



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

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

MATTER OF C-S-, INC.

DATE: SEPT. 11, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a company engaged in software development and sales, seeks to classify the Beneficiary, its chief executive officer, as a multinational manager or executive. *See* Immigrant and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the record did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity.

On appeal, the Petitioner asserts that the company's small size is not a disqualifying factor, and that the Beneficiary has contributed to the beneficiary's growth in his role as its CEO. The Petitioner submits a legal brief and supporting exhibits.

**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.

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.
- (C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

## II. ISSUE ON APPEAL

The sole issue on appeal is whether the Petitioner established that the Beneficiary will be employed in a qualifying managerial or executive capacity.

### A. Facts

The Petitioner filed the Form I-140 on October 23, 2013. The petition included an October 16, 2013 letter signed by [REDACTED] Chief Technology Officer of the Petitioner's parent company in Israel. The Petitioner provided a chart of the Beneficiary's duties and the hours devoted to each task:

Job Duties	Weekly Hours
Oversee company's day-to-day operations and manage company's employees.	12-14
Meet with strategic technology partners and coordinate the marketing efforts (manage relations with key customers . . . ; approve price proposals for company's services and products).	10-12
Exclusive responsibility over financial affairs of the Petitioner (signatory rights and bank account management, payment to suppliers, employees and other expenses, as well as working with the company's auditors on financial reports and statements).	7-10

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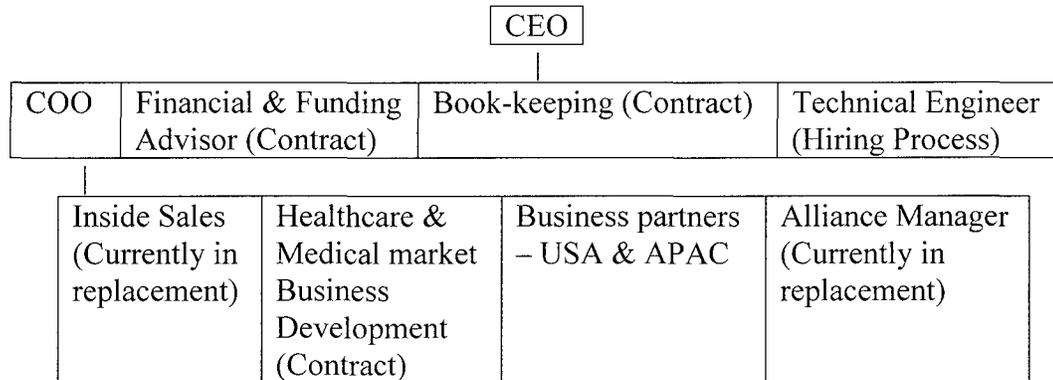
Responsibility over all HR [human resources] affairs of the Petitioner (hiring, dismissal, and engagement negotiations with potential employees, contractors, and outsourced service providers).	5-6
Drafting and presenting for approval of the Board of Directors of annual budget for Petitioner's activity. Managing the approved budget, with full signatory rights to execute all tasks derived thereof.	3-4
Representing [the Petitioner] in conventions and business events.	3-4
Responsibility over regulations and legal activities in front of the U.S. authorities.	1-2

On the Form I-140, the Petitioner stated its "Current Number of U.S. Employees" as "6 (including contractors)." The Petitioner asserted: "A significant number of additional employees will be added to the U.S. payroll, as soon as agreements with [REDACTED] and other companies are finalized." The Petitioner submitted the following chart, labeled "current employees" although it also includes unstaffed and anticipated future positions:

Position	Job description	Weekly working hours	Reporting to
CEO	Managing the company	40-50	Board of Directors
COO [Chief Operating Officer]	Responsible for the relationship with existing business partners in North and South America	45-50	CEO
Senior Alliance manager [vacant at time of filing.]	Responsible for strategic engagement with key organizations and partners.	25-30	COO
Business development – Healthcare and Medicaid	Responsible for the business relationship with companies in the Healthcare and medical device market.	5-10	CEO
Finance & Funding	Helps [company] to engage with strategic partners and venture capital firms.	5-10	CEO
Inside Sales representative [vacant]	Coordinates the sales activities, telemarketing, etc.	20-30	COO

Support Specialists [“Number of employees depends on the growth of the company.”]	Customer support and pre-sale	35-40	CEO
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An accompanying organizational chart included the following information:



The organization chart shows positions not shown on the employee list. Furthermore, it is not evident in what sense the Petitioner’s business partners report to the Petitioner’s COO as the organizational chart implies.

A second organizational chart, showing the company’s projected structure “[a]fter [e]xpected investment” in the first two quarters of 2014, added a Chief Financial Officer and a Technical Officer directly below the CEO. Two support engineers would report to the Technical Officer. The number of workers reporting to the COO would expand to five: the Inside Sales Manager (overseeing an Inside Sales Representative); a Marketing Manager; a Healthcare & Medical Market BD Manager; a Sales Director (overseeing three regional Alliance Managers); and a fourth Alliance Manager, outside the chain of command for the regional Alliance Managers.

The Petitioner submitted copies of six IRS Form W-2 Wage and Tax Statements for 2012, showing wages and salaries paid to six employees that year. Other materials in the record provide titles for four of these individuals and refer to a fifth as an “Owner/Corporate Officer.” The salaries paid were as follows:

The Beneficiary	\$176,900.00
Unspecified owner/officer	39,241.42
COO	27,884.00
Alliance Manager	34,999.00
Inside Sales Rep.	2,898.00
Unspecified	850.00

The Petitioner submitted copies of offer letters and contracts, describing three of the positions identified on its organizational chart. A “Consultancy Services offer” listed the following duties for the Healthcare & Medical Market Business Developer:

- Introduce prospective enterprise companies and business partners from the healthcare and medical devices industry.
- [C]onduct initial meetings with prospects to introducing Company and Company’s offering for a possible business opportunity. . . .
- [F]ocus on the following areas:
  - Build/increase US Market Awareness on Company products and services
  - Develop direct contacts with decision-makers at Upper-tier Accounts, business partners and resellers
  - Assist in building a relationship with Local Company Alliances

A letter to the Petitioner’s contracted Financial & Funding Advisor indicated that the position would involve “Business development strategy planning,” “Corporate Operation strategy” and “Capital and financing.” A job offer letter for the part-time position of “inside sales admin assistant” stated that the position’s “responsibilities will include, but shall not be limited to, inside sales activities, telemarketing, CRM updates and presentations in front of customers over GoToMeeting.”

The Director issued a request for evidence (RFE) on July 10, 2014. The Director stated that the Petitioner had not submitted adequate information about the Beneficiary’s duties and those of his subordinates. The Director noted that the Beneficiary and the COO were the only full-time employees.

In response, the Petitioner submitted a second chart describing the Beneficiary’s job duties. The duties described were nearly identical to those on the earlier chart, but the Petitioner changed the balance of the hours devoted to some tasks:

<u>Job Duties</u>	<u>Hours, chart 1</u>	<u>Hours, chart 2</u>
Financial affairs	7-10	5-8
Drafting budgets	3-4	5-7
Conventions and events	3-4	6-8
Regulations and legal activities	1-2	4-5

A revised list of “current/prospective employees” did not show the expansion that the Petitioner had forecast for the first half of 2014. The list is largely similar to the previous list of current employees and contractors, except that a part-time Marketing Associate position had replaced the Senior Alliance Manager position, and the Petitioner projected the future hiring of full-time Sales Account

Managers and up to five Software Engineers, with the exact number of both positions dependent on the company's future growth. A July 30, 2014 job offer letter for the Marketing Associate listed the position's responsibilities as "inside sales and marketing activities, telemarketing, CRM updates, SEO and any future required marketing activities."

An organizational chart, dated August 2014, showed the Beneficiary on the top level, with five subordinates on the second level: the COO; a Support Engineer; a Software Engineer; and two contractors: the Financial & Funding Advisor and a Bookkeeper. The COO's listed subordinates were unchanged from the earliest organizational chart, except for the addition of the part-time Marketing Associate. The new chart indicated that the Alliance Manager position, absent from the "current/prospective employees" list, still existed but was vacant.

Also in the RFE, the Director instructed the Petitioner to "submit copies of Forms W-2 and/or 1099 for each of the employees and contractors paid in 2012 and 2013 as well as state employment tax reports showing the amount of wages paid in 2012 and 2013." The Petitioner's response did not include any IRS Forms 1099. Also, the Petitioner did not document the extent, if any, to which it hired the services of contractors during early 2014, projected earlier as a period of expansion.

The Petitioner submitted five Forms W-2 for 2013, as well as tax and payroll documentation for the first quarter of 2014, showing the following amounts:

	2013	Q1 2014
The Beneficiary	\$163,400	\$42,600
COO	41,548	13,122
Alliance Manager	11,999	-
Inside Sales Rep. 1	550	-
Inside Sales Rep. 2	3,600	2,880

The salaries reported on the Forms W-2 total \$221,097 in 2013, compared to \$282,772.42 in 2012.

In the denial notice, the Director observed that the Petitioner has only two full-time employees and stated: "As there are few employees to carry out the daily essential functions of the business, it must be demonstrated that the beneficiary is not performing them, but is in fact serving in a managerial or executive role." The Director concluded that the Petitioner had not established that the Beneficiary is employed or will be employed, in a qualifying executive or managerial capacity.

On appeal, the Petitioner submits a brief, asserting that it has provided sufficient information and evidence to warrant approval of the petition, and that it has identified "professional employees within the company, who are subordinate to the Beneficiary and who would relieve the Beneficiary from performing routine duties inherent to operating the business."

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## B. Analysis

For the reasons to be discussed below, we find that the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity.

The definitions of executive and managerial capacity each 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 devotes a considerable portion of the appeal to the assertion that the company has grown as a result of the Beneficiary's leadership. Evidence of growth would not, by itself, demonstrate that the Beneficiary qualifies as a multinational manager or executive. Further, the record does not support the Petitioner's claim. The Petitioner asserts that the response to the RFE included "evidence of significant growth of the company." The record does not support this assertion. The RFE response did not show that the company had taken on a greater number of employees, and the Petitioner's payroll shrank by more than \$60,000 from 2012 to 2013. A payroll journal for late October 2014 identifies the Beneficiary and only three other paid employees, two of whom are part-time. A new organizational chart submitted on appeal shows a fifth part-time employee (hired November 2014), three vacant positions, and four contractors. The Beneficiary and the COO remain the Petitioner's only full-time employees.

Furthermore, at the time of filing the petition, the Petitioner stated: "The company has been growing very fast. . . . The revenue is expected to hit \$1,000,000.00 by the end of 2013." The Petitioner's RFE response showed that the Petitioner did not reach this goal. The Petitioner's IRS Form 1120 U.S. Corporation Income Tax Return for 2013, submitted in response to the RFE, shows gross receipts of \$345,269 for the year, with a net loss of \$349,210 after expenses. Therefore, the record does not support the Petitioner's claims of fast, significant, or sustained growth.

The Petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a petition for classification as a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner submits new organizational charts for the petitioning U.S. entity and the parent company in Israel. These new charts both indicate that the Beneficiary is the CEO not only for the Petitioner, but for the foreign entity as well. The Petitioner's previous organizational charts and descriptions of duties did not indicate that he remained responsible for the foreign entity. The Petitioner's initial filing did not refer to the Petitioner as the company's headquarters, and [REDACTED]

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October 16, 2013 introductory letter used the past tense when referring to the Beneficiary's time as the CEO of the company in Israel.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

The Petitioner states that the Director made a general finding of ineligibility but did not "identify[] those job duties that would render Beneficiary ineligible." Elsewhere in the same brief, however, the Petitioner cites such examples, stating that the Director "mistakenly concluded that the Beneficiary 'will be working with customers' and 'will be working at sales conventions.'" The Petitioner did not explain how these conclusions were mistaken, given that the Petitioner's list of the Beneficiary's duties included "manag[ing] relations with key customers" and "[r]epresenting [the Petitioner] in conventions and business events." The appeal itself contains a new job description stating that the Beneficiary "sometimes represents [the Petitioner] in national and international conventions and business events."

The Petitioner asserts that any non-qualifying functions the Beneficiary performs are incidental, and that the Beneficiary primarily performs qualifying managerial duties. The Petitioner, however, has not described those primary duties in any detail. The original description of his chief function reads, simply: "Oversee company's day-to-day operations and manage company's employees."

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. Here, the Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the 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). 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. A new job description, submitted on appeal, indicates that the Beneficiary "dedicates 100% of his time to fulfill his executive role," through "Meetings with the Board of Directors and Stockholders," "Supervision of strategic business relationships," and such activities. The updated job description relies on the Petitioner's current structure and projected future hiring, rather than the structure that was in place when the when the petition was filed. The 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).

When the Petitioner filed the appeal, there was no indication that it intended to supplement the appeal at a later date. Two months later, the Petitioner submitted documentation that had accompanied a separate nonimmigrant petition, seeking to classify the Beneficiary as an L-1A nonimmigrant manager or executive. The Petitioner filed the nonimmigrant petition on November

28, 2014, after the denial of the present immigrant petition and more than 13 months after the present petition was filed. USCIS approved the nonimmigrant petition on December 29, 2014. The Petitioner asserts that this evidence shows that USCIS has accepted that the Beneficiary qualifies as a multinational manager or executive.

The 2014 nonimmigrant petition is not before us on appellate review, and we will therefore reach no conclusions on its merits. We note, however, that the job description submitted with that petition is demonstrably different from the description submitted with the immigrant petition under review. Some duties are entirely different, and where there is overlap, the hours devoted to the tasks are markedly different. Therefore, the two petitions rested on two different fact patterns, and the approval of one does not demonstrate or imply error in the denial of the other. In making a determination of statutory eligibility, USCIS is limited to the information contained in the individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Overall, while we do not doubt that the Beneficiary exercises the appropriate level of authority over the petitioning company as its CEO, the evidence of record does not establish that he, as one of only two full-time employees, performed primarily qualifying duties at the time of filing, or that he had sufficient subordinate staff to relieve him from involvement in the day-to-day operations of the company.

For the foregoing reasons, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity.

### 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 C-S-, Inc.*, ID# (AAO Sept. 11, 2015)