



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

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

In Re: 26384872

Date: MAY 3, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner is an electrical contractor that helps clients manage their electrical systems. It seeks to permanently employ the Beneficiary as a construction manager 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 denied the petition, concluding that the record did not establish that the Beneficiary was employed abroad in a managerial capacity.¹ 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 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).

¹ The Petitioner does not claim that the Beneficiary was employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term “managerial capacity” as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) 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;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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.

II. ANALYSIS

The issue to be addressed is whether the Petitioner provided sufficient evidence in support of its claim that the Beneficiary’s employment abroad was in a managerial capacity.²

To be eligible for immigrant visa classification as a multinational manager, the Petitioner must show that the Beneficiary performed the high-level responsibilities set forth in the statutory definition at section 101(a)(44)(A)(i)-(iv) of the Act. If the record does not establish that the Beneficiary’s proposed position meets all four of these elements, we cannot conclude that it is a qualifying managerial position.

If the Petitioner establishes that the position in question meets all elements set forth in the statutory definition, the Petitioner must prove that the Beneficiary *primarily* performed managerial duties, as opposed to ordinary operational activities alongside other employees within the U.S. entity. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006). In determining whether a given beneficiary’s duties are primarily managerial, we consider that beneficiary’s job duties, the employer’s organizational structure, the duties of a 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 a beneficiary’s actual duties and role in a business.

² Because the Petitioner does not claim that the Beneficiary was employed in an executive capacity, we will only discuss whether the foreign employment fits the statutory criteria of managerial capacity.

A. Factual Background

The Petitioner is a full-service electrical contractor that operates in the “medium and high voltage industries,” offering project management as well as construction and field services to clients throughout North America. In a supporting cover letter, the Petitioner highlighted the Beneficiary’s “proven history of project management,” stating that during his employment abroad the Beneficiary managed “day-to-day operational control of [] specific projects” and assumed “direct managerial authority over direct trade employees while on the worksite”; the “trade” personnel were said to include journeymen electricians, apprentices, and equipment operators and laborers. The Petitioner stated that the Beneficiary was tasked with managing the construction team “to ensure projects are completed on-time and under budget,” which involved the authority to “report/evaluate on progress and efficiency of other sub-contractors during the project, and to fire subcontractors or [] employees from any given project, if necessary.” In the course of managing project work sites, the Beneficiary performed the following job duties:

- Ensure that projects are executed according to specifications, schedules, and budgets.
- Ensure completion and daily submission of crew timesheets.
- Assume role of liaison between employer and client’s site crew.
- Ensure compliance with on-site safety policies and report and investigate onsite incidents.
- Work with the project manager to meet project timelines by ensuring sufficient staffing, materials, and equipment.
- Mentor, train, and motivate the site crew to “adopt[] a culture of safety.”
- Support audit and inspection activities.
- Attend project kick-off meetings to gauge “special characteristics” and safety concerns at project sites and update health, safety, and environmental tool kits for each project.
- Conduct random safety audits to ensure compliance with requirements and work plans.

The Petitioner stressed the Beneficiary’s “complete discretion” over the daily operations of specific project work sites, noting that having discretion over a project included supervisory control over supervisory, professional, or managerial employees and did not include performing operational tasks, such as “actual construction work,” which was performed by those whom the Beneficiary managed in his capacity as “manager of the project.” In addition, the Petitioner stated that the Beneficiary assisted in setting up new divisions within the company by forging relationships between subcontractors, local hires, clients, and suppliers.

The Petitioner also listed the names, job titles, job duties, and educational credentials of five employees who were claimed to be the Beneficiary’s direct reports. Of those five employees, four were also depicted as the Beneficiary’s subordinates in the organizational chart for the foreign entity’s “South Division,” where the Beneficiary was employed. The chart showed an organization comprised of three management tiers; the top tier was comprised of a chief operating officer and a president/chief executive officer (CEO), followed by a division manager occupying the next management tier and reporting to the CEO, while a field area manager occupied the third management tier and reported to the division manager. The field manager is depicted as directly and indirectly overseeing the employees who comprise the remainder of the organization, starting with the following direct subordinates: 1) five site supervisors; 2) one construction manager, the position that the Beneficiary is shown as having occupied; and 3) an unspecified number of subcontractors. The Beneficiary and

the five site supervisors were each depicted with 4-5 subordinates; the Beneficiary's subordinates included a lead commissioning technologist, a journeyman electrician, a journeyman power systems electrician, and an equipment operator.

In denying the petition, the Director found that the Beneficiary held the position of site supervisory from January 2017 to March 2018 and determined that this position does not meet the statutory criteria of managerial capacity because it did not involve primarily managing supervisory, professional, or managerial employees.

On appeal, the Petitioner states that in the 14-month period between January 2017 and March 2018, the Beneficiary assumed a managerial position "as Site Supervisor or Construction Manager"; the Petitioner argues that both positions are deemed by the foreign entity as having "the same job responsibilities and same managerial responsibilities when overseeing direct reports and work-sites on behalf of the organization." The Petitioner goes on to restate the previously submitted job duty breakdown of the Beneficiary's former position, contending that the Beneficiary met the four prongs that comprise the statutory definition of managerial capacity. The Petitioner also provides a new iteration of the foreign entity's organizational chart, contending that the chart submitted on appeal reflects the Beneficiary's managerial role and "is a comprehensive version of [the Beneficiary]'s prior managerial role abroad."

B. Analysis

As a preliminary matter, we note that although the Petitioner has provided two organizational charts listing the Beneficiary's position abroad as that of construction manager, the record contains no evidence showing that the Beneficiary assumed that position during his period of employment. Rather, the record contains a "Change of Status" document which was issued by the foreign entity's human resources department, and which shows that, effective January 9, 2017, the Beneficiary was promoted from "Journeyman PSe" to that of "Site Supervisor." In fact, the notes in the "Comments" field of that document state that the Beneficiary's promotion to "lead crew" on the [REDACTED] project was pending his completion of specific training, which, if not completed by May 31, 2017, would result in the Beneficiary "revert[ing] back to Journeyman PSe." The Petitioner did not offer evidence documenting the Beneficiary's completion of the required training, nor did it provide a "Change of Status" document showing that the Beneficiary was promoted to the position of construction manager during his employment abroad. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Here, the Petitioner merely relies on claims made in its supporting statements and information offered in its organizational charts to show that the Beneficiary was employed abroad in the position of construction manager. Further, if, as the Petitioner claims, the roles of the site supervisor and construction manager are analogous, it is unclear why the Petitioner seeks to distinguish the Beneficiary's position abroad as the latter.

We further note that the organizational chart offered on appeal is markedly different from the chart submitted earlier in the Petitioner's response to a request for evidence (RFE). Although the Petitioner claims that the chart submitted on appeal is "a comprehensive version of [the Beneficiary]'s prior managerial role abroad," a comparison of the two charts merely shows two distinct and inconsistent iterations of the foreign entity's organizational hierarchy. One clear distinction is in the naming of the

two charts; the chart that was submitted in response to the RFE states that it represents the staffing of the foreign entity's "South Division," while the chart submitted on appeal states that it represents the "Atlantic Division." The Petitioner has not provided evidence demonstrating that the chart submitted on appeal is merely "a comprehensive version" of the initially submitted chart.

Further, the chart titled "South Division" lists [redacted] as the president/CEO and depicts two management tiers – a division manager and a field manager – between the Beneficiary and the president/CEO. However, the chart titled "Atlantic Division" shows [redacted] as occupying the position of president/CEO as well as the subordinate position of field area manager, which is depicted as directly overseeing the Beneficiary in the position of construction manager. Meanwhile, the position of division manager, which the South Division chart shows as directly subordinate to the president/CEO, is eliminated from the Atlantic Division chart, which contains the position of area manager, a position that the South Division chart did not include. In addition, the previously submitted chart depicts the Beneficiary with four subordinates, while the chart submitted on appeal lists five total subordinates.

The Petitioner must resolve the above-noted incongruities with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, a petitioner may not make material changes to a petition on appeal in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Because the organizational chart provided on appeal does not clarify the Beneficiary's role within the foreign organization, and instead provides new information that is inconsistent with the previously submitted organizational chart, we will focus on the original organizational chart as the basis of our analysis. In doing so, we find that the evidence in the record does not show that the Beneficiary's role was at a senior level with respect to the foreign organization. Namely, the previously submitted organizational chart shows that the Beneficiary was subordinate to three tiers of management, thereby indicating that he was not sufficiently elevated in the foreign entity's staffing hierarchy. Although the Beneficiary may have exercised discretion over the day-to-day operations of the projects he was assigned to manage, the Petitioner must still establish that the position meets all elements of the statutory definition of managerial capacity in the course of performing primarily managerial duties. For the reasons discussed above, the Petitioner has not established that the projects the Beneficiary managed represented a department, subdivision, function, or component of the organization and that the Beneficiary managed a department, subdivision, function, or component of the organization, as required by section 101(a)(44)(A)(i) of the Act.

Further, despite claiming that the Beneficiary's former position involved oversight of managerial employees, the record indicates that the Beneficiary's primary focus, like that of the five site supervisors who assumed similar roles within the organization, was the oversight of work sites of individual projects to which he was assigned in his supervisory capacity with respect to the project. However, the Petitioner neither indicated nor did it provide evidence showing that the work-site projects to which the Beneficiary was assigned, either individually or collectively, represented a department, subdivision, function, or component within the foreign organization. Although the Beneficiary's former position may have entailed some supervisory tasks over subordinate employees who performed the underlying tasks of the work-site projects that the Beneficiary managed, the record indicates that employee supervision was only ancillary to his primary responsibility, which was to support the work-site project to which he was assigned.

The Petitioner also did not establish that the Beneficiary managed an essential function pursuant to section 101(a)(44)(A)(ii) of the Act. The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that “(1) the function is a clearly defined activity; (2) the function is ‘essential,’ i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function’s day-to-day operations.” *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

In this matter, the Petitioner claims that the Beneficiary’s position abroad focused on specific work-site projects. However, it has not established that those projects represented a clearly defined activity or that they were “essential” to the organization, as required by the first two prongs of the function manager analysis. Although the Petitioner claimed that its organization services many clients, it did not indicate that there was a hierarchy among those clients, nor did it demonstrate that the clients associated with the Beneficiary’s assigned projects were particularly critical to the organization so that they would have been deemed “essential” within the organization, or a department or subdivision of the organization.

In light of the deficiencies discussed above, the Petitioner has not established that the Beneficiary was employed abroad in a managerial capacity.

ORDER: The appeal is dismissed.