U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27518685

Date: JUNE 30, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, which sells and services parts for hydraulic equipment, seeks to permanently employ the Beneficiary as its vice president 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 (1) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer, and (2) 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.

On appeal, the Petitioner submits a brief, copies of previously submitted materials, and new documents relating to the company's recent performance. This new evidence does not address the stated grounds for denial, and therefore is not material to the outcome of our appellate decision.

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

A. Qualifying Relationship

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) 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 regulation and case law confirm that ownership and control are the factors that determine whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification.[1] In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity.[2]

The Petitioner indicates that the Beneficiary began working for [redacted], in Nicaragua in 2016, and in 2019 he began working for the Petitioner as an L-1A nonimmigrant.

[redacted] articles of association from February 2016 indicate that the Beneficiary's father, who is also general manager of [redacted] owned 60 shares of the company; the Beneficiary owned 39; and a third individual owned the one remaining share, later transferred to the Beneficiary in 2017. Meeting minutes from November 2018 state that another individual, identified elsewhere as president and chief executive officer (CEO) of the petitioning U.S. company, "will enter as a new partner." The document does not indicate that the Petitioner's president/CEO holds any ownership interest in [redacted]

The Petitioner's 2018 limited liability company (LLC) agreement identifies three members (owners): the Beneficiary, his father, and the president and CEO of the petitioning entity. The agreement states that each "Member's Percentage Interest" is "listed on Exhibit A," but the submitted copy of the LLC agreement does not include Exhibit A. The Petitioner's undated business plan indicates that the Beneficiary's father owns 51% of the LLC; the president/CEO owns 30%; and the Beneficiary owns the remaining 19%, but the business plan is not an instrument of ownership.

The Petitioner's 2020 income tax return, filed in November 2021, almost three years after the date of its LLC agreement, repeatedly and consistently identifies the company's president/CEO as the only

[1] *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).
[2] *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

member of the LLC. Form 1125-E, Compensation of Officers, indicates that the president/CEO owns "100%" of the petitioning U.S. company. Schedule K-1 indicates that the president/CEO received 100% of the "current year allocation percentage" and held all shares in the company, both at the beginning and at the end of the year.

Therefore, on their face, the most recent submitted documents from the two entities do not show the common ownership necessary to establish a qualifying relationship between the two companies.

Citing "conflicting material evidence regarding the ownership structure of the two companies," the Director requested "independent and objective evidence" to establish the ownership and control of both companies. In response, the Petitioner submitted copies of previously submitted documents; a translated document describing a transfer of one share of SHE from a third member to the Beneficiary in 2017; and copies of the Petitioner's income tax returns for 2019 to 2021, with Schedules K-1 and Forms 1125-E consistently stating that the president/CEO is the sole owner of the U.S. company.

The Petitioner's president/CEO referred to the Director's "inquiry of K-1 distribution," stating that he received 100% of "the company's profit distribution" "in 2021, 2020, [and] 2019 . . . due to [the Beneficiary and his father] primarily residing in Nicaragua."

The Director denied the petition, based in part on the determination that the Petitioner had not submitted persuasive documentary evidence to show a qualifying relationship between the two entities. On appeal, the Petitioner asserts that the grounds for denial are "baseless," and repeats the assertion that, as the only U.S. resident member of the LLC, only the president/CEO was eligible to receive "the distribution of income, dividends, and loss made by the U.S. company." The Petitioner also asserts: "Tax law does not prohibit any LLC to comply with tax obligation in the way the partners of the U.S. company did."

But the Director did not take issue with the distribution of income as reported on the tax returns. For all the reported tax years, Schedule K-1 provides separate entries for profit distribution and "[s]hareholder's number of shares." As noted above, Form 1125-E on each of the tax returns also specifies that the president/CEO owns "100%" of the company; that form does not concern "the distribution of income, dividends, and loss."

The Petitioner submits a statement from an accountant, stating: "the company has always had 3 partners. . . . The omission of information was due to the fact that the capability and guidance of the person in charge of preparing and sending the company's tax returns was trusted." The Petitioner did not submit a corroborating statement from the preparer of previous years' tax returns.

Also, the Petitioner filed its 2019-2021 tax returns on IRS Form 1120-S, U.S. Income Tax Return for an S Corporation. An LLC's membership is directly material to a company's eligibility for taxation as an S corporation. An LLC that elects to be taxed as an S corporation cannot have "non-resident alien shareholders." *See S Corporations*, https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations, and *LLC Filing as a Corporation or Partnership*, https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership. The record does not indicate that the Beneficiary's father, said to own a controlling membership interest in the petitioning entity, resided in the United States during those years.

The burden of proof is on the Petitioner to establish, by a preponderance of evidence, that it meets all eligibility requirements, including a qualifying relationship with the Beneficiary's foreign employer. Before the denial of the petition, the Petitioner indicated on three consecutive income tax returns that its president/CEO is the company's sole owner, and those tax returns were filed on forms that cannot properly be used by foreign-owned companies.

The appeal includes a copy of the Petitioner's 2022 tax return, with Schedules K-1 reflecting a 51-19-30 division of "allocation percentage," which concerns financial distributions rather than ownership or membership. The lines marked "Shareholder's number of shares" are blank. The 2022 return does not include Form 1125-E. This return does not identify the owner(s) of the petitioning entity and does not materially affect the outcome of our decision. Like the earlier returns, the 2022 return is on Form 1120-S, indicating that the Petitioner elected to be treated as an S corporation with no nonresident alien shareholders or members.

The Petitioner's business plan is not first-hand evidence of what it describes as a 51-19-30 membership interest split between the Beneficiary's father, the Beneficiary, and the president/CEO. The LLC agreement names those three individuals as members, but, as noted before, the Petitioner did not submit "Exhibit A" of the LLC agreement, which would have shown the percentages of each member's interest and any subsequent changes in membership that might have occurred after the agreement was drafted in December 2018.

The Petitioner has submitted conflicting information regarding its ownership, and has not resolved this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, we conclude that the Petitioner has not met its burden of proof with regard to its claimed qualifying relationship with the Beneficiary's employer abroad.

B. Employment Abroad in a Managerial or Executive Capacity

The Director determined that the Petitioner did not establish that the Beneficiary has been employed abroad in a managerial or executive capacity. The Petitioner asserts that the Beneficiary's position abroad was an executive capacity, and therefore we will not consider the separate requirements for a managerial capacity.[3]

"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, 8 U.S.C. § 1101(a)(44)(B).

[3] On appeal, the Petitioner contends: "In foreign countries, executives of a company always have managerial capacity." The Petitioner cites no support for this assertion. For the purposes of the immigrant classification sought, there are separate and distinct statutory definitions of "executive capacity" and "managerial capacity" which are binding in this proceeding.

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 was *primarily* engaged in executive duties, as opposed to ordinary operational activities. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether the beneficiary's duties were 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.

The general manager of [redacted] stated in a translated letter that the Beneficiary worked for the foreign company "since June 2016 . . . , performing the position of Administrative Executive." The letter provides no further details. In another letter, however, the same official stated that the Beneficiary "works in the executive position of Vice Manager," with the following duties:

> Representing the General Manager during his absence [and] having control, knowledge and coordination with the different areas described below:
>
> - Establishing procedures and functions manual.
> - Ensuring . . . compliance with company rules and policies.
> - Controlling the proper use of company resources and funds.
> - Planning and coordinating of productive and effective strategies.
> - Creating sales plan and route assignment.
> - Managing cash flow.
> - Reviewing and approving the compensation form and payroll.
> - Approving Payment to Suppliers.

The Petitioner's business plan states that the Beneficiary "continues to serve as [redacted] Manager in charge of the company administration and products importation," while also "overseeing [the Petitioner's] Company operations and administration."

In response to the Director's request for more details about the Beneficiary's employment abroad, the Petitioner submitted a new letter from [redacted] stating:

> The daily responsibilities as VP [vice president]/Operations Manager include, but are not limited to, the management of manufacturing and repair services. In this role, [the Beneficiary] had sole respon[si]bility of ensuring all aspects of sales, dispatch, manufacturing, purchasing, human resources, and management of client relationships. In addition, [the Beneficiary] was solely responsible for training and developing the employees within his direct supervision, as well as, the weekly/monthly financial reports regarding budgeting or assets.

The Petitioner also submitted copies of payroll records identifying the Beneficiary as "administrative manager" in 2018 and "vice president" in 2020 and 2021. The Petitioner did not submit payroll records from other years.

In the denial notice, the Director noted that the letters describing the Beneficiary's position abroad contain inconsistent titles, "roles and responsibilities." On appeal, the Petitioner contends: "Different synonyms are used for the beneficiary's role because of his multi-functions in the direction and general supervision of the company." Of greater consequence than the changing job titles are the inconsistent job descriptions.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial 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).

The submitted job descriptions for the Beneficiary show significant differences, rather than slight variations on the same basic set of duties. The second letter from [redacted] emphasized "manufacturing and repair services," which were not mentioned in the earlier letter. The business plan provides few details about the Beneficiary's position except to state that he was "in charge of the company administration and products importation," but the letters from [redacted] do not refer to "products importation." These inconsistencies reduce the probative value of the submitted statements. *See Matter of Ho*, 19 I&N Dec. at 591-2.

Furthermore, the organizational chart for SHE listed the employees said to have been under the Beneficiary's authority abroad: two sales staff, a receptionist, a driver, an inventory worker, and six shop technicians. The Petitioner did not provide further details to describe, or evidence to establish, the nature and extent of the Beneficiary's authority over the listed subordinates and show how the subordinates' work supported the Beneficiary's position.

First-line supervision of non-professional staff is not an executive responsibility. Section 101(a)(44)(B) of the Act requires an executive to primarily direct the management of the organization or a major component or function of the organization. The Petitioner did not establish that any of the listed subordinate employees constituted the management of the organization or one of its major components or functions. *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.")

Given the deficiencies and inconsistencies described above, we conclude that the Petitioner has not met its burden of proof to establish that the Beneficiary was employed abroad in an executive capacity.

III. CONCLUSION

The Petitioner has not met its burden of proof to establish a qualifying relationship with the employer abroad, and to show that the Beneficiary's position abroad met the requirements of a primarily managerial or executive capacity. We will dismiss the appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.