



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

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

MATTER OF U-C-I-, LLC

DATE: JUNE 29, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an importer and seller of corporate uniforms, seeks to permanently employ the Beneficiary as its president under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the Beneficiary would be employed in the United States in an executive capacity.

On appeal, the Petitioner submits a brief asserting that the Director used an incorrect standard of proof in denying the petition and maintains that the Beneficiary's position requires him to perform primarily executive duties.

Upon *de novo* review, we will dismiss the appeal.

## I. LEGAL FRAMEWORK

Section 203(b)(1)(C) of the Act makes an immigrant visa available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate.

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. A labor certification is not required for this classification. The Form I-140 must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. 8 C.F.R. § 204.5(j)(3).

## II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director determined that the Petitioner did not establish that the Beneficiary would be employed in the United States in an executive capacity.<sup>1</sup>

The term “executive capacity” is defined as “an assignment within an organization in which the employee primarily”:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). 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. Duties

When examining whether a beneficiary will be employed in an executive capacity, we will look first to the submitted description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

Based on the statutory definition of executive capacity, the petitioner must first show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the petitioner must demonstrate that the beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the petitioner’s other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In its letter of support, the Petitioner explained that it was established for the purpose of importing, warehousing, selling, shipping, and delivering uniforms in the United States. The Petitioner stated that the Beneficiary would be responsible for overseeing personnel, developing the company’s internal structure and operating processes and procedures, and overseeing business development. The Petitioner also provided a list of the Beneficiary’s proposed job duties, which would include

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<sup>1</sup> The Petitioner does not claim that it will employ the Beneficiary in a managerial capacity.

directing business operations through management of profit and loss as well as “facilitating management, safety and security, loss prevention, and banking.” The Petitioner did not clarify what tasks are involved in “facilitating management,” state how the Beneficiary would protect the company from loss, or specify his actual role with respect to banking activities.

The Petitioner also stated that the Beneficiary would supervise, set goals for, and oversee the scope of work of the export sales department, which was not included in the Petitioner’s corresponding organizational chart. In fact, in a separate statement, the Petitioner explained that it viewed export activity as a future undertaking. Likewise, while the Petitioner stated that the Beneficiary would oversee the training of sales teams, the corresponding organizational chart shows one sales team with four existing employees and five vacant spots for sales representatives that are projected as future hires. The chart does not show that the Petitioner had multiple “sales teams” at the time of filing. With regard to any job duties that are contingent on future developments, such as proposed departments or projected employees, we note that the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Our analysis of this issue is based on the organizational hierarchy that existed when the petition was filed.

The Petitioner also broadly stated that the Beneficiary would be responsible for: directing the implementation of the “Institutionalization Program” with the goal of developing new products and finding business opportunities in the surrounding areas; directing and coordinating finances and budget activities and activities associated with production, pricing, sales, and product distribution; directing and implementing policies and objectives; and directing human resource activities, such as approving human resources plans, selecting “high-level staff,” and establishing “major departments.” The Petitioner did not describe the components of the “Institutionalization Program” or specify the actual tasks involved in setting goals and policies or coordinating various company activities. Other duties listed included approving proposed budgets, overseeing client negotiations and development of new client business, evaluating the company’s finances with respect to business development, ensuring implementation of the foreign entity’s business model, and conferring with management and staff to address issues or problems, coordinate activities, and analyze company performance.

After reviewing the record, the Director issued a request for evidence (RFE), instructing the Petitioner to list the Beneficiary’s specific daily job duties and the percentage of time the Beneficiary would allocate to each individual task. The Director advised the Petitioner against grouping tasks into categories and stated that the job description should explain how the Beneficiary’s proposed position meets the four-prong definition of managerial capacity.

In response, the Petitioner provided a statement containing a supplemental job description, which restates certain job duties that were part of the original job description and assigns a percentage of time to those duties. The additional job description provided little new information and instead continued discussing the Beneficiary’s proposed position in a general manner without conveying a meaningful understanding of the Beneficiary’s actual daily tasks. For instance, the Petitioner

claimed that 15% of the Beneficiary's time would be allocated to "[p]lanning, developing, and coordinating all business operations at the highest level of management with the help of subordinate executives and staff members, including managing profit and loss, facilitating management, safety and security, loss prevention, and banking." While the references to "business operations" and "highest level of management" are both new, neither addition enhances our understanding of the specific daily tasks involved in managing profit and loss or "facilitating management." The Petitioner also added that the Beneficiary will develop and implement "the company's management, sales and marketing, logistics, human resources, and infrastructure," and exercise discretionary decision-making without oversight. However this additional language only conveys a sense of the Beneficiary's level of authority, yet adds no practical understanding of the specific actions the Beneficiary would undertake to meet these broadly stated job responsibilities.

Next, the Petitioner stated that 15% of the Beneficiary's time would be allocated to reviewing budgets; 15% to directing and coordinating finances that are associated with business development activities, such as budgets, expenditures, research, marketing, return-on-investment, and profit-loss projections; and 10% to reviewing financial documents and working with managers and other staff to address issues, coordinate activities, resolve problems, and analyze operations. The Petitioner did not specify any issues, activities, or problems or explain the repeated references to the Beneficiary's responsibility to "[a]nalyze operations." Again, while all three sets of duties denote the Beneficiary's heightened degree of discretionary authority over business activities, the Petitioner did not provide sufficient information about his actual daily tasks. Further, the Petitioner's reference to "installation" and "technical service offered to clients" when discussing the Beneficiary's operational analysis responsibility is unclear and appears to have little to do with the Petitioner's clothing distribution business. 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). The actual duties themselves reveal the true nature of the employment. *Id.*

The Petitioner went on to restate two elements of the original job description regarding the Beneficiary's role in directing and implementing the "Institutionalization Program" and supervising and overseeing "the scope of work of the export sales department," allocating a combined 15% of the Beneficiary's time to these duties. However, the Petitioner did not disclose any specific actions that would be involved in directing and implementing the stated program, other than to vaguely state that the goal of the program would be to "assur[e] that the business process matches the best practices" to allow for company growth and development; nor did the Petitioner provide further information to explain why the Beneficiary would be tasked with overseeing a department that does not appear to have existed within the organization at the time the petition was filed. Although the Petitioner claimed that the Beneficiary would "be responsible for establishing the necessary mechanisms to effectively evaluate the company's performance," it is unclear how this responsibility would translate to his daily activities.

Next, Petitioner stated that 23% of the Beneficiary's time would be allocated to various responsibilities associated with managing subordinates, including overseeing the training of sales teams, meeting with the sales team to conduct progress reviews and improve performance, and directing human resource (HR) activities, including approving HR plans and activities, selecting directors and other high-level staff, and establishing departments. The lack of information about the specific type of oversight the Beneficiary would be required to provide in sales training gives rise to the question of whether conducting such oversight would realistically be a routine daily or weekly task. Furthermore, while the Petitioner stated that it "envisions the hiring of additional sales representatives" to ensure client satisfaction, the Petitioner's organizational chart indicates that at the time of filing, the Petitioner had a sales director, a customer service adviser, and two sales managers comprising its entire sales force. There is insufficient evidence that the Petitioner had multiple sales teams whose training the Beneficiary would have to regularly oversee. Likewise, while it is likely that the Beneficiary would approve HR plans or activities, hire high-level staff, and establish new departments within the organization intermittently based on the needs of the organization, there is little evidence to suggest that the Beneficiary would perform any of these duties in the routine course of his daily business.

Finally, the Petitioner stated that the remaining 7% of the Beneficiary's time would be allocated to overseeing client negotiations and developing business relationships. However, it is not clear that these tasks, which are part of the overall process of selling the Petitioner's product and finding more clients to sell those products to, can be deemed as being executive in nature, despite the level of discretionary authority that may be inherent to the negotiation process itself.

In the denial decision, the Director determined that the record is not persuasive in demonstrating that the Beneficiary would be employed in a managerial or executive capacity.

On appeal, the Petitioner argues that the Director's RFE erroneously focused on the statutory definition of managerial capacity, thereby overlooking the Petitioner's claim that the Beneficiary would be employed in an executive capacity. While we agree that the Director's focus on managerial capacity was incorrect given the Petitioner's claim, we find that the oversight was harmless and did not contribute to the findings in the denial decision, which expressly referenced both managerial and executive capacity, thereby indicating that the Petitioner was given the full benefit of having its eligibility assessed under both statutory definitions.

The Petitioner also restates the job description it provided in response to the RFE, classifying each job duty into one of four subject headings – financial directive, operational objective, sales directive, or overall directive goal. As with the prior job description, the Petitioner's argument on appeal focuses on the Beneficiary's authority to analyze and oversee all aspects of the company's daily operations and make discretionary decisions regarding the company's business and financial goals based on data compiled by subordinate staff. The Petitioner also points to the Beneficiary's knowledge of "all aspects of the product industry" based on his experience in his former employment abroad.

We find that the record properly documents the Beneficiary's knowledge and experience and we do not dispute the Beneficiary's authority over personnel and all business matters based on his top-most placement within the Petitioner's organizational hierarchy. Rather, the issue in contention is whether the job duties the Beneficiary would carry out in the process of running the U.S. operation would be primarily of an executive nature. As stated above, we find that the Petitioner has not submitted sufficient information about the Beneficiary's actual daily tasks and therefore we cannot determine whether such tasks would be primarily executive in nature. Therefore, while we do not question the Beneficiary's qualifications for the proposed employment, based on the above discussion highlighting the various deficiencies in the job descriptions on record, we disagree with the Petitioner and find that the record lacks a sufficient job description which "clearly describe[s] the duties to be performed" by the Beneficiary. 8 C.F.R. § 204.5(j)(5).

#### B. Staffing

Beyond the required description of the job duties, USCIS reviews the totality of the evidence when examining the claimed executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to an understanding of a beneficiary's actual duties and role in a business.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as an owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

We note 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 visa petition for classification as a multinational executive. *See* section 101(a)(44)(C) of the Act. 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-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.*, 469 F.3d 1313; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner claimed to have seven employees at the time of filing and submitted an organizational chart depicting the Beneficiary at the top of the hierarchy as its president with a sales director and a

financial manager as his direct subordinates. As noted above, the organizational chart goes on to depict the rest of the staffing structure showing an accounting clerk as the financial manager's subordinate, a customer service adviser as the sales director's subordinate, and two sales managers subordinate to the customer service adviser. Although the chart shows a fifth hierarchical tier consisting of five sales representatives, all five positions were vacant at the time of filing and will not be considered. The Petitioner provided evidence of wages paid to employees in 2014, but did not provide recent payroll evidence from 2015. The individual identified on the chart as the financial manager ( [REDACTED] ) did not receive wages in 2014.<sup>2</sup>

In the RFE, the Director instructed the Petitioner to provide an organizational chart accompanied by job titles and job descriptions for subordinate employees along with their IRS Form W-2 wage statements for the relevant time periods, their educational levels, and information disclosing their full- or part-time status with the U.S. entity. The Petitioner was also instructed to provide evidence documenting the number of contractors used, if any, and the job duties they performed.

In response, the Petitioner resubmitted a copy of the original organizational chart and provided its quarterly federal tax return for the third quarter of 2015, during which the instant petition was filed. The Petitioner also provided job descriptions for the Beneficiary's direct subordinates – the sales director and financial manager – as well as nine Form W-2s it issued in 2015. A Form W-2 showing earnings of \$23,063 was issued to [REDACTED]. As noted in the Director's denial, this evidence does not resolve the discrepancy between the Petitioner's documented workers and the organizational chart, which shows [REDACTED] rather than [REDACTED] in the position of financial manager. We further note that [REDACTED] Form W-2 for 2015 shows that her earnings were approximately \$7,500 less than those of the accounting clerk, a position that is directly subordinate to the financial manager. Even if we were to disregard the name anomaly for the position of financial manager, it is unclear why the financial manager's subordinate received a salary that is approximately 23% higher than that of the financial manager herself. Further, despite the Director's discussion of the lack of wage evidence for [REDACTED] the Petitioner did not acknowledge or provide evidence to resolve the inconsistency. The Petitioner must resolve these incongruities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We also agree with the Director's decision to question the full- or part-time status of at least one employee – [REDACTED] the Petitioner's sales director. Namely, we note that while [REDACTED] was identified as one of the Beneficiary's two direct subordinates, projected to assist the Beneficiary in managing the organization, his salary for 2015 was only \$7,500 as compared to his 2014 Form W-2, which was originally submitted in support of the petition and which showed a salary of \$150,000. While it is possible that the 2015 W-2 only reflects [REDACTED] partial earnings, this gives rise to

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<sup>2</sup> The Petitioner provided a résumé for a [REDACTED] who indicated that she is the Petitioner's financial manager. The Petitioner's organizational chart indicates its financial manager is [REDACTED] and the Petitioner did not provide evidence that she is also known as [REDACTED]. The Petitioner did not pay wages to [REDACTED] or to [REDACTED] in 2014.

question whether [REDACTED] was actually employed by the Petitioner at the time of filing. Given that \$7,500 represents only 5% of [REDACTED] 2014 earnings, it appears that he was employed for only a short time period in 2015 and thus may not have been employed at the time of filing or the time going forward. This anomaly causes us to question whether the Petitioner had a sales director at the time of filing and if not, who, other than the Beneficiary, would have been available to carry out the sales director's job duties.

Another employee identified on the Petitioner's organizational chart, a sales manager, earned less than half of his 2014 salary in 2015, raising similar questions as to whether he was still employed by the Petitioner at the time of filing in the third quarter of 2015. While the Petitioner claims on appeal that the Form W-2s it submitted in the RFE response were only reflective of employee base salaries, it provided little evidence to show that it paid its employees commissions or other earnings in 2015 beyond those included in the Form W-2s. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, the Petitioner's claim that the Beneficiary "will be in charge of the overall sales procedures of the company" is not supported by evidence showing that the Petitioner had a sales director to carry out the sales procedures put forth by the Beneficiary. This leads us to question the true nature of the Beneficiary's job duties, which would undoubtedly be affected by the lack of a support staff to carry out his sales directives and relieve him from various sales-related duties. While no beneficiary is required to allocate 100% of his time to executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

In denying the petition, the Director questioned whether the Petitioner's staff at the time of filing was sufficient to relieve the Beneficiary from having to primarily carry out the nonexecutive operational tasks of the organization. The Director declined to consider "artificial staffing tiers" or inflated employee job titles.

On appeal, the Petitioner objects to the Director's reference to artificial tiers and inflated job titles, referring to its organizational hierarchy, which shows seven positions reporting to the Beneficiary and relieving him from having to carry out the organization's nonexecutive functions.

We find that the various unresolved discrepancies and anomalies pertaining to the Beneficiary's subordinate staff preclude us from gaining a full understanding of who the Petitioner employed at the time of filing and the job duties they performed. Without this critical information we cannot conclude that the Beneficiary had adequate staff to support him in a position that would entail job



duties that are primarily of an executive nature. The Petitioner's reliance on its organizational chart and employee résumés is insufficient given the above-cited inconsistencies between the organizational chart and the employee wage evidence. *See Ho*, 19 I&N Dec. 591-92. While we agree with the Petitioner's assertion that no adverse finding should result merely from the fact that the organization experienced staffing changes between 2014 and the date the petition was filed, the Petitioner must provide evidence to show who it employed at the time of filing and establish that the staffing structure at that time was sufficient to support the Beneficiary in an executive capacity. As stated above, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

Further, we note that the Petitioner did not claim to have employees or contractors to provide the logistics services that involve receiving the imported merchandise, shipping it to its final destinations, or any other operational tasks that would go along with the Petitioner's import and distribution operations. The Petitioner claims to have a warehouse in [REDACTED] Texas, but did not further elaborate regarding its staffing or operations. Without further evidence or explanation, we cannot exclude the possibility that the Beneficiary would be directly involved in carrying out or overseeing the logistical tasks pertaining to the shipping and receiving of the Petitioner's merchandise, which would not be deemed as tasks of an executive nature.

We have considered the Petitioner's staffing needs within the scope of its sales-driven operation; however, the various unexplained and unresolved anomalies catalogued above detract from the Petitioner's claim and lead us to question whether it was adequately staffed at the time of filing such that it was ready and able to relieve the Beneficiary from having to allocate a significant portion of his time to non-executive duties.

Based on the deficiencies and inconsistencies addressed above, the Petitioner has not established that it will employ the Beneficiary in an executive capacity.

### III. PRIOR APPROVALS

As a final note, we acknowledge that USCIS previously approved an L-1A nonimmigrant petition filed on behalf of the Beneficiary. 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 Church Scientology Int'l*, 19 I&N Dec. at 597); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at \*2 (E.D. La. 2000).

The Petitioner's nonimmigrant petition filing was a separate proceeding with a separate record. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the Director reviewed the record of proceedings and concluded that the Petitioner was ineligible to classify the Beneficiary as a multinational executive based on its failure to establish eligibility. In both the RFE

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and the final denial, the Director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous petition was approved based on the same insufficient evidence of the Beneficiary's eligibility, the approval would constitute error on the part of the Director.

#### IV. CONCLUSION

In light of the analysis provided above, the Petitioner has not established that the Beneficiary would be employed in the United States in an executive capacity.

**ORDER:** The appeal is dismissed.

Cite as *Matter of U-C-I-, LLC*, ID# 454669 (AAO June 29, 2017)