



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

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

MATTER OF P-E-, INC.

DATE: NOV. 9, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, described as a manufacturer of wastewater treatment equipment, seeks to employ the Beneficiary as its executive vice president 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, Nebraska 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.

The language of the statute is specific in limiting this provision only to those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a Form I-140, Immigrant Petition for Alien Worker, 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 or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

II. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The only issue on appeal is whether the Petitioner intends to employ the Beneficiary in the United States in a qualifying managerial or executive capacity. Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), provides:

(A) 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.

(B) 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

(b)(6)

Matter of P-E-, Inc.

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

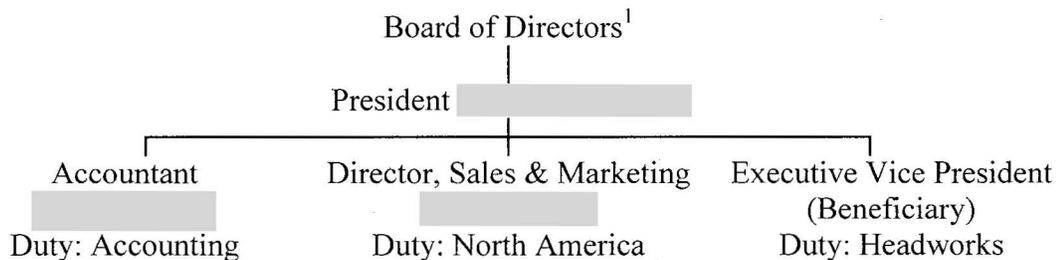
Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development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

A. Facts

The Petitioner filed Form I-140 on June 20, 2014. The Petitioner submitted a letter dated May 8, 2014, from [redacted] owner and president of the petitioning company. [redacted] stated that the Petitioner is “the headquarters of an international partnership . . . with over 400 employees.” Regarding the Beneficiary’s intended duties for the Petitioner, [redacted] stated:

Reporting and working with the president, [the Beneficiary] will have broad responsibilities across several departments and with various members of the U.S. organization. These areas include being responsible for sound financial management of the organization, identifying ways to increase revenues and decrease costs, analyzing financial reports and working to prepare operating budgets, maintaining a healthy work environment and ensuring sound policies and procedures are in place particularly with foreign partners, and work with the president to create sales and engineering innovations for strategic business development.

The Petitioner also submitted an organizational chart, showing the following hierarchy:



At the bottom of the chart, the Petitioner listed five departments:

- Sales & Marketing (contractors)
- Engineering (the Petitioner’s staff and contractors)
- Procurement/Manufacturing (the Petitioner’s staff, contractors, and vendors/suppliers)
- R & D (the Petitioner’s staff)
- Customer Service (the Petitioner’s staff)

¹ According to meeting minutes in the record, [redacted] is the sole member of the Petitioner’s board of directors.

(b)(6)

Matter of P-E-, Inc.

The organizational chart indicates that the Petitioner's staff handles many of the operational functions such as research and development and customer service, but the Petitioner claimed no staff other than the four individuals named on the organizational chart. The four names on the chart are consistent with the assertion on Form I-140 that the company had four U.S. employees. The Petitioner did not claim or establish that the petitioning company has any employees outside the United States. Rather, [REDACTED] is a majority shareholder of [REDACTED] in the Czech Republic. He referred to additional "entities located in . . . Taiwan, and Southeast Asia," but did not identify them or provide any further information about them. [REDACTED] did not state that the Beneficiary has any authority over the employees of the foreign companies in which [REDACTED] owns a controlling interest.

The Petitioner submitted copies of purchase orders signed by the Beneficiary, showing that the Petitioner sold equipment to two customers. The Petitioner did not submit any other examples of the Beneficiary's work product with the Petitioner.

The Director issued a request for evidence (RFE) on November 11, 2014, stating that the Petitioner had not submitted enough information about the Beneficiary's employment. The Director asked for details about the Beneficiary's "specific daily tasks . . . and the percentage of time spent on each duty," and "[a] list of employees (and individual contractors) in the beneficiary's immediate division, department, or team."

In response, the Petitioner submitted a copy of the same organizational chart submitted previously, and a new letter from [REDACTED] dated January 12, 2015, in which he stated:

[The Beneficiary] is in charge of Headworks group of our five product groups (namely, Headworks, Aeration, Solids Separation, Solids Handling, and Industrial) and running it as an internal business unit.

[The Beneficiary] is responsible for the Group's P&L (Profit/Loss) and covering tasks (estimated % time) such as Strategic planning/budgeting (10%); Product Development Decisions (10%); Sales/Marketing Tactics & Execution (50%); Engineering Decisions (5%); Customer Services (20%) and Office Administration (5%). As indicated in the . . . organization chart, [the Beneficiary] is taking care of Headworks Product Group along with [REDACTED] and me. [REDACTED] our Director for Sales and Marketing, is a full-time employee taking charge of Aeration, Solids Separation, Solids Handling and Industrial sales and marketing in North America. . . .

[The Beneficiary] is setting his group goals and policies . . . by analyzing group product mix, market demand, existing sales force, internal/external supporting capacities (i.e. engineering, manufacturing). He is making decisions for what to expand, where to go, which Rep. to hire, how to train and serve better, and when/how to execute. Even though our organization chart look[s] simple, included in our scope of managerial/executive capacities are >200 Independent US/International Reps, >15

(b)(6)

Matter of P-E-, Inc.

OEM accounts, and >50 independent vendors/suppliers. (Please find attached copy of Reps/OEM/Contractors US list.)

. . . Strategic and tactical decisions include, but are not limited to:

- what product bears the most potential,
- how to position ourselves (name brand or OEM),
- where are the markets,
- which channel/how-much to advertise,
- who/how can we choose to work with,
- which Rep. excels or need[s] further training,
- how to expedite the orders received,
- how to resolve customer issues, etc.

Regarding the “attached copy of Reps/OEM/Contractors US list,” the Petitioner submitted a “Phone List” with 219 listed contacts, but the list contains no internal evidence about its relevance or the relationship that each listed individual or company has with the Petitioner. There is considerable overlap within the list. For example, it names eight people with respect to the same company [REDACTED] seven of whom share the same telephone number, and some individuals are listed twice (such as [REDACTED] and [REDACTED]).

The Petitioner submitted photographs of manufacturing facilities, captioned to identify them as the Petitioner’s facilities in Taiwan and Thailand. The Thailand photograph includes a sign bearing the name of the petitioning company. A map of the Petitioner’s “Global Network,” however, identified the Taiwan company as [REDACTED], and the Thailand company as [REDACTED].

The Director denied the petition on March 9, 2015, concluding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial or executive capacity. The Director found that the Petitioner did not sufficiently describe the Beneficiary’s duties, and that “the beneficiary satisfies neither the four criteria for an executive, nor the four criteria for a manager.” The Director noted that the petitioning “corporation consists of . . . four (4) employees,” and found that the Petitioner had not shown that “the beneficiary can devote the **primary** amount of his time to executing purely executive functions.” (Director’s emphasis).

The Director stated that, with respect to the Beneficiary’s claimed oversight over contractors, “the amount of direction and leadership provided is questionable, as that would contradict the essence of an independent contractor. . . . It seems likely that . . . [the Beneficiary] performs much of the work himself, rather than supervising a staff of professional employees.”

On appeal, the Petitioner states: “A plain reading of the law does not require direct supervision of any employees.” The Petitioner notes that the Beneficiary can qualify if he “manages an essential function within an organization, or a department or subdivision of the organization.” In this respect, the Petitioner maintains that the Beneficiary’s “continued management is instrumental in the development and growth of . . . our Headworks Group,” which encompasses “50% of our business.”

B. Analysis

For the reasons stated below, we find that the Petitioner has not established that it intends 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. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her/his duties are "primarily" managerial.

The Director noted in the denial that the Petitioner's generalized description of the Beneficiary's duties was insufficient to establish eligibility in this matter. On appeal, the Petitioner has not disputed or rebutted the Director's specific finding that the Beneficiary's job description lacked detail. The appeal rests, instead, on the Petitioner's contention that the Beneficiary is a function manager, not a personnel manager, and therefore the Petitioner's small staff is not inconsistent with the Beneficiary's eligibility.

The Petitioner asserts that the Beneficiary qualifies as a function manager because he oversees the essential function performed by the Headworks Group. 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

(b)(6)

Matter of P-E-, Inc.

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 manages an essential function. The Petitioner's product catalog shows that its headworks products include screens, pumps, and other equipment associated with intake in the wastewater treatment process. The record, however, does not establish the nature of the Beneficiary's authority over that group. The Beneficiary's only directly documented activity relating to the Headworks group consists of his signature on two purchase orders for headworks products.

The Petitioner initially identified its business, on Form I-140, as "Mfg [manufacturing] Wastewater Treatment Equipment." Two of [REDACTED] letters, and the Petitioner's product catalog, include the assertion that the Petitioner "is an established major, global manufacturer/supplier of process equipment to the pollution control industry." The Petitioner, however, has not established that it owns or operates any manufacturing facilities or employs anyone in manufacturing. Sales representative training materials in the record indicate that the Petitioner "is responsible for Marketing, Specifications, Applications, and Service of Waste Water Products produced by the partner companies worldwide." (Emphasis in original). The map submitted by the Petitioner indicates that overseas affiliates manufacture products which the Petitioner then sells.

There is no evidence in the record that the Beneficiary has authority over the foreign manufacturers. The only foreign company for which the Petitioner has provided ownership information is [REDACTED] which is not the petitioning U.S. employer. The Beneficiary is part owner of [REDACTED] and had previously served as its president, a position which would have given him discretionary authority over that company, but there is no evidence that the Beneficiary continues to have authority over [REDACTED] or its manufacturing facilities. [REDACTED] is the Petitioner's affiliate, not its subsidiary, and the shared ownership interest resides with [REDACTED] rather than with the Beneficiary.

In the United States, the Petitioner's organizational chart states that its own staff handles research and development and customer service, but the Petitioner has not identified employees designated to perform those functions. The Petitioner has indicated that contractors and "Independent . . . Reps" handle sales duties, which indicates that the Petitioner's chief functions appear to be marketing and putting products manufactured by affiliates into the hands of third-party sales personnel.

In the RFE response, the Petitioner claimed that the Beneficiary devotes half of his time to "Sales/Marketing Tactics & Execution." The record does not support this assertion, partly because of the lack of supporting evidence and partly because the Petitioner has a director of sales and marketing who, presumably, would have primary responsibility over sales and marketing. Some of the Petitioner's other assertions are, likewise, inconsistent with the evidence submitted to support those assertions, beginning with the claim on Form I-140 that the Petitioner is a manufacturer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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. at 1108. Therefore, reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. As discussed previously, the record lacks details and evidence that would show what, exactly, the Beneficiary does for the Petitioner. The Petitioner, on appeal, has not addressed the Director's finding that the Beneficiary's job description lacks critical details. When an appellant does not offer an argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims abandoned when not raised on appeal to the AAO).

For the reasons discussed above, we find that the Petitioner has not met its burden of proof to establish, by a preponderance of the evidence, that the Beneficiary will work in a qualifying managerial or executive capacity for the petitioning U.S. employer. Therefore, USCIS cannot approve this petition.

III. 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.

ORDER: The appeal is dismissed.

Cite as *Matter of P-E-, Inc.*, ID# 14397 (AAO Nov. 9, 2015)