



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF R-I-, INC.

DATE: DEC. 4, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an importer of home textile products, seeks to employ the Beneficiary as its president¹ under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial

¹ Some documents instead state the title as "general manager."

or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily—

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines “managerial capacity”:

The term “managerial capacity” means 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.

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Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. ISSUE ON APPEAL

The sole ground for denial is the Director's finding that the Petitioner has not shown that the Beneficiary qualifies for classification as an executive.

A. Facts

The Petitioner filed Form I-140 on September 9, 2014. On the petition form, the Petitioner indicated that it had one employee in the United States. The record demonstrates that this one employee is the Beneficiary.

The Petitioner submitted a letter, dated August 18, 2014, stating that the "[p]arent company is engaged in manufacturing and export of high quality home textile products" such as [REDACTED] and that the purpose of the petitioning entity is to import those goods for sale in the United States. Regarding the Beneficiary's position with the company, the Petitioner stated that he "is employed in an Executive capacity and is responsible for the following duties":

- Directing the management of the U.S. Company which will market the products of the foreign entity in the U.S.
- Oversee subordinate managers, supervisors and employees engaged in market research
- Negotiate contracts with U.S. clients
- Establish consignment relationships and negotiate prices
- Support the sales team with executive level presentations
- Provide leadership
- Hire additional personnel as needed to achieve the goals of the U.S. entity
- Ensure resources are in place to achieve the financial goals of the business
- Analyze factors driving profitability
- Analyze market trends and competitors with the goals of achieving competitive positioning of the company's products in the U.S. market
- Formulating plans and making decisions regarding sales plans, marketing strategies and other initiatives
- Solving problems in the area of customer care and distribution and coaching sales employees, prepare sales and profit forecasts, attending trade shows in order to promote the products of the company.

The Director issued a request for evidence on February 5, 2015, stating:

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The petitioner's letter states that one of the beneficiary's job duties is to oversee subordinate managers, supervisors and employees engaged in market research. However, the I-140 shows that the petitioner employ[s] only one worker. It is unclear how the beneficiary can primarily perform the job duties of an executive without employees to perform the day-to-day duties of the petitioner.

The Director requested evidence relating to each of the Petitioner's employees, and/or evidence of the Petitioner's use of contract labor. The Director also stated: "If the beneficiary does not supervise other employees, specify what essential function within the organization he will manage."

In response, the Petitioner submitted a letter dated February 25, 2015. The Petitioner stated that the company uses four contractors:

- [REDACTED] "for transporting goods from India to USA";
- [REDACTED] "for customs clearing and issue of the delivery order";
- [REDACTED] "for storing goods in the warehouse, and making deliveries to the customers"; and
- [REDACTED] "for sales purposes."

To document its use of the above contractors, the Petitioner submitted copies of agreements with [REDACTED] and [REDACTED] and copies of checks and IRS Forms 1099-MISC, Miscellaneous Income, issued to [REDACTED], and [REDACTED]

The Petitioner provided a new list of job duties, with approximate percentages of the time the Beneficiary devotes to each of his duties:

- Analyze the market and target the prospective buyers. . . . 15%
- [T]he beneficiary consigns sample products . . . to the prospective buyers . . . by either personal delivery or using other methods of shipment. 10%
- When the beneficiary receives the purchase order from the customers, he coordinates with [the foreign parent company] to produce the order received. . . . 10%
- [P]ursue the goods when they are shipped and en-route for delivery to the United States. . . . 10%
- When the goods arrive in the United States, the beneficiary coordinates with [REDACTED] d/b/a [REDACTED] to track the location of the goods. 5%
- [C]onfirm that the duty of the goods is duly paid. . . . 5%
- The beneficiary prepares a master packing list and advance shipping notice before handing the good to [REDACTED] 10%

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The beneficiary also coordinates with [REDACTED] to pick up the goods and stock them in the warehouse according to the master packing list.

- [P]repare a submission sheet containing the details of the goods and deliver it to the customers. In doing so, the beneficiary also manages and controls a sales representative [REDACTED] for delivering the submission sheet to the customer. . . . 10%
- [T]he beneficiary supervises the delivery of the goods to the customer from the warehouse. . . . 5%
- Upon issuance of the proof of delivery, the beneficiary prepares an invoice to be sent to the customer for the payment of the goods. 10%
- [T]he beneficiary monitors and reports on production activities, costs, performance, etc. This also includes preparing and maintaining profit and loss sheet. 10%

The Director denied the petition on May 5, 2015, concluding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial or executive capacity. The Director stated: “Without sales people and an administrative staff, the beneficiary must perform a wide range of daily functions associated with running a business that are not of an executive nature.”

On appeal, the Petitioner asserts that “the beneficiary is acting as a ‘function manager’ . . . [and] also directing the work of outside agencies.” The Petitioner asserts that the number of employees should not, by itself, determine the outcome of the petition. The Petitioner states that the Beneficiary’s supervision of contractors is sufficient to qualify the Beneficiary for the classification sought.

B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that it seeks to employ the Beneficiary in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary’s proposed job duties with the petitioning entity. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary’s employment. *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). We then consider the beneficiary’s job description in the context of the petitioner’s organizational structure, the duties of the beneficiary’s subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary’s actual duties and role within the petitioning entity.

In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary’s duties, the petitioner still has the burden of establishing that the beneficiary is “primarily” performing managerial or executive duties. See Section 101(a)(44) of the Act.

The Director did not deny the petition only because the Beneficiary is the Petitioner's sole employee. The Director acknowledged that "the beneficiary has three contractors to receive and deliver the petitioner's shipments," and did not question the Beneficiary's authority to direct the actions of those contractors. The Director's key finding is that "the beneficiary's job duties show that he must perform many non-executive duties, such as receiving purchase orders, tracking shipments and preparing packing lists, submission sheets, and invoices." This finding derives not from the Petitioner's staffing, but from the list of duties provided by the Petitioner. The Petitioner, on appeal, has not addressed this element of the denial.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The initial list of the Beneficiary's duties and the percentage breakdown submitted later are not consistent with one another; several duties appear on one list but not on the other. For example, only the first list stated that the Beneficiary would negotiate contracts and "oversee subordinate managers, supervisors and employees." Only the second list indicated that the Beneficiary would prepare invoices, profit and loss statements, and other documents. The second list's percentage breakdown of the Beneficiary's duties shows that the Beneficiary spends the majority of his time on non-qualifying functions such as delivering samples, tracking shipments, and preparing shipping documents.

The Petitioner, on appeal, asserts that the Beneficiary need not supervise subordinate staff because "the beneficiary is acting as a 'function manager.'" 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, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the Petitioner has not provided evidence that the Beneficiary primarily manages an essential function.

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Furthermore, if the Petitioner chooses to represent the Beneficiary as both an executive *and* a manager, then the Petitioner must establish that the Beneficiary meets all of the statutory criteria for both executives and managers. Here, the Petitioner has not addressed any of the elements of the definition of a manager except the clause pertaining to function managers. Before the denial of the petition, the Petitioner had consistently described the Beneficiary as an executive rather than as a manager.

We acknowledge the Petitioner's claim that the Beneficiary manages the business through directing and overseeing the actions of contractors. As the Director observed in the denial notice, the Petitioner established payments to [REDACTED] and [REDACTED] predating the filing of the petition in September 2014, but the Petitioner did not document any arrangement with [REDACTED] until January 2015, after the filing date. The Petitioner's sales commission agreement with [REDACTED] has an effective date of January 1, 2015, and the record does not contain checks or other evidence of payments to [REDACTED] in 2014. Therefore, the Director found that the 2015 contract with [REDACTED] cannot establish eligibility at the time of filing, as required by 8 C.F.R. § 103.2(b)(1). We conclude that the Beneficiary performed sales duties himself at the time of filing, because the Petitioner has not shown that it employed or contracted a sales staff at the time to relieve the Beneficiary from performing those duties. The Petitioner has acknowledged that the Beneficiary performed non-qualifying functions such as preparing invoices and delivering samples. The overall record indicates that the Beneficiary does not primarily perform the duties of an executive (as originally claimed) or a manager (as claimed on appeal).

Accordingly, we find that the Petitioner did not provide reliable, probative evidence sufficient to establish that the Beneficiary will be employed in a qualifying managerial or executive capacity in the United States. For this reason, USCIS cannot approve this petition.

III. BEYOND THE DECISION OF THE DIRECTOR

Beyond the decision of the Director, the Petitioner has not provided sufficient evidence to establish its ability to pay the Beneficiary's proffered wage. As indicated at 8 C.F.R. § 204.5(g)(2), the Petitioner has the burden of establishing its ability to pay commencing with the date it files the Form I-140. In order to establish the ability to pay, the Petitioner must provide copies of its annual reports, federal tax returns, or audited financial statements for the relevant time period in question. In the present matter, the Form I-140 indicates that the Beneficiary will be paid \$40,000. The record reflects that the Beneficiary was paid \$35,040 in 2014, but does not include any evidence demonstrating the Petitioner's ability to pay the proffered wage from the priority date. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

We will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

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ORDER: The appeal is dismissed.

Cite as *Matter of R-I, Inc.*, ID# 14873 (AAO Dec. 4, 2015)