



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

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

MATTER OF N- CORP.

DATE: OCT. 15, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an import/export company, seeks to permanent employ the Beneficiary as its President under the multinational manager or executive immigrant classification. *See* Immigration and Nationality 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.

The Director concluded that the Petitioner had not established that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the Petitioner submits a brief and supporting exhibits, including payroll documentation. The Petitioner maintains that all of the Beneficiary's duties are in an executive capacity.

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

II. ISSUE ON APPEAL

The Director denied the petition based on a finding that the Petitioner had not established that the Beneficiary will be employed 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;

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(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.

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. See section 101(a)(44)(C) of the Act.

A. Facts

On Form I-140, the Petitioner identified its "Type of Business" as "Wholesale and Import Company & Car Dealer," with seven current employees as of April 29, 2014 when the petition was filed. The record does not indicate that the Petitioner is, itself, a car dealership. Rather, it owns [REDACTED], a separate corporation that operates a used car dealership in [REDACTED] Florida.

In a letter dated January 10, 2014, [REDACTED] the Petitioner's majority shareholder, provided the following breakdown of the Beneficiary's proposed duties as President, and the amount of time he would devote to each:

- Plan, develop, and establish policies and objectives in accordance with company's philosophy and goals. 10%
- Supervise and direct the activities of managers reporting to him such as reviewing closings and sales reports, including title sales and summations for the Department of Motor Vehicles. He will meet with Managers as necessary. 15%
- Recruit sales personnel. 3%
- Direct and coordinate financing activities as the company provides financing to its clients including: Analyzing data concerning business development and regulations affecting financing. 12%
- Direct all marketing, sales, and fiscal policies including analyzing data concerning business development and regulations to create opportunities for their products. 10%
- Direct marketing activities including the review of marketing and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction or implementation of new procedures for program improvement. 13%
- Direct sales activities. 15%
- Direct fiscal and budgeting activities. 5%
- Negotiate and execute contracts with important clients and vendors. 12%
- Human resources functions. 5%

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██████████ listed examples of the Beneficiary's "expected executive decisions," including "the purchase of inventory," "the hiring and firing of employees," and "[d]irect[ing] the financial activities of the company."

The Petitioner provided an organizational chart, which identified eight employees subordinate to the Petitioner, including three individuals identified as managers: a sales manager (who supervises a maintenance worker), a technical manager, and a body shop manager (who supervises a painter). The Petitioner also claimed one employee under each of the headings "Administration," "Accounting" and "Customer Service," with no titles specified. The chart indicated that all of these individuals are employees of ██████████ rather than the petitioning company. The Petitioner did not claim or identify any subordinate employees of the "Wholesale and Import Company" that filed the petition.

The Petitioner provided the following job descriptions for the three identified managers:

Sales Manager: In store and Internet Sales Managing and supervisor. Analyze and propose to the President price schedules and discount rates; resolve customer complaints regarding sales and service; supervise sales employees; supervise social media directing sales activities; consult with President to plan marketing and advertising campaigns; Analyze and perform reports to present to President with operational records and sales projections; analyze customer preferences and expectations to determine focus of sales efforts.

Technical Manager: Reporting directly to the President. Managing and overseeing the repairs of all technical and electrical issues; and the installation and control of GPS systems.

Bodyshop Manager: Reporting directly to the President. Ensures that vehicles are accurately and fully assessed for damage and repairs. Estimates repairs, considering time allowed, materials and parts required. Explaining work required to customers, insurers and other assessors in an efficient manner. Planning and directing Bodyshop marketing initiatives and alert the Sales Manager to potential opportunities to sell replacement or additional vehicles to customers.

The above description indicates that the sales manager "supervise[s] sales employees," but the Petitioner did not show that it has any sales employees. The sales manager's only identified subordinate, according to the organizational chart, was a "maintenance worker," whose own job description does not involve any sales duties.

The Director issued a request for evidence (RFE) on August 12, 2014. The Director requested information about the Beneficiary's "specific daily duties (rather than categories of duties)" and about any workers (whether employed or contracted) who are subordinate to the Beneficiary. The Director also requested information about the Petitioner's name and location, and indicated that copies of "state quarterly wage reports" would be one form of acceptable documentation.

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In response, the Petitioner submitted an October 30, 2014 letter from [REDACTED] including a revised list of the Beneficiary's duties. The revised list repeated the earlier list, with some items including expanded descriptions. For example, the item beginning "Direct marketing activities" included this added portion: ". . . and approve marketing proposals such as (automotive TV commercial, radio commercial, newspaper advertising, automotive direct mail, digital banner ad campaigns and interactive automotive website)." The newly added details did not address the Director's request for "specific daily duties (rather than categories of duties)"; rather, the new details provided more information about the categories of duties. Several of the percentage values varied somewhat from those listed in the earlier letter.

[REDACTED] stated that the Beneficiary has sole authority over the U.S. corporation. As an example of the Beneficiary's business decisions, he stated: "When the import/export business was low, [the Beneficiary] decided to Create [REDACTED] to enter into the car dealership business. He hired all the necessary employees to run the business." The Petitioner submitted a revised organizational chart identifying nine subordinate employees. As with the first organizational chart, the named subordinates are [REDACTED] employees. The Petitioner did not identify any employees performing operational functions in "the import/export business." The revised chart showed positions that were not included on the initial organizational chart, including two sales representatives, an "Internet sales and social media" employee, and a mechanic.

The Petitioner submitted copies of Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Returns, showing that [REDACTED] paid a total of \$40,970.36 to eight employees in the first quarter of 2014, and \$42,039.96 to six employees in the second quarter of 2014. The Petitioner also submitted copies of individual paychecks, dated mid- to late 2014, from [REDACTED] to various employees and contractors.

The Director based the denial in part on a finding that "the beneficiary's subordinates have received less than . . . a full-time professional wage." The Director also concluded that the Petitioner had not established that it employs "sufficient staff to relieve [the Beneficiary] from having to perform primarily non-qualifying duties."

On appeal, the Petitioner asserts that the size of the business does not inherently disqualify the Beneficiary for the classification sought, and that "the director must articulate some rational basis for finding a petitioner's staffing levels or structure to be unreasonable." The Petitioner submits tax and payroll documentation for the Beneficiary and [REDACTED] workers, and a February 6, 2015 letter from [REDACTED] listing the duties of the Beneficiary and the other workers at [REDACTED]. The new letter is largely identical to the October 30, 2014 letter, with some changes to the section listing subordinates and their functions.

B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner has not established that the Beneficiary's position in the United States is in a qualifying managerial or executive capacity.

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The new statement from [REDACTED] indicates that the “company currently has seven (7) positions,” but the description that follows lists eight different titles. The Petitioner also claims that two people work as sales representatives, for a total of nine subordinate workers at [REDACTED]. The Petitioner indicated that four of those nine workers are independent contractors.

The Petitioner states that “the Director based his decision on an erroneous estimate of beneficiary’s subordinates’ salaries,” and submits copies of IRS Forms W-2 (Wage and Tax Statement) and 1099-MISC (Miscellaneous Income) for 2014. The IRS Forms 1099-MISC show that [REDACTED] highest-paid contractor, one of its sales representatives, earned \$29,680 in 2014. The other three contractors each earned between \$10,261 and \$16,221. The IRS Forms W-2 show that ten employees, other than the Petitioner, each earned between \$1,100 and \$29,012 in 2014. [REDACTED] indicates that several of the positions changed hands over the course of 2014, and he identifies the same individual [REDACTED] as [REDACTED] accountant/bookkeeper and its Internet sales and social media manager.

The Petitioner does not explain how the submitted payroll information shows that the Director relied on “an erroneous estimate of beneficiary’s subordinates’ salaries.” According to [REDACTED] the three highest-paid employees occupied their manager-level positions for four to seven months during 2014, each earning between \$21,158 and \$29,011 during that time. Seven of the ten employees earned less than \$15,000 each, and five earned less than \$5,000 each. [REDACTED] claims that [REDACTED], [REDACTED] technical manager, is a “Full-time Employee” who has held that position “since January 2014,” but that individual received only \$1,100 as an employee. He received a higher sum, \$16,221, as a contractor, but this is not consistent with the claim that he was an [REDACTED] employee, rather than contractor, throughout the year. Although [REDACTED] claims that [REDACTED] simultaneously holds two full-time jobs with [REDACTED] one of them identified as managerial, the company paid him only \$11,617.90 in 2014.

The Petitioner has shown that [REDACTED] has paid several employees and contractors, but the Petitioner has not shown that the compensation has been commensurate with the managerial or professional duties that the Petitioner claims many of those workers have performed. As noted previously, the job description for the sales manager included oversight over sales staff at a time when the Petitioner had not shown that [REDACTED] employed any sales staff. Further, there are several individuals identified on the initial organizational chart who received neither a Form W-2 nor a Form 1099 for 2014. The Petitioner did not provide evidence of wages or other payments made to the painter, customer service, administrative or accounting employees identified on the organizational chart included with its initial evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). While the Petitioner acknowledges that there has been turnover in several positions, it is unclear who was actually employed at the time of filing. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

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Turning to the Beneficiary's role with the company, the Petitioner has submitted three similar job descriptions for the Beneficiary, all of them lacking substantial detail. Furthermore, those details that the Petitioner has provided concern ██████████ business. The Petitioner claims to be a wholesale import business, but the petitioner has not identified any functions that the Beneficiary performs with respect to that business. The Petitioner also appears to have no employees; all of the submitted tax and payroll documents pertain to ██████████. Therefore, the Petitioner has no subordinate employees to relieve the Beneficiary from performing the operational functions of its wholesale import business, if in fact the Petitioner engages in such business at all. Further, the Petitioner has not identified how the Beneficiary divides his time between the two companies.

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). Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Id.* The Petitioner has not provided sufficient details or explanation of the beneficiary's activities in the course of his daily routine.

There is no dispute that the Beneficiary is the ranking official at the petitioning company and at ██████████ but this is not sufficient by itself. The definitions of executive and managerial capacity have two parts. First, a 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 Beneficiary's senior rank at the company meets only the first part of the definition, and the record contains insufficient information regarding the Petitioner's activities, the Beneficiary's role in the Petitioner's import/export business, and the staffing of ██████████ at the time of filing. Accordingly, we cannot determine what the Beneficiary actually does on a day-to-day basis and cannot conclude that he performs primarily managerial or executive functions.

For the reasons discussed above, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity. Therefore, the appeal will be dismissed.

III. ADDITIONAL ISSUES

Review of the record reveals additional grounds for denial of the petition. Because we review the record on a *de novo* basis, we may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

A. Ability to Pay

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The regulation at 8 C.F.R. § 204.5(g)(2) provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.¹ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On Form I-140, the Petitioner indicated that it would pay the Beneficiary \$35,000 per year. The Petitioner must show that the petitioning entity itself, rather than an affiliated but legally distinct entity such as [REDACTED] has the ability to meet this obligation.

At the time of filing, the Petitioner submitted a copy of its 2012 IRS Form 1120, U.S. Corporation Income Tax Return, which shows \$10,000 in officer compensation, no other salaries, and no reported income from any source. In the RFE, the Director requested further evidence of the Petitioner's ability to pay the Beneficiary's salary. In response, the Petitioner submitted a copy of its amended IRS Form 1120 for 2013, which showed \$4,393 in gross receipts or sales, no compensation or salaries paid, and no taxable income.

The Petitioner also submitted a copy of [REDACTED] amended 2013 IRS Form 1120 return, indicating that the company paid \$27,926 in compensation of officers and ended the year with \$25,966 in taxable income. A copy of IRS Form W-2 showed that the Beneficiary received the entire sum designated as officer compensation.

The \$27,926 that the Beneficiary received in 2013 is less than the \$35,000 proffered salary. [REDACTED] claimed \$25,966 in taxable income would suffice to cover the difference, but the

¹ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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Petitioner's IRS Form 1120X Amended U.S. Corporation Income Tax Return indicates that [REDACTED] originally reported gross income of \$72,722 and net loss of \$14,606, and later amended those figures to show gross income of \$135,652 and taxable income of \$25,966. The company offered no explanation for these significant changes except to claim that the "[o]riginal tax return was a 'tentative return.'"

The Petitioner and [REDACTED] prepared amended tax returns in October 2014, nearly two months after the Director issued the RFE. Like a delayed birth certificate, the amended tax returns, prepared after the Director raised the issue, raise questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Furthermore, there is no evidence that [REDACTED] actually filed the amended return with the IRS. The amended returns are stamped "COPY," but both of them bear original signatures, in ink, from the preparer.

On appeal, the Petitioner claims that the "beneficiary earned \$73,494 during 2014." An IRS Form W-2 submitted on appeal shows that [REDACTED] paid the Beneficiary \$28,494 in 2014. The remaining \$45,000 took the form of a dividend from [REDACTED] reported on IRS Form 1099-DIV, Dividends and Distributions. A dividend paid to a shareholder is not a salary or wage. The record shows that the Beneficiary received less than the proffered salary in 2013 and 2014.

Regardless, there is no evidence that the Petitioner is a profitable business, or even an active one, and it cannot establish its ability to pay by drawing funds from the separately incorporated [REDACTED]. Therefore, beyond the Director's decision, the Petitioner has not established that the intending U.S. employer is able to pay the proffered wage as of the filing date.

In the instant case, the Petitioner did not demonstrate that it paid the Beneficiary the full proffered wage each year, and its net income and net current assets were not equal or greater to the proffered wage. Further, the Petitioner has not established that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the Petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the Beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the documentation in the record does not establish that the Petitioner has sufficient income or assets to cover the Beneficiary's full salary of \$35,000 per year. For this additional reason, we cannot approve the petition.

B. Doing Business

The petitioner must show that the prospective United States employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2). Therefore, it cannot suffice for the Petitioner to establish that the prospective United States employer existed for more than one year prior to the filing date.

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On its IRS Form 1120 returns, the Petitioner identified its principal business activity as “wholesale durable goods.” The record contains no evidence to show that the company has regularly, systematically, and continuously provided goods and/or services in this area. The 2012 tax return shows no sales income at all, and the amended 2013 return reported gross receipts or sales in the amount of \$4,393, an amount that does not appear to be indicative of the regular, systematic, and continuous provision of goods and/or services. As noted previously, the Petitioner has claimed no employees of its own.

In his two most recent letters, ██████████ stated that the Petitioner created ██████████ “[w]hen the [Petitioner’s] import/export business was low,” thereby implying that the company had been conducting some volume of business. This assertion is not, itself, documentary evidence that the Petitioner has ever done business as an import/export company.

██████████ business activity does not establish eligibility. ██████████ was incorporated on April 11, 2013, one year and 18 days before the petition’s filing date, but incorporation is not “doing business,” and neither are start-up activities, such as leasing space and arranging for utility service. These activities do not constitute the regular, systematic, and continuous provision of goods and/or services.

The record contains no evidence that ██████████ was doing business for one year prior to the April 29, 2014 filing date. ██████████ license to sell motor vehicles had an effective date of ██████████, 2013. ██████████ earliest documented sale took place on June 4, 2013, according to an October 22, 2013 sales listing in the record.

██████████ did not begin doing business until June 2013, and there is no evidence that the petitioning entity itself has ever done business as a wholesale or import/export company. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

We will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 N- Corp.*, ID# 14037 (AAO Oct. 15, 2015)