



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

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

MATTER OF Y-R-E-A-C-, LTD.

DATE: OCT. 19, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a cargo airline, seeks to employ the Beneficiary in the United States as its manager of North America operations under the multinational manager or executive immigrant classification. 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. 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 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, 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. THE ISSUE ON APPEAL

The only issue on appeal is whether the Petitioner has established that it will employ the Beneficiary 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;

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- (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

The Petitioner filed a Form I-140 on behalf of the Beneficiary on May 29, 2014. The petition included an introductory letter, dated February 26, 2014, from counsel. In that letter, counsel claimed that the Beneficiary would serve as the Petitioner's "Services Manager of all North American operations," and claimed that he would have "full responsibility for all of [the Petitioner's] day-to-day operations." Counsel's letter does not comply with the regulatory requirement at 8 C.F.R. § 204.5(j)(3)(i), which requires the submission of a statement from an authorized official of the petitioning United States employer.

On Part 5, line 2c of the Form I-140, asked to specify its "Current Number of U.S. Employees," the Petitioner answered "30 contracted." An unsigned, undated statement indicated that these contractors included three full-time sales representatives, [REDACTED] flight crews, and part-time cargo handlers, maintenance workers, and support crew providing catering and ground service.

The Director issued a request for evidence on November 3, 2014. The Director instructed the Petitioner to submit a job description from an authorized official, rather than from counsel, including a "[d]etailed description of the specific daily tasks that are involved with the completion of each duty and the percentage of time to be spent on each duty."

In response, the Petitioner submitted a December 26, 2014 letter from [REDACTED] human relations director of the Petitioner's headquarters in [REDACTED] who stated:

Since most of the work in the United State[s] is performed by contracted American corporations, [the Beneficiary's] principal responsibility has been to supervise and coordinate this work to confirm that it is done in full compliance with [regulatory] requirements. . . .

.....

For the North American company operations . . . [the Beneficiary] must:

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1. Make sure that the operations in [REDACTED] and Alaska comply with the laws and regulation[s] of those cities and states and also comply with U.S. FAA [Federal Aviation Administration] requirements and company standards.
2. Check and direct local cargo handling companies in doing their off-loading and loading of all scheduled and charter flights.
3. Check and confirm food catering management work to guarantee timely services for all flights.
4. Supervise and direct inspection, maintenance and repair work done by contracting companies.
5. Supervise inspections and make sure all flights are safe to operate.
6. Monitor the management of ground operations, including towing, food, drinking water and lavatory services, overnight accommodations, ground power services, and security;
7. Check and inspect the management of fuel services by the contracting American companies to make sure the quality and quantity of fuel is provided according to plan specifications.
8. Listen to managers of all contracted U.S. companies that provide services to our North America operations and report their comments and recommendations to the Operation General Managers in China.

The Petitioner submitted an organizational chart with the Beneficiary at the top as general manager. The second level of the chart showed the managers of three branches [REDACTED] and [REDACTED], with the Beneficiary shown a second time as the manager of the [REDACTED] branch. The [REDACTED] and [REDACTED] branches had three divisions each (sales, ground operation, and aircraft maintenance), while the [REDACTED] branch had two divisions (ground operation and aircraft maintenance). The chart identified the contractors who performed the work of these divisions, and indicated that some of the contract workers worked exclusively for the Petitioner.

The organizational chart identified managers in [REDACTED] and [REDACTED] but tax documents and a payroll journal in the record indicate that the Beneficiary was the Petitioner's only employee throughout 2014.

The Director denied the petition on January 15, 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 list of duties provided by [REDACTED] did not establish that the Beneficiary would primarily perform qualifying managerial or executive functions. Noting that the Petitioner

apparently had only one employee at the time of filing, the Director asserted: “The supervision of independent contractors will not permit a beneficiary to be classified as a manager. Only the management of employees may be considered a qualifying managerial duty.” The Director also stated: “The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis.”

On appeal, the Petitioner submits a legal brief. The Petitioner notes the prior approval of an L-1A nonimmigrant petition for the Beneficiary, and asserts that the Director has cited no authority to explain the different outcome of the immigrant petition. The Petitioner also contends that the Director held the Petitioner to an improper standard.

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that the Beneficiary’s proposed position with the petitioning entity would be in a qualifying managerial or executive capacity.

B. Analysis

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 job duties with the entity in question. 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 organizational structure of the division or department where the beneficiary would be employed, the job duties and job requirements of the positions under the beneficiary’s immediate control, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary’s daily tasks and his or her role within the petitioner’s organization.

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 Petitioner, on appeal, asserts that the Director “used the definition of the duties of an ‘executive’ to adjudicate the petition,” whereas the Petitioner seeks to employ the Beneficiary as a manager, who need not perform executive-level duties. The Petitioner also contends that the Director improperly required “that all of the employees who were managed by the beneficiary had to be employed and paid by the petitioning company.” (Emphasis in original). These are valid points. The Petitioner has consistently called the Beneficiary a manager. Also, while the definition of a manager specifies employees rather than contractors when it indicates that the manager “[s]upervises and controls the work of other supervisory, professional, or managerial employees,” the next clause

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in the definition indicates that the manager can manage a function without directly supervising employees. These points, nevertheless, do not rebut the Director's decision as a whole.

The Petitioner asserts that the Beneficiary performed managerial duties "for many years as an L-1" nonimmigrant, and therefore consistency demands approval of the immigrant petition. For most of those years, the Beneficiary held L-1B status as an intracompany transferee with specialized knowledge. The Beneficiary's status did not change to that of an L-1A manager until February 4, 2014, less than four months before the petition's filing date. The prior approval of L-1A status for the Beneficiary does not require USCIS to approve a later immigrant petition. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). Furthermore, even if a prior L-1A approval did have that effect, it would not follow that the previous L-1B approvals would do the same.

Much of the appellate brief consists of counsel's claims regarding the Beneficiary's responsibilities and his past and future tasks. Counsel states, for instance: "The beneficiary was the person who represented [the Petitioner] in . . . complex discussions and negotiations with airport authorities in charge of the [redacted] in Texas." As another example, counsel states: "the beneficiary is the person who is recognized by the U.S. Federal Aviation Authority [*sic*] (FAA) as being the 'responsible party' in the United States representing [the Petitioner] in any permit, licensing, performance or airworthiness issues." The record does not contain any evidence from airport officials or from the FAA to support these claims. The assertions of counsel are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. 1108. In this instance, the Petitioner has not provided specific information that would establish the exact nature of the Beneficiary's duties from day to day. Instead, the Petitioner has essentially listed a variety of airport support functions and claimed that the Beneficiary is responsible for them. The Director asked the Petitioner to specify the percentage of time devoted to each task, but the Petitioner did not do so. 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.

[redacted], in a December 26, 2014 letter, asserted: "It is not possible to describe the [Beneficiary's] specific daily tasks . . . because each day's work varied so much." It may not be possible to provide a complete account of each of the Beneficiary's various functions, but the information that the Petitioner has supplied has been so vague and general that it gives little, if any, idea as to the nature of the Beneficiary's work on a typical day. We cannot determine whether the

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Beneficiary's duties are primarily managerial or administrative. This is a crucial distinction because administrative tasks do not qualify as managerial.

Accordingly, we find that the Petitioner did not provide reliable, probative evidence sufficient to establish that the Beneficiary's intended employment in the United States would be in a qualifying managerial or executive capacity. For this reason, 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 Y-R-E-A-C-, Ltd.*, ID# 14059 (AAO Oct. 19, 2015)