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

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

MATTER OF W-G-S-, INC.

DATE: SEPT. 18, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a gas station and convenience store, seeks to employ the Beneficiary as its president under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Beneficiary also intends to work as director of financial operations and marketing for the [REDACTED]. The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

A United States employer may file Form I-140 to classify a foreign national 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 sole issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in the United States in a managerial 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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

The Petitioner filed Form I-140 on February 27, 2014. The Petitioner, a gas station and convenience store, employs five to seven employees. The petition form specified that the Beneficiary's title would be "Director of Marketing & Finance."¹ The Petitioner submitted a February 21, 2014 statement, signed by the Beneficiary in his capacity as president, which described the Beneficiary's intended duties with the Petitioner as follows:

He will continue to be responsible for establishing all company policies and reviewing the day-to-day operations of [the Petitioner] through his general manager, [REDACTED]. [The Beneficiary] is responsible for reviewing and certifying [REDACTED] reports and accounts to the franchisors as required under the various franchise agreements.

The Petitioner also provided a list of six job duties, which appear to combine his intended functions at both [REDACTED] and the petitioning company:

1. Establishing procedures under which all financial records of the eight restaurants are maintained.
2. Supervises the Chief Managing Officer to [ensure] procedures are being followed concerning collection of money, making bank deposit[s], and preparing reports.
3. Supervising Accountant in review of daily bank reconciliations of the four restaurants, including deposits and withdrawals.
4. Directing bookkeepers in random review of individual invoices to make certain the merchandise is being properly ordered and inventoried.
5. Maintaining financial records according to franchise agreements; ensures that bookkeepers have made the required payments according to agreements; reviews monthly statements received from franchisors.

¹ In its letter dated February 21, 2014, the Petitioner stated the Beneficiary would hold "the position of President of [the petitioning entity] and Director of Financial Operations and Marketing for the [REDACTED]." The [REDACTED] is a company that owns and manages 13 [REDACTED]

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6. He will also review recommendations for the hiring and training of new staff, raises and discharges, setting of work schedules and ordering of inventory.

For the most part, we cannot determine which of the listed functions pertain specifically to the Petitioner. (The reference to “eight restaurants” clearly pertains to [REDACTED].)

The Director issued a request for evidence (RFE) on September 23, 2014. In the RFE, the Director requested “a definitive statement from the petitioner which describes the beneficiary’s job duties,” and instructed the Petitioner to “explain why a limited-size gas station and convenience store would require the services of a director of marketing and finance.”

In response, the Petitioner submitted a letter dated December 5, 2014, from [REDACTED] [REDACTED] stated:

In describing [the Beneficiary’s] duties, we have apparently created a misconception. [The Beneficiary] does not direct a single operation consisting of a gas station and fast food outlet with 6-7 employees. Rather, he is the Director and Operations Manager for three business entities which employ directly or indirectly 270 employees in the United States and an additional 250 in Nepal.

The Petitioner asserted that the Beneficiary initially intended “to expand his business organization” based in Nepal and that he continues to spend roughly two to three hours per day on the foreign parent company’s affairs. The Petitioner stated that the Beneficiary also spends three hours per day overseeing the operation of the petitioning entity, and nearly four hours a day on [REDACTED] activities.

The Petitioner described the Beneficiary’s duties at the petitioning entity as follows:

- Reviews and maintains the financial records of the business, reconciles daily bank deposits, reviews and reconciles monthly bank statements, prepares payroll, pays suppliers after consulting with General Manager (2 hrs a day)
- Meets with General Man[a]ger to determine that records are properly maintained, fees are properly paid and procedures are properly followed according to rules established by franchise agreements (.25 hrs a day)
- Reviews and approves the ordering of supplies and inventory and the payment of accounts payable; Reviews receipt of gasoline invoices and reports prepared by General Man[a]ger according to agreement with gas supplier. (.5 hr a day)
- Performs miscellaneous tasks including: Meets with accountant to maintain books and records required by state, federal and local regulatory agencies in connection with lottery games and for the payment of all taxes, licenses and other fees; inspects kitchen facilities to ensure that standards are being maintained according to state and local health department regulations, approves work schedules established by General Manager (.25 hrs a day)

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The Director determined that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity. The Director noted “disparities in the functioning of the petitioner and the number of employees.” The Director quoted the job duties listed for the Beneficiary at the Petitioner’s store, and concluded: “The evidence fails to establish that [the] duties to be performed for the petitioner . . . constitute to any extent, let alone a majority of the time, work that is certainly executive or managerial.”

On appeal, the Petitioner submits a brief, asserting:

██████████ provides Managerial Services for 13 ██████████ franchises which collectively employ[] 270 individuals. Thus the petitioner is not, as indicated in the denial, a “gas station and convenience store” but rather a management consulting company that directly owns and manages a gas station and convenience store while simultaneously owning a 20% interest in another entity, ██████████ that owns and manages 13 fast food restaurants. Thus the petitioner directly manages 5-7 employees and indirectly manages 270 employees.

The Petitioner repeats the assertion that the Beneficiary, on any given day, performs qualifying managerial or executive duties for the Petitioner, ██████████, and the foreign entity.

B. Analysis

Upon review, and for the reasons discussed below, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity.

As a threshold matter, we will not consider the Beneficiary’s job duties for ██████████ because the Petitioner has not established a qualifying relationship (involving ownership and control) with ██████████. A May 29, 2012 Shareholders Agreement specified that the Beneficiary, as an individual, purchased a 20% interest in ██████████ with ██████████ holding the remaining 80%. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm’r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm’r 1980).

Other documents in the record contradict the above information by indicating that the Petitioner, rather than the Beneficiary, holds an ownership stake in ██████████. Share certificates, also dated May 29, 2012, indicate that ██████████ owns 80 of 100 shares, and that the Petitioner owns the remaining 20 shares. ██████████ 2012 IRS Form 1065, U.S. Return of Partnership Income, includes three Schedules K-1, Partner’s Share of Income, Deductions, Credits, etc. These Schedules K-1 indicate that ██████████ owns 75% of the entity; ██████████ owns 5%; and the Petitioner owns the remaining 20%. These certificates would establish minority ownership, but not control.

██████████ in a letter dated December 12, 2014, stated that the Beneficiary, “through [the petitioning] organization, became a minority owner of ██████████” She did not claim that the Beneficiary has any control over the organization. Rather, he is “responsible for ██████████ financial

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management.” She also specified that she is “the sole owner of 13 [REDACTED]”
Thus, [REDACTED] plays a management function but does not own the restaurants.

The regulation at 8 C.F.R. § 204.5(j)(2) defines an “affiliate” as, in pertinent part:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The same regulation also states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The present proceeding involves three entities, of which the Beneficiary has varying levels of ownership. The Petitioner’s introductory statement described the foreign entity, [REDACTED] as “the parent company,” but there is no evidence that this company has any ownership interest in either the Petitioner or [REDACTED]. The petitioner has asserted that the Beneficiary is the sole owner of [REDACTED] 80% owner of the petitioning entity; and 20% owner of [REDACTED]. Under these conditions, [REDACTED] is not a subsidiary of either the foreign entity or the petitioning company.

[REDACTED] is, likewise, not an affiliate of the petitioning company. If the Beneficiary is the owner of 20% share of [REDACTED] that percentage is not approximately the same share as his sole ownership of the foreign entity or his 80% stake in the Petitioner. Also, the companies are not owned by “the same group of individuals” as the regulation requires; [REDACTED] majority shareholder owner [REDACTED] is not the same person as the Petitioner’s minority shareholder [REDACTED]. Therefore, if the Beneficiary is the minority shareholder, [REDACTED] does not meet the regulatory definition of an affiliate of the petitioning U.S. employer.

The share certificate and tax documents attest that the Petitioner, rather than the Beneficiary, owns 20% of [REDACTED]. Even then, however, minority ownership does not establish control. The Petitioner asserts that the Beneficiary “will play a major role in the operation of” [REDACTED], but neither [REDACTED] nor the petitioning entity controls [REDACTED]. The shareholder agreement indicates that the Beneficiary “shall be responsible for [REDACTED] financial and marketing operations,” whereas [REDACTED] shall be responsible for the day-to-day operation of the business.” Financial responsibility is not control of the company.

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Because [REDACTED] is neither an affiliate nor a subsidiary of the petitioning U.S. employer, the Beneficiary's intention to work for [REDACTED] cannot qualify him for the classification sought.

We will next address the Petitioner's assertion that the Beneficiary will work in a qualifying managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). We then consider the beneficiary's job description in the context of the petitioner's organizational structure, the duties of the beneficiary's subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's actual duties and role within the petitioning entity.

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). Therefore, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a given beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

The Director, in denying the petition, focused on the Beneficiary's three hours of claimed daily duties with the petitioning entity. The Petitioner claims that the Beneficiary devotes three hours a day to the affairs of the petitioning entity, and spends the remainder of his day working for [REDACTED] and managing the foreign entity. With respect to the Beneficiary's position as president of the petitioning entity, the majority of his claimed duties in that capacity relate to the Petitioner's finances, specifically "maintain[ing] the financial records," "reconcil[ing] monthly bank statements," "prepar[ing] payroll" and "pay[ing] suppliers. These duties, as described, appear to be administrative rather than managerial or executive. The Petitioner contends that the Beneficiary devotes 15 minutes a day to miscellaneous functions including "[meeting] with accountant to maintain books and records." The Petitioner also, however, states that the Beneficiary himself "maintains financial records" for two hours a day. Financial tasks such as bookkeeping and issuing

² USCIS records do not appear to show that the Beneficiary is authorized to work for [REDACTED] either through an approved nonimmigrant petition or through general employment authorization. The Beneficiary's L-1A nonimmigrant status only authorizes him to work for the Petitioner. *See* 8 C.F.R. § 274a(b)(12).

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payments are operational tasks, involved in the direct operation of the business. If the Beneficiary performs these tasks himself, then he is directly performing functions of the business rather than managing those functions.

An organizational chart included in the Petitioner's RFE response indicates that the gas station has "5 employees including attendants [and] cooks," in addition to the general manager. The Petitioner has not identified any subordinate staff that is responsible for performing these financial functions. Also, the Petitioner has not established that the petitioning gas station has a sufficient level of organizational complexity to justify two levels of management as claimed.

Tax documents in the record do not show that the Petitioner has any full-time staff that would relieve the Beneficiary from performing operational tasks at the gas station. IRS Form 1120, U.S. Corporation Income Tax Return, shows that the Petitioner paid \$41,600 in non-officer salaries and wages in 2013. IRS Forms W-2, Wage and Tax Statements, show that this amount was divided between four workers, three of whom each earned \$8,320 for the year. These amounts are not consistent with full-time employment. The same tax return indicates, on IRS Form 1125-E, Compensation of Officers, that the Beneficiary devotes 100% of his time devoted to the company's business, which contradicts the assertion that the Beneficiary works for the Petitioner for only three hours a day, spending the rest of his time on the affairs of [REDACTED] and [REDACTED]. Form 1125-E also indicates that the Beneficiary received compensation totaling \$65,695, although his Form W-2 for the year shows only \$41,600.

On appeal, the Petitioner repeats the same list of claimed duties, but does not dispute the Director's findings regarding those duties. The Petitioner, therefore, has not rebutted or overcome the Director's finding that the Beneficiary's duties with the petitioning entity are not primarily managerial or executive.

The Director found that the Petitioner had provided inconsistent figures regarding the Petitioner's staffing, with staffing figures ranging from "5-7" to "270 employees." The Director did not address the Beneficiary's asserted management role with [REDACTED] or the Petitioner's claim that the Beneficiary continues to run the foreign entity. On appeal, the Petitioner maintains that the Director must take these other ventures into account in order to get a full picture of the Beneficiary's executive and/or managerial duties.

Specifically, the Petitioner contends: "The interlocking corporations provide an opportunity for [the Petitioner] to provide the management services for which it was formed. . . . [The Beneficiary's] services are critical to the operation of more than 13 restaurants." The record does not support the Petitioner's claim, on appeal, that "the Petitioner is . . . a management consulting company that directly owns and manages a gas station and convenience store while simultaneously owning a 20% interest in another entity, [REDACTED] that owns and manages 13 fast food restaurants." As discussed above, [REDACTED] is a separate company that does not have a qualifying relationship with the Petitioner or the foreign entity. For this reason, we will not consider the Beneficiary's proposed job duties with [REDACTED].

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The Beneficiary's claimed ongoing duties for the foreign entity also cannot qualify him for the immigrant status he seeks in this proceeding. The statute and regulations establish that the Beneficiary must seek employment as a manager or executive for a United States employer. The foreign entity does not meet that requirement, as it is not doing business in the United States. The Petitioner claims that the Beneficiary continues to run [REDACTED] by telephone and other means, but his presence in the United States does not mean that [REDACTED] is doing business in the United States. "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).

As discussed above, the Beneficiary's claimed duties with the foreign entity and [REDACTED] do not constitute work (whether managerial, executive, or otherwise) for the petitioning U.S. employer.

For the above reasons, we find that the Petitioner has not provided reliable, probative evidence sufficient to establish that the Beneficiary will be employed in the U.S. 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 W-G-S-, Inc.*, ID# 13405 (AAO Sept. 18, 2015)