



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

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

MATTER OF CS-III- INC.

DATE: NOV. 25, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a California corporation, seeks to employ the Beneficiary in the United States as an employment-based immigrant. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). Although the Petitioner's Form I-140 was initially approved, upon further review, the Director, Nebraska Service Center, determined that the Petitioner was not eligible for the benefit sought. Therefore, the Director properly served the Petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The Director ultimately revoked the approval of the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. THE 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 to only 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 petition on Form I-140, Immigrant Petition for Alien Worker, for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. 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 a statement must clearly describe the duties to be performed by the alien.

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

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.

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.

In addition, with regard to the revocation of a previously approved petition, section 205 of the Act, 8 U.S.C. § 1155, states: “The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for “good and sufficient cause” where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.* at 590.

## II. FACTS AND PROCEDURAL HISTORY

The Petitioner filed the Form I-140 on November 26, 2012. The Petitioner submitted various business and corporate documents as well as a supporting statement, dated November 21, 2012, addressing its eligibility. The Petitioner also provided a copy of its proposed organizational chart, which depicted its currently filled positions as well as proposed positions the Petitioner expected to fill in the future. The Petitioner supplemented the record with a list of its current employees, as well as each individual’s name, job title, salary, date of hire, and brief job description.

On May 28, 2013, the Director issued a request for evidence (RFE), instructing the Petitioner to provide additional information pertaining to the Beneficiary’s proposed employment. Namely, the Petitioner was asked to provide a more detailed job description listing each of the Beneficiary’s specific daily job duties accompanied by an estimated percentage of time that the Beneficiary would allocate to each listed task. The Director asked the Petitioner to refrain from grouping multiple tasks together when providing the breakdown of proposed job duties. The Petitioner was also asked to provide a detailed organizational chart depicting its staffing at the time the petition was filed.

The Petitioner provided a response statement, dated June 24, 2013, which included a list of job duties consisting of nine items that accounted for 100% of the Beneficiary’s time. In supporting exhibit No. 4, the Petitioner included a copy of the originally submitted organizational chart and two additional percentage breakdowns of job duties for the Beneficiary and the Petitioner’s vice

president, the Beneficiary's immediate subordinate as depicted in the chart. The Beneficiary's job description in exhibit No. 4, however, included only eight items and accounted for only 85% of his time.

Notwithstanding the Petitioner's submission of supporting evidence and the initial decision to approve the petition, the Director issued a notice of intent to revoke (NOIR), dated December 15, 2014, informing the petitioner that the record lacked sufficient credible evidence establishing that an approval of the petition was warranted. Namely, the Director indicated that the Petitioner "over inflated" the job duties it provided in response to the RFE. The Director determined that the size and nature of the Petitioner's business did not require the employment of someone who would merit the classification of a multinational manager or executive.

The Petitioner's response included a statement, dated December 30, 2014, accompanied by a third copy of the proposed organizational chart, which was in effect at the time of filing. The Petitioner also provided all four quarterly tax returns for 2012 and 2013 and its IRS Form W-3, Transmittal of Wage and Tax Statements, and IRS Form W-2, Wage and Tax Statements, for 2012 and 2013.

After reviewing the contents of the Petitioner's response to the NOIR, the Director determined that the Petitioner did not overcome the previous findings with regard to the issue of the Beneficiary's proposed employment. Therefore the Director issued a notice, dated March 2, 2015, revoking approval of the petition based on the finding that the record does not establish that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The Director pointed out that two out of six of its employees would be assigned primarily managerial or executive job duties and ultimately found that the Petitioner's organizational complexity is not sufficient to require a president, a vice-president and a general manager. The Director revoked the approval of the petition on March 2, 2015.

The Petitioner now files an appeal contesting the Director's decision. In support of the appeal, the Petitioner submits a supporting statement and copies of previously submitted documents along with the Beneficiary's letter of employment, dated September 13, 2013, which includes a percentage breakdown accounting for the Beneficiary's job duties during 90% of his time.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the Petitioner has not provided sufficient evidence to overcome the Director's decision.<sup>1</sup>

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<sup>1</sup> While we have considered all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the above listed grounds for denial.

### III. THE ISSUE ON APPEAL

As indicated above, the primary issue to be addressed in this decision is whether the Petitioner submitted sufficient evidence to establish that it would 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. 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, job duties assigned to the Petitioner's support staff, and any other relevant factors that may contribute to a comprehensive understanding of the Beneficiary's proposed daily tasks and his prospective role with the U.S. entity.

Turning to the Beneficiary's job description, we find that the Petitioner did not provide sufficient information about the specific tasks to be performed. Namely, the job descriptions that the Petitioner provided do not include a comprehensive list of the Beneficiary's specific daily tasks. Despite the Petitioner's adherence to the Director's original RFE instruction, which requested that a percentage breakdown be included with a list of proposed job duties, the overall content of the job description that was provided in response to the RFE did not include a list of the specific tasks the Beneficiary would actually perform. According to the items listed in the RFE response statement, dated June 24, 2013, 60% of the Beneficiary's time would be spent directing the vice president in his various responsibilities, including promoting the business, establishing and implementing departmental goals and policies, conducting job training and directing other subordinate managers, conducting local public relations activities, and conducting job performance reviews. While these statements provide some insight as to the types of job duties the vice president would perform, the same cannot be said of the Beneficiary's job duties, which the Petitioner did not define with specificity. Despite the Petitioner's repeated use of various forms of the term "direct" as a means of indicating that the Beneficiary would not actively participate in carrying out the Petitioner's daily operational tasks, we cannot assume that the Beneficiary's time would be primarily allocated to tasks of a qualifying managerial or executive nature without an express delineation of his proposed tasks. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; as indicated above, the regulations require a detailed description of the beneficiary's job duties. 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. *Id.* at 1108.

While the record includes a second job description and percentage breakdown, which is contained in an employment letter, dated September 13, 2013, the Petitioner did not assign time allocations to specific job duties and instead assigned time allocations to each of six broadly stated job responsibilities. Given that the job description contains certain non-qualifying job duties, it is particularly important to assign time allocations to the individual job duties. The fact that the

Petitioner chose to assign time allocations to the broadly stated job responsibilities precludes us from being able to determine how much time the Beneficiary would actually allocate to the performance of tasks that are in a managerial or executive capacity. The job description is also incomplete, as the time constraints account for only 90% of the Beneficiary's time.<sup>2</sup> Further, a comparison of the elements that comprise each job responsibility with the job description provided in response to the RFE indicates that the two descriptions are at odds and do not consistently convey the same information about the Beneficiary's role within the petitioning organization. While the job description provided in response to the RFE repeatedly emphasized the Beneficiary's oversight of the vice president, the job description contained in the letter of employment did not expand on that role and instead focused on other broadly stated oversight duties that did not mention the vice president.

Further, despite the Petitioner's attempt to provide a more detailed job description by listing individual elements that comprise the Beneficiary's broad job responsibilities, the job description contained within the September 13, 2013 employment letter is still overly vague and does not convey a meaningful understanding of the Beneficiary's daily tasks within the specific scope of the Petitioner's organization. Namely, as part of his responsibility in making major policies and reviewing progress reports, to which the Beneficiary would allocate 15% of his time, the Petitioner claimed that the Beneficiary would oversee the company's sales operations, approve operational procedures and policies, and review activity reports and financial statements. However, the Petitioner did not identify any operational procedures or policies or explain how this qualifies as a specific daily task, as opposed to a more general task that is performed intermittently based on the operational needs of the organization. In terms of overseeing the company's sales operations, the Petitioner did not clarify who would actually carry out the sales function or cite the Beneficiary's specific oversight tasks in relation to that function.

Next, the Petitioner listed the elements that comprise the responsibility of reviewing and executing long-term business plans, indicating that the Beneficiary would develop and analyze reports, work with a management team to ensure business efficiency, study business trends, and recruit managers and conduct orientation programs, which would cumulatively consume 15% of the Beneficiary's time. The Petitioner did not, however, distinguish between analyzing reports, which was listed as an element of the above job responsibility, and reviewing activity reports, which was listed as an element of this responsibility. Further, the Petitioner separately listed the responsibility of reviewing quarterly operation and financial reports, which would include the underlying task of reviewing sales analysis reports. However, the Petitioner did not explain the distinction between the task of analyzing financial reports, activity reports, and sales analysis reports, which were listed as three separate elements under three different job responsibility headings. In other words, the Petitioner appears to have listed a common activity several times throughout this job description without clarifying how, if at all, this activity of report analysis differs in the way it is performed in relation to

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<sup>2</sup> We also note that the Petitioner's list of the Beneficiary's duties in exhibit No. 4, submitted in response to the RFE, identifies fewer duties than those listed in the RFE response letter, and accounts for only 85% of the Beneficiary's time. No explanation for this additional discrepancy was provided.

each job responsibility. The Petitioner also did not specify how the Beneficiary would recruit managers or establish that recruiting managers and conducting orientation programs fit the definition of managerial or executive capacity.

As part of his responsibility in supervising operation and administration, to which the Beneficiary would allocate 20% of his time, the Petitioner stated that the Beneficiary would represent the company at trade shows, direct marketing and determine market demand, provide technical direction, and supervise the development of a “product and solution roadmap.” However, the Petitioner did not establish that trade show attendance is a qualifying managerial or executive task, nor did the Petitioner clarify how what tasks the Beneficiary would perform in directing marketing and determining market demand. The Petitioner also provided no explanation as to the type of “technical direction” the Beneficiary would provide or specify what supervisory tasks are involved in developing a “product and solution roadmap.” In other words, the Petitioner’s statements do not clarify who is creating the roadmap or explain how the Beneficiary would execute his claimed supervisory role. Lastly, the Petitioner did not explain what means the Beneficiary would use to explore and maintain good business relationships or why this should be deemed a qualifying managerial or executive task.

On appeal, the Petitioner resubmits the above job description, which remains incomplete due to the Petitioner’s accounting for only 90% of the Beneficiary’s time. Nevertheless, the Petitioner points to the Beneficiary’s top-most placement within its organizational hierarchy and contends that his primary focus would be on job duties that involve directing, coordinating, and supervising. However, as indicated above, the lack of adequate content in the Beneficiary’s job descriptions, which included overly broad statements and insufficient information as to the actual tasks that the Beneficiary would perform, precludes us from being able to determine whether the Beneficiary allocated his time primarily to the performance of qualifying managerial or executive tasks.

In addition, the Petitioner claims on appeal that the Beneficiary will supervise only the vice president and that he would manage an essential function. However, the evidence in the record does not support either of these assertions. First, we note that the claim that the Beneficiary would oversee only a single subordinate is inconsistent with the Beneficiary’s prior job descriptions in which the Petitioner made references to “a Manager and Operation supervisor” and indicated that he would be “working with a management team.” These references contradict the notion that the Beneficiary would oversee the work of only one employee and, instead, indicates that the original claim was based on the assertion that the Beneficiary would oversee other members of the Petitioner’s staff. 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. at 591-92.

Second, with regard to the new claim that the Beneficiary would assume the role of a function manager, we note that in making such a claim, the Petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the

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essential nature of the function, and establish the proportion of the Beneficiary's daily duties attributed to managing the essential function. 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 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 *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

We further caution that a petitioner must not claim to employ a beneficiary in the role of a function manager as a default mechanism when the petitioner cannot establish the beneficiary's role as a personnel manager whose primary concern is to manage a subordinate staff of managerial, supervisory, and/or professional employees. Here, the function manager claim is new, as it was not raised prior to the issuance of the decision to revoke approval of the petition. We note, however, that the Petitioner must establish that the position offered to the Beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner prior to the filing of the appeal did not indicate that the Beneficiary would assume the role of a function manager; rather, the Petitioner added the new claim to be considered with a previously existing job description, which contains no provisions for a function manager. A petitioner may not make material changes to a petition 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).

Even if we were to fully explore the new claim that the Beneficiary would assume the role of a function manager, the record indicates that the Petitioner has not met the basic requirement of specifically identifying what essential function the Beneficiary would manage. Rather, the Petitioner merely states that the Beneficiary's "major function as president . . . will be 'building 100% confidence with the oversea [sic] affiliate company in order to obtain full financial support from the oversea [sic] company.'" It is unclear how this claimed essential function is related to the Petitioner's business objective of exporting car products or what underlying tasks are associated with this function. In light of these grave deficiencies, we find that the record lacks sufficient evidence to establish that the Beneficiary would assume the role of a function manager.

Furthermore, as previously noted, the Petitioner has provided several deficient job descriptions, none of which identified the Beneficiary's tasks with specificity or contained sufficient information that would allow us to determine what portion of the Beneficiary's time would be allocated to the performance of qualifying managerial or executive tasks. Absent a clear and credible breakdown of the time spent by the Beneficiary performing her/his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the Beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While we acknowledge that no beneficiary is required to

allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. As previously stated, 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 *Matter of Church Scientology International*, 19 I&N Dec. at 604. Here, not only does the record lack a detailed delineation of the Beneficiary’s actual daily tasks, but the percentage breakdowns that the Petitioner has provided preclude an understanding of how much of the Beneficiary’s time would actually be allocated to tasks within a qualifying managerial or executive capacity.

In light of the various evidentiary deficiencies described above, we find that the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary’s proposed position in the United States would consist primarily of tasks within a qualifying managerial or executive capacity. On the basis of this finding, the instant petition cannot be approved.

#### IV. CONCLUSION

The approval of the petition will be revoked and the appeal dismissed for the above stated reason. 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, that burden has not been met.

**ORDER:** The appeal will be dismissed.

Cite as *Matter of CS-III, Inc.*, ID# 14674 (AAO Nov. 25, 2015)