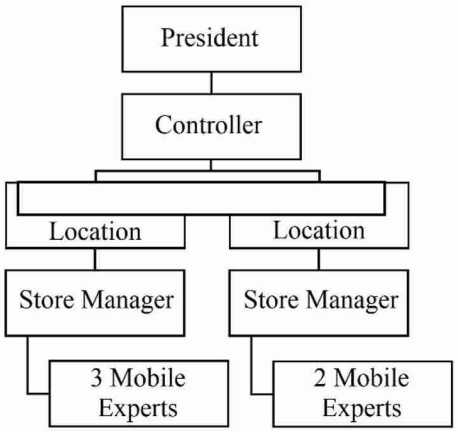
The Petitioner also submitted a list of "Executive Decisions made by the Controller," which indicates that "[t]he Controller has established the policy and procedures manual for the company as well as the required training program for all Managers."

An accompanying organizational chart, reproduced below, indicates that the staff accountant would be the Beneficiary's only subordinate. The other employees would report to the president, either directly or, in the case of the retail staff, through the store manager.



The Director denied the petition, stating: "the organization does not have the complexity to support an executive staff. Moreover, there is insufficient staff to relieve the beneficiary from any non-executive or non-managerial duties."

On appeal, the Petitioner submits an entirely different organizational chart:



The revised chart places more employees under the Beneficiary's authority, but does not show a staff accountant or IT programmer as shown earlier. The Petitioner submits new job descriptions, in which the duties formerly assigned to the staff accountant now belong to the store managers. The duties previously assigned to the IT programmer are absent from the new job descriptions.

In its appellate brief, the Petitioner does not explain or acknowledge the substantial differences between the two organizational charts and sets of job descriptions. A petitioner must meet all eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). Therefore, the significant, unexplained revision of the company's organizational structure does not overcome the stated grounds for denial.

The Petitioner states that the Director "failed to acknowledge that the beneficiary has the authority to hire, promote or dismiss any subordinate employee. The beneficiary is a signatory on the business

checking account, and he reports directly to the President of the company." The Director did not dispute that the Beneficiary would have some degree of discretionary authority over the company. The denial focused on a particular element of the statutory definition of "executive capacity" at section 101(a)(44)(B)(i) of the Act, requiring that an executive "primarily . . . directs the management of the organization or a major component or function of the organization." This requirement is integral to the definition of an executive capacity, and the Petitioner must satisfy that requirement in order for the petition to be approved.

An executive directs the management of the organization, major component, or essential function of a given organization by controlling the work of managerial or lower-level executive employees. *See BlueStar Cabinets, Inc. v. Jaddou*, No. 21-10116, 2022 WL 4364734, at *7 (5th Cir. Sept. 21, 2022) (holding that "'[d]irect[ing] the management of the organization' necessarily includes directing managers of the organization.") *See generally, also,* 2 *USCIS Policy Manual* L.6(D), https://www.uscis.gov/policy-manual.[1]

The Petitioner has asserted that its entire staff consists of managers and executives, but the record does not support this claim. Job descriptions in the record refer to all the lower-level employees as "managers," but the corresponding duties are operational or supervisory rather than managerial. For example, the staff accountant "[m]aintain[s] and update[s] accounting records," and the IT programmer "[d]esign[s] desktop applications." The store manager's first-line supervision of retail staff is not a managerial capacity under the statutory definition at section 101(a)(44)(A) of the Act. The Petitioner has not established that the Beneficiary's authority over a staff accountant, as originally claimed, or a small number of retail staffers, as claimed on appeal, amounts to directing the management of the company or of a component or function thereof.

The Petitioner states:

> [A]ny successful business must prepare financial reports [and related documents]. . . . The Beneficiary will also be responsible for working with external auditors for the preparation of the year-end financial statements and the filing of the Corporate Income taxes each year. These responsibilities are far beyond the duties of a manager or supervisor and requires [sic] an executive for an approval and or a signature requirements [sic]."

The Petitioner cites no source or authority to support the contention that "any . . . business," regardless of its size or structure, requires executive-level authority for financial matters.

The Petitioner asserts:

> USCIS relies on the Department of Labor to determine the Employment based preference when an employer files a Labor Certification for a potential employee. To meet the EB2 preference the employer must require 5 years experience and a minimum of a Bachelor Degree to serve in an Executive or Manager role. There is no mention of the number of subordinate employees required for a Professional Occupation such

[1] The cited section of the *USCIS Policy Manual* pertains to nonimmigrant petitions, but the underlying definition of "executive capacity" at section 101(a)(44)(B) of the Act is the same for immigrant and nonimmigrant petitions.

as a Financial Manager or Executive to supervise so they can maintain their role as a Financial Manager or Executive.

The above passage is not relevant to this petition. It describes the requirements for classification as a member of the professions holding an advanced degree under section 203(b)(2)(A) of the Act. The Petitioner seeks a different classification for the Beneficiary under section 203(b)(1)(C) of the Act.

With respect to the size of the company, section 101(a)(44)(C) of the Act permits "staffing levels [to be] used as a factor in determining whether an individual is acting in a managerial or executive capacity," so long as we "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." In this instance, the Petitioner has not established that the company, at the time it filed the petition, had a sufficiently complex organizational structure to have a reasonable need for an executive position in which the Beneficiary would direct the management of all or part of the organization.

The Petitioner has submitted inconsistent and inadequately-supported assertions regarding the Beneficiary's intended duties and authority. We agree with the Director that the Petitioner has not met its burden of proof to show that it seeks to employ the Beneficiary in an executive capacity.

The Director also concluded that the Petitioner had not shown that the Beneficiary was employed abroad in an executive capacity. The Petitioner claims that the Beneficiary served as general operations manager of a computer service company in Uganda starting in January 2018. On appeal, the Petitioner states that the Director erred by considering the Beneficiary's position abroad under the requirements of an executive capacity rather than those of a managerial capacity. The Petitioner asserts that the Beneficiary worked as a manager abroad, and correctly observes that it never described the Beneficiary's employment abroad as being executive rather than managerial.

While the Director erred by considering the Beneficiary's claimed employment abroad under the criteria for an executive capacity rather than a managerial capacity, this error did not affect the outcome of the proceeding. The above discussion of the Beneficiary's intended employment in the United States is sufficient to warrant denial of the petition and dismissal of the appeal.

Furthermore, review of the record shows another issue relating to the Beneficiary's claimed employment abroad. By statute, the Beneficiary must have been employed abroad in a qualifying capacity for at least one year during the three years preceding the filing of the petition. *See* section 203(b)(1)(C). The regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) accounts for beneficiaries who are "already in the United States working for the same [or related] employer" when the petition is filed. In this instance, however, the record does not show that the Beneficiary was working for the Petitioner at the time of filing.

A break in qualifying employment longer than two years will interrupt a beneficiary's continuity of employment with the petitioner's multinational organization. Such breaks may include, but are not limited to, intervening employment with a nonqualifying U.S. employer or periods of stay in a nonimmigrant status without work authorization. *Matter of S-P-, Inc.*, Adopted Decision 2018-01 4 (AAO Mar. 19, 2018). A beneficiary who worked as a manager or executive for a qualifying multinational organization for at least one year, but who then left the organization for a period of more

than two years, is ineligible for this immigrant visa classification. To cure the interruption in employment, such a beneficiary would need an additional year of qualifying employment abroad before he or she could once again qualify. *Id.*

The record establishes a disqualifying interruption in the Beneficiary's employment abroad. The Beneficiary entered the United States in May 2019 as a B-2 nonimmigrant visitor, changing status in November 2020 to an F-2 spouse of an F-1 nonimmigrant student. Neither of those nonimmigrant classifications allows employment in the United States. *See* 8 C.F.R. §§ 214.1(e) and 214.2(f)(15)(i). The Petitioner filed a nonimmigrant petition in 2021 seeking to classify the Beneficiary as an L-1A intracompany transferee, but that petition was not approved, and therefore the Beneficiary never held L-1A nonimmigrant status.

Therefore, when the Petitioner filed the immigrant petition in July 2022, the Beneficiary had been in the United States for more than three years. During that time, he was neither performing qualifying duties outside the United States nor authorized to work for the Petitioner in the United States. This three-year interruption in employment means that the Beneficiary cannot satisfy the statutory requirement of at least one year of employment abroad during the three years preceding the filing of the petition. The Beneficiary will not be eligible for classification as a multinational manager or executive until after he leaves the United States and works as a manager or executive for a qualifying employer for at least a year.

III. ADDITIONAL ISSUE

Beyond the Director's decision, our review of the file reveals another apparently disqualifying issue, concerning the relationship between the Petitioner and the Beneficiary's employer in Uganda.

A petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer or related as a "parent and subsidiary" or as "affiliates." *See generally* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

The Petitioner claimed that both it and the foreign entity are owned by [redacted] The Petitioner submitted a copy of a board resolution listing the "allotment of shares" in the foreign entity, but the document is only partly legible, and therefore it does not reliably identify the shareholders.

The Petitioner's certificate of formation, filed with the State of Texas in March 2021, names one director of the company [redacted] and authorizes the issuance of 1000 shares. The Petitioner has not documented the issuance and allotment of shares with copies of share certificates, a share ledger, or other comparable evidence.

An August 2021 partnership agreement between [redacted] indicates that [redacted] each contributed $20,000 in capital to the petitioning company. The agreement does not reveal the amount, if any, of [redacted] capital contribution, and it does not indicate that [redacted] received any shares in exchange for their capital contribution. Furthermore, the record does not fully explain the purpose or effect of the partnership agreement. The Petitioner is not a partnership. Rather, it is a corporation that already existed before August 2021.

The Petitioner's 2021 income tax return indicates, in two places, that [redacted] owns 95% of the company's shares, while [redacted] owns the remaining 5%. This information contradicts that claim that [redacted] own the petitioning U.S. company. The Petitioner must resolve this discrepancy 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). Here, the Petitioner has not resolved or even addressed the contradictory claims regarding the company's ownership.

Because the ownership evidence is incomplete and inconsistent, the Petitioner has not met its burden of proof to establish that it has the required qualifying relationship with the Beneficiary's foreign employer.

IV. CONCLUSION

We will dismiss the appeal because the Petitioner has not established that it will employ the Beneficiary in an executive capacity. Also, the record shows a disqualifying interruption in the Beneficiary's employment, and the Petitioner has not established a qualifying relationship with the Beneficiary's employer abroad.

ORDER: The appeal is dismissed.