U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-G- INC

DATE: OCT. 11, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a gemstone trading company, 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: (1) the Petitioner has a qualifying relationship with the Beneficiary's employer abroad; (2) the Beneficiary was employed abroad in a managerial or executive capacity for at least one year in the three years preceding his entry to the United States as a nonimmigrant; and (3) the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The Director denied the petition with a finding of fraud or willful misrepresentation of a material fact.

On appeal, the Petitioner submits additional evidence and asserts that the Director did not conduct a complete review of its response to a notice of intent to deny (NOID). The Petitioner maintains that it has met all eligibility requirements for the requested classification.

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

I. LEGAL FRAMEWORK

An immigrant visa is 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. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include 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. *See* 8 C.F.R. § 204.5(j)(3).

II. QUALIFYING RELATIONSHIP

The Director found that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. The Petitioner claims to be a wholly-owned subsidiary of a sole proprietorship located in India, and states that this entity employed the Beneficiary from 1997 until 2008.

To establish a qualifying relationship under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

The term "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. *Id.*

In separate supporting letters submitted at the time of filing, the Petitioner and the foreign entity stated that the petitioning company was incorporated in 2004 and became a wholly-owned subsidiary of in 2008, when the foreign entity purchased its shares.

The Petitioner provided a copy of its New York Certificate of Incorporation indicating that it was established in December 2004, and authorized to issue 200 shares of common stock with no par value. The Petitioner has submitted a copy of its stock certificate number 1 indicating that all 200 shares were issued to on January 9, 2008, as well as a stock ledger indicating that no shares had been issued until the foreign entity acquired these shares for a purchase price of $45,000 in 2008.

In the denial decision, the Director acknowledged this evidence, but found that there were unresolved inconsistencies regarding the Petitioner's ownership based on the information it provided in its corporate tax returns for the years 2008 and 2009. In both tax returns, the Petitioner had indicated that it had two stockholders: the Beneficiary (10%) and the foreign entity (90%). The Director determined that this information contradicted the Petitioner's claim that it is a wholly-owned subsidiary of the foreign company.

The Director also acknowledged the Petitioner's response to a NOID, in which it submitted copies of its revised tax returns for the years 2004 through 2014, noting that the error had been rectified. All of the submitted tax returns identified as the Petitioner's sole owner. However, the Director declined to consider this evidence because it was recently prepared to comply with the

issues raised in the NOID, and because the Petitioner had not provided evidence that it actually filed amended tax returns with the Internal Revenue Service (IRS).

Finally, the denial decision also states that the Director "performed a search for [the Petitioner] in the website" which revealed that the Petitioner operates in a "single location" and therefore does not appear to have a qualifying relationship with the foreign entity.

On appeal, the Petitioner submits partial copies of IRS Forms 1120X, Amended U.S. Corporation Income Tax Return, for the years 2008 and 2009, which bear IRS receipt stamps dated April 7, 2017. The Petitioner does not include copies of the full returns that accompanied these filings.

The Petitioner also objects to the Director's reliance on the website, arguing that it was inappropriate for him to use this website to authenticate the Petitioner's information. The Petitioner notes that U.S. Citizenship and Immigration Service (USCIS) typically uses the system, which is based on information from The Petitioner provides a copy of its recently-updated report indicating that it is owned by

Upon review, we agree with the Petitioner, in part, as the Director should have given prior notice to the Petitioner of potentially derogatory information obtained from outside the record and provided an opportunity to rebut this information before citing to information obtained from the outside source in a denial decision. *See* 8 C.F.R. § 103.2(b)(16)(i). As the Director did not provide the Petitioner with this prior notice, his reliance on the website was not appropriate and we will disregard the information reported there. However, after reviewing the totality of the evidence, we find that the record still contains unresolved inconsistencies pertaining to the qualifying relationship.

First, the Petitioner's statements and evidence regarding its prior ownership have been inconsistent. At the time of filing, the Petitioner indicated it became a subsidiary of in 2008 when the foreign entity acquired all of its shares. However, because the company was established in December 2004 and has been filing tax returns reporting revenues since that time, it is reasonable to consider whether the Petitioner had a previous owner or owners.

In fact, in support of a prior Form I-140 which is part of the record of proceeding, the Petitioner submitted copies of its federal tax returns for the years 2004 through 2007. The Petitioner's accountant-prepared tax returns for 2004 and 2005 identify the Beneficiary as the sole owner of the company and indicate the company had issued common stock valued at $101,856. The Petitioner's 2006 tax return for the year December 1, 2006, to November 30, 2007, indicates that the Petitioner had two owners, including an unidentified Indian owner with a 90% ownership interest. This tax return pre-dates the foreign entity's purchase of the Petitioner's shares, which is claimed to have occurred in January 2008.

The "rectified" tax returns submitted in response to the Director's NOID further confused the issue because they indicated that the foreign entity held sole ownership of the Petitioner from the date of

its incorporation in 2004. This information directly contracts the Petitioner's previous claim that the foreign entity acquired an ownership interest in the Petitioner in 2008.

The Petitioner later claimed that the foreign entity sent the Beneficiary to open the U.S. office in 2004. However, if the shares were issued to him at that time and later transferred to the foreign entity, it is unclear why the Petitioner did not consistently state this and why such transfer was not documented in the Petitioner's own stock ledger and stock certificates. Both versions of the Petitioner's 2004 federal tax return indicate that the company issued stock valued at over $100,000 during that tax year, while the Petitioner claims that the foreign entity acquired all of the stock for $45,000 approximately three years later and had not issued its shares previously. If the Petitioner actually issued stock in 2004, this raises doubts regarding the credibility of the evidence indicating that the company issued its first stock certificate in January 2008.

In light of these unresolved issues, the Petitioner's stock ledger and stock certificates alone are insufficient to establish that the foreign entity is the Petitioner's sole owner as claimed. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must all be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In addition, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting control of the entity. *See Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, we are unable to determine the elements of ownership and control.

Based on the inconsistencies discussed above, the Petitioner has not met its burden to establish that it has a qualifying relationship with the foreign entity.

III. ONE YEAR OF EMPLOYMENT ABROAD

The Director also determined that the Petitioner did not establish that the Beneficiary had one year of employment abroad in a managerial or executive capacity during the requisite three-year period.[1]

The regulations require that, if a beneficiary is already in the United States working for an entity that has a qualifying entity with their foreign employer, the petitioner must establish that the beneficiary was employed by the entity abroad in a managerial or executive capacity for at least one year in the three years preceding the beneficiary's entry as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

[1] Although the Director concluded that the Beneficiary did not have the required year of employment abroad in a managerial or executive capacity, the denial decision did not reach a discussion of the Beneficiary's employment capacity and instead focused on whether the evidence was sufficient to establish that he had one year of employment abroad during the relevant three-year period. As we find that the Petitioner did not overcome this basis for denial, we will not address whether the evidence establishes that his claimed foreign employment was in a managerial or executive capacity, as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44).

The Beneficiary began working for the Petitioner as an L-1A nonimmigrant intracompany transferee in October 2008 and the Petitioner indicated on the Form I-140 that he had a petition to extend that status pending when it filed this immigrant petition in August 2010.[2] The supporting letters from the Petitioner and foreign entity stated that employed the Beneficiary as its international marketing manager from 1997 until September 2008.

In the denial decision, the Director noted that the Beneficiary had spent a significant amount of time in the United States in 2005, 2006, and 2007 (146 days, 176 days, and 187 days, respectively), and therefore could not establish one year of continuous employment abroad with the foreign entity in the three years preceding his entry in L-1A status.[3]

The Director also mentioned other facts that raised questions as to whether he had been employed by the foreign entity during this period. First, the Director noted that the Beneficiary had signed the Petitioner's stock certificate in his capacity as "president" in January 2008, and had also signed the Petitioner's lease agreements dating back to April 2005. The Director expressed doubts that he would have signed these documents if he was employed abroad as the foreign entity's international marketing manager. Further, the Director noted that the Beneficiary did not list a foreign employer on his Form G-325A, Biographic Information, which he filed with his Form I-485, Application to Register Permanent Residence or Adjust Status.

On appeal, the Petitioner asserts that the Beneficiary was required to travel extensively as the foreign entity's international marketing manager, noting that, in addition to spending time in the United States, he traveled to Hong Kong, Thailand, United Arab Emirates, and Australia between 2005 and 2007. The Petitioner explained that the Beneficiary signed the Petitioner's stock certificate and leases because he was the foreign entity's designee to lay the foundation for the U.S. office, prior to the formal transfer of shares to the foreign entity in 2008.

The Petitioner further notes that it had submitted an amended Form G-325A in response to the NOID. The Petitioner states that the Beneficiary's omission of information regarding his last employment abroad was merely a technical error. The amended version lists the Beneficiary's employment with from 1997 until September 2008. In addition, the Petitioner emphasizes that it had provided the Beneficiary's personal Indian tax returns and monthly pay receipts, which were not mentioned in the Director's decision. The Petitioner maintains that the Beneficiary's periods of time spent in the United States should not preclude a finding that he was employed abroad for at least one year during the three years preceding his transfer in L-1A status.

Upon review, the Petitioner has not established that the Beneficiary had at least one year of employment abroad during the three years preceding his entry as a nonimmigrant (September 2005

[2] USCIS records show that the Beneficiary had been granted one extension of his L-1A status through January 15, 2010. The Petitioner filed two additional extension requests, but USCIS denied both petitions (and in March 2010 and May 2010, respectively. The Petitioner later acknowledged that its extension request had been denied in May 2010.

[3] The Beneficiary was also in the United States in B-2 visitor status from October 2007 until the approval of the initial L-1A approval in September 2008.

to September 2008). However, the Director appears to have applied a strict *continuous* employment requirement that applies to the L-1 nonimmigrant classification, which has similar, but not identical requirements with respect to a beneficiary's one year of employment abroad. However, even the L-1 nonimmigrant classification, allows for non-interruptive, intervening trips to the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). Periods of time spent in the United States do not count towards USCIS' calculation when determining whether the Beneficiary had one full year of employment abroad, but will not prevent us from concluding that he accumulated a full year during a three year period.

Based on the Director's calculations, the Beneficiary spent 376 days outside the United States during the 2006 and 2007 calendar years and was not disqualified from meeting this eligibility requirement based on his physical presence as a visitor in the United States during this period. We also accept the Petitioner's explanation that the Beneficiary simply erred when he did not provide a full five-year employment history on his original Form G-325A completed in 2010.

However, there are other deficiencies and anomalies in the record and the Petitioner has not met its burden to establish that [redacted] employed the Beneficiary for at least one year between September 2005 and September 2008.

First, it appears that the Beneficiary was in the United States for all of 2008 prior to being granted a change of status from B-2 to L-1A in September of that year. While the Petitioner submitted payment vouchers from the foreign entity indicating that he received a salary payment in each month of that year, his qualifying employment with the foreign entity must have taken place while he was abroad.

The Petitioner also provided the Beneficiary's monthly payment vouchers for 2007, but the Beneficiary was in the United States for approximately one half of that year. For this reason, these documents cannot establish a full year of employment abroad and we would need to see additional records to verify his employment prior to 2007. The record does not include evidence of the foreign entity's monthly salary payments to the Beneficiary in the years 2005 or 2006.

However, the Petitioner did submit copies of the Beneficiary's personal Indian tax returns. The information provided on these returns casts doubt on the Petitioner's claim that the Beneficiary was a salaried employee of the foreign entity during the relevant three-year period.

The Beneficiary's Indian tax return (Form ITS-2D) for the 2006-2007 assessment year (which reports income for the year April 1, 2005, to March 31, 2006), indicates his "income from salary" as "Nil" and his "income from house property" as Rs. 96,040. The "Computation of Total Income" statement attached to the tax return confirms that his sole source of income in that year came from leasing a residential property located in [redacted] India.

For the 2007-2008 assessment year (for the year ended on March 31, 2007), the Petitioner submitted an acknowledgement from the Indian Tax Department showing that the Beneficiary had filed his tax return reporting gross income of Rs. 120,400. An attached "Computation of Total Income"

statement indicated that the Beneficiary's sole source of income was once again the letting of a residential property located in India.

Finally, the Petitioner submitted the same acknowledgement document for the 2008-2009 assessment year (for the year ended on March 21, 2008). The accompanying "Computation of Total Income" statement indicates that the Beneficiary received Rs. 204,000 in income from both "rent & salary" but did not provide a breakdown of how much income he derived from each source.

These documents contradict the foreign entity's handwritten "journal vouchers" indicating that paid the Beneficiary a salary of Rs. 15,000 per month or Rs. 180,000 per year in 2007 and 2008. Further, the foreign sole proprietor's own tax return for the year ended on March 31, 2009 indicates that paid only Rs. 111,200 in total salaries in that year, while the Petitioner submitted payroll journals showing that the Beneficiary alone was paid Rs. 155,000 during 2008.

The Petitioner must resolve these inconsistencies 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). Based on the lack of specific payroll evidence for the years 2005 and 2006, the Beneficiary's presence in the United States for half of 2007 and all of 2008, and the contradictory information revealed in the Beneficiary's tax returns, the record does not establish that the Beneficiary had the required one year of employment abroad with the foreign entity in the three years preceding his entry as a nonimmigrant to work for the Petitioner.

IV. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director also found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. In the denial decision, the Director found that the Petitioner provided vague position descriptions for the Beneficiary that did not adequately explain the nature of his typical day-to-day duties, and questioned whether the company's four-person support staff would be sufficient to relieve the Beneficiary from having to perform non-managerial and non-executive duties.[4]
On appeal, the Petitioner maintains that the Director "completely ignored" the Beneficiary's job duties, which establish that the Beneficiary relies on a subordinate manager to carry out and oversee the company's day-to-day operations.

The law defines the term "managerial capacity" as an assignment in which an employee primarily manages the organization, or a department subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or

[4] The Director also cited to other "inconsistencies" in the record. The first concerned the amount of the Beneficiary's proffered salary, noting that the amount offered was $42,000 in the previous Form I-140 petition and $48,000 in the current petition. The record demonstrates the Petitioner's ability to pay the Beneficiary's proffered annual salary of $48,000 as of the date of filing and we disagree with the Director's finding that there was an inconsistency in this regard that would undermine the Petitioner's claim that it would employ the Beneficiary in a managerial or executive capacity. We will withdraw the comments regarding the proffered salary.

manages an essential function within the organization; has the authority to hire and fire or recommend those as well as other personnel actions, or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act. Further, "[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." *Id.*

The term "executive capacity" is defined as an assignment within an organization in which the employee primarily: directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and 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.

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. Section 101(a)(44)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which clearly describes the duties to be performed by the Beneficiary. Beyond the required description of the job duties, USCIS reviews the totality of the evidence when examining a beneficiary's claimed managerial or executive capacity, 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 understanding a beneficiary's actual duties and role in a business. Accordingly, our analysis of this issue will focus on the Beneficiary's duties as well as the company's staffing levels and reporting structure.

A. Duties

The Petitioner must show that the Beneficiary will perform certain high-level responsibilities consistent with the statutory definitions of managerial or executive capacity. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). In addition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or 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 a letter submitted in support of the petition, the Petitioner stated that the Beneficiary's duties as president would include hiring and supervising sales and marketing employees; defining goals and developing marketing strategies; maintaining regular contact with existing and potential buyers; participating in gem and jewelry exhibitions; negotiating and finalizing contracts with buyers; studying and analyzing market trends; and coordinating with the principal in India.

In a separate statement submitted at the time of filing, the Petitioner submitted a lengthy job description indicating that the Beneficiary would allocate 60% of his time to executive duties and 40% of his time to managerial duties. The Petitioner divided these duties into the following categories:

Duties in an Executive Capacity:

1. Plans, develops and establishes policies and goals of the business organization in accordance with the overall objectives and chart of the company. (15%)
2. The President in conjunction with Marketing/Sales Manager sets sales targets, standards in customer service and direct marketing initiative. (10%)
3. Approves the budget for various activities and supervise their implementation. Monitor insurance plans, governmental liabilities and taxes and will be the authority for financial decision. (10%)
4. Actively engages in analyzing the market for core items and identifies priority areas of potential markets in conjunction with Marketing/Sales Manager and Sales Representatives. (10%)
5. Represent the organization at major [redacted] in the world. (5%)
6. The President ensures realization of business of the organization through a well-structured progress review system and would send in report to the principal (10%).

Duties in a Managerial Capacity:

1. Plan the general outline of Company's organizational structure. (10%)
2. Orient new employees, review position responsibilities. Establish work goals and objectives or standards to be achieved. (10%)
3. Train, develop and motivate employees to improve current performance and to prepare for higher-level jobs. (10%)
4. Evaluate the performance, review salaries and take personnel actions such as promotions, performance awards, demotions, etc. (5%)
5. Help maintain discipline, recommend and administer corrective action according to policy and procedures. (5%)

The Petitioner re-submitted this same position description in response to a request for evidence (RFE). In response to the Director's NOID, however, the Petitioner submitted a revised, six-page job description that divided the Beneficiary's duties into only five categories and did not make distinctions between executive and managerial tasks. The categories of duties included:

1. Oversee all sales transactions executed by the Marketing/Sales Manager with wholesalers and retailers. (25%)
2. Shall work with the Book-keeper on a weekly basis with the payables and receivables report, to ensure the organizations ability to meet payables, payroll and expenses. Defines and allocates budget, staff and other resources to accomplish objectives for organizational goals. (15%)

3. Identify problem areas in smooth running of the organization. Develop and recommend new policies and procedures for resolution in coordination with the President. (25%)
4. Negotiate and liaison with shipping agent and various governmental organizations through the concerned personals [*sic*]. (10%)
5. Create monthly report for review by the President, in coordination with the Sales Personals [*sic*] & Marketing/Sales Manager; Review inventory requirement send in by marketing/sales department fortnightly and co-ordinates with the Principal for the purchase of the same. (10%)

We note that these duties provided in response to the NOID did not add up to 100%. On appeal, the Petitioner again references this description and indicates that the Beneficiary allocates 20% of his time to #2 above, and 15% of his time to both #4 and #5, so that the percentages now amount to 100%.

Upon review, although the Petitioner has submitted two different lengthy descriptions of the Beneficiary's proposed duties that establish his level of authority as the company's senior employee, we agree with the Director's assessment that the Petitioner has not clearly conveyed the nature of the Beneficiary's primary day-to-day duties. The Petitioner's initial summary of the Beneficiary's duties indicated that he would be involved in sales and marketing duties alongside the company's other employees. Specifically, the Petitioner stated that he would be "maintaining regular contact with existing and potential buyers; participating in gem and jewelry exhibitions; negotiating and finalizing contracts with buyers; [and] studying and analyzing market trends." Most of these non-qualifying duties were not included among the Petitioner's lengthier breakdowns of the Beneficiary's position, which raises questions as to whether those expanded job descriptions encompassed all of his proposed non-managerial tasks.

Further, several of the broad duties outlined in the lengthier job descriptions seem incongruous with the Petitioner's business. For example, the Petitioner initially stated that the Beneficiary would spend 10% of his time "planning the general outline" of the company's organizational structure, and referred to future business units. However, such business units were never identified and the structure of the company remained unchanged between 2010 and 2017. While the Beneficiary has the authority to determine whether new positions should be created, it is evident that he would not spend four hours per week on this task.

Similarly, the Petitioner's claim that the Beneficiary would spend eight or more hours per week (20% of his time) working with the bookkeeper in order to manage the company's financial activities is not supported by the record. The "secretary/bookkeeper," based on the description of her duties, spends 80% of her time performing secretarial and clerical duties and the Petitioner indicated that this employee's bookkeeping duties are limited to preparing invoices and entering data into the accounting system. The Beneficiary's job description submitted in response to the NOID attributes a much greater role to the secretary/bookkeeper than indicated in that employee's job description and indicates that this employee prepares payroll documents, tax documents, and annual reports, among other duties. Based on this discrepancy, we cannot determine to what extent this

employee would actually relieve the Beneficiary from involvement in the company's routine financial activities.

In addition, the Petitioner states that the Beneficiary is responsible for negotiating and liaising with shipping agents "through the Marketing/Sales manager" and therefore does not have to directly coordinate transportation and logistics tasks for the import, export and domestic distribution of the Petitioner's products. We have reviewed the Marketing/Sales manager's job description and note that her duties do not include any tasks related to coordinating transportation and logistics. This evidence calls into question whether this area of responsibility, which would require an additional 15% of the Beneficiary's time, would involve managerial duties.

Further, there are instances in which the Petitioner indicated that the Beneficiary will perform his duties "in coordination with the President" or "create monthly report for review by the President" which creates confusion because the Beneficiary himself is the company's president. Overall, these incongruities detract from the probative value of the various submitted job descriptions, which, although lengthy, do not provide a clear or consistent picture of what the Beneficiary primarily does on a day-to-day basis.

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, 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 the 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.*

Whether the broad duties attributed to the Beneficiary qualify as executive in nature depends in large part on whether the Petitioner established that the Beneficiary has sufficient subordinate staff to manage and perform the day-to-day company functions he is claimed to direct. As discussed further below, the record shows that the Beneficiary's four-person staff is primarily concerned with sales and administrative matters, and the Petitioner has not shown its ability to relieve the Beneficiary from significant involvement in the other operational tasks required to operate its international gemstone trading business.

The fact that the Beneficiary will manage or direct a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act. Even though the Beneficiary may exercise discretion over the Petitioner's operations and possess the requisite level of authority with respect to discretionary

decision-making, the position descriptions alone are insufficient to establish that his actual duties would be primarily managerial or executive in nature.

B. Staffing and Organizational Structure

The Director determined that the Petitioner did not demonstrate that it has an organizational hierarchy in place sufficient to relieve the Beneficiary from involvement in the day-to-day operations of the business.

The Petitioner claimed "5+" employees at the time of filing. An employee list identified the Petitioner's five employees as (1) the president (the Beneficiary), (2) a marketing/sales manager, (3) a secretary/bookkeeper, and (4) two sales/marketing representatives. The Petitioner stated that it expected to hire three additional sales representatives and two "office staff" who would be responsible for shipping and delivery activities, handling returned merchandise, bank deposits, and other duties that were not specified. The Petitioner provided evidence that its employees received their base salaries in 2010, but did not show that it has paid its sales representatives a salary plus commission, as claimed.

The Petitioner's staffing remained relatively unchanged while the Form I-140 was pending adjudication. It hired one additional marketing/sales agent and replaced the previous marketing/sales manager with a new hire prior to the denial of the petition. Our review of the Petitioner's staffing will be based on the structure of the company at the time of filing. 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).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act. The Petitioner has not claimed that the Beneficiary would be responsible for managing a function, but rather indicates that he would supervise a subordinate manager or professional. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees.[5] Contrary to the common understanding of the word "manager," the statute plainly states that 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." 8 C.F.R. § 204.5(j)(4)(i). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2).

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[5] In evaluating whether a beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Therefore, we must focus on the level of education required by the position, rather than the degree held by a subordinate employee.

The Petitioner indicates that the Beneficiary supervises a full-time marketing/sales manager who is in charge of the day-to-day marketing/sales activities and spends approximately 20% of her time on duties related to supervising the training and performance of the marketing/sales representatives. The Petitioner indicated that this position requires a bachelor's degree and two years of experience, and provided copies of bachelor's diplomas for both employees who have worked in the position. The employee who filled the position at the time of filing had a foreign bachelor of arts degree in an unspecified field, while the latter employee has a foreign bachelor of commerce degree. The Petitioner did not indicate what type of degree is required for the position, and the record does not contain sufficient information to establish that the position is a professional position that requires the equivalent of a U.S. bachelor's degree in a specific course of study related to the duties performed.

While the Petitioner depicts the marketing/sales manager as a first-line supervisor, this employee's interactions with the marketing/sales agents are limited to "report to the President on the various developments/requirements in training/appraisal of Marketing Sales Agents etc." and "co-ordinate with the appointed Marketing/Sales agents in different areas & respond to their requirements, supervise their performance & report to the President on their function." These duties require a total of 20% of the marketing/sales manager's time and do not support a finding that this is primarily a supervisory position.

Further, even if we conclude that the marketing/sales manager is a supervisory position, it is unclear how much time the Beneficiary spends on supervising this employee given the two different breakdowns of his duties submitted by the Petitioner. Further, the Petitioner has not indicated that any other employees have supervisory responsibilities and has not claimed to employ other professional personnel. The record does not support a finding that the Beneficiary primarily supervises a subordinate staff of managers, supervisors or professionals in support of a claim that he qualifies as a personnel manager.

We acknowledge the Petitioner's assertion that the Director over-emphasized the small size of the company in concluding that the Beneficiary would not be employed in a qualifying capacity. The Petitioner correctly observes that we must take into account the reasonable needs of the organization and that a company's size alone may not be the only factor in denying a visa petition for classification as a multinational manager or 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-managerial or non-executive operations of the company. *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 has three marketing/sales staff and one "secretary/bookkeeper" who mainly performs secretarial and administrative functions. While the Petitioner indicated that it will hire additional "office staff" in the future, it has not identified any current employees who purchase inventory, coordinate the logistics, transport, and delivery of its products, or perform most of the day-to-day banking and financial activities of the company. Further, at least one summary of the Beneficiary's duties attributes routine sales and market research duties to him and suggests that he performs some of these duties alongside the company's other sales and marketing staff. In addition, the record

includes copies of the Beneficiary's identification badges from various gemstone trading events identifying him as a "buyer." Therefore, while the Petitioner correctly states that there is no minimal staffing requirement applicable to this visa classification, the Petitioner must still show that the staff in place at the time of filing would be sufficient to relieve the Beneficiary from significant involvement in the non-managerial, day-to-day operations of its gemstone trading business. The Petitioner has not met this burden.

For the reasons discussed above, the Petitioner has not established that the Beneficiary would be employed in a managerial or executive capacity.

V. FINDING OF FRAUD OR WILLFUL MISREPRESENTATION

The Director's decision concluded with a statement that "USCIS is also denying this Form I-140 with a finding of fraud or willful misrepresentation of a material fact."

Any foreign person who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act is inadmissible. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); Matter *of Kai Hing Hui*, 15 I&N Dec. at 288.

Here, the Director's summary finding of "fraud or willful misrepresentation of a material fact" appears to have been made on the basis of number of discrepancies noted earlier his decision, rather than on a specific determination that the Petitioner willfully made a particular false representation of a material fact to USCIS. As noted in our discussion above, the Director overlooked the Petitioner's explanation for certain discrepancies and also relied, in part, on information obtained from sources outside of the record of proceeding (i.e., the " website) without providing the Petitioner

with notice. As such, we find that there were insufficient facts to support the Director's finding and the finding is withdrawn.

However, our withdrawal of the Director's finding of fraud or willful misrepresentation of a material fact should not been deemed a finding that we find the evidence submitted with this petition to be credible. We have noted material discrepancies between the Beneficiary's foreign tax returns and payroll records that cast doubt on his employment with the foreign employer and which were not addressed in the Director's decision. If the Petitioner chooses to pursue this matter and cannot resolve those discrepancies, this evidence would raise serious concerns about the veracity of the Petitioner's assertions regarding the Beneficiary's foreign employment. Doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Ho*, 19 I&N Dec. at 591.

VI. CONCLUSION

The appeal must be dismissed as the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer, that the Beneficiary had one year of employment with the foreign entity in the three years preceding his entry to the United States as a nonimmigrant, or that the Petitioner would employ the Beneficiary in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of T-G- Inc.*, ID# 664812 (AAO Oct. 11, 2017)