



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

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

MATTER OF E-G-USA INC.

DATE: SEPT. 26, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an international trading company, seeks to permanently employ the Beneficiary as its president/chief executive officer (CEO) 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 Beneficiary would be employed in the United States in a managerial or executive capacity, or (2) that she was employed abroad in a managerial or executive capacity for at least one year in the three years preceding her entry to the United States as a nonimmigrant.

On appeal, the Petitioner submits additional evidence and asserts that it established by a preponderance of the evidence that the Beneficiary qualifies for the requested classification. The Petitioner argues that the Director disregarded evidence, penalized the Petitioner for failure to submit information that was not requested, and placed undue emphasis on the small size of the company.

#### 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).

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 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, 8 U.S.C. § 1101(a)(44)(A). 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.

## II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

In the denial decision, the Director determined that the Petitioner’s description of the Beneficiary’s job duties was deficient because it was overly broad and did not provide sufficient insight into the nature of her proposed day-to-day duties. Further, the Director found that the Petitioner did not provide a sufficiently detailed organizational chart and observed that four of its employees appear to be part-time workers. The Director concluded that it is more likely than not that the Beneficiary would need to allocate a significant proportion of her time to non-managerial and non-executive duties.

On appeal, the Petitioner asserts that the Director erroneously denied the petition based on the size of the company and did not properly review the detailed position descriptions provided for the Beneficiary and the positions subordinate to her.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe 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 the claimed managerial or 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 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 business activities and staffing levels.

#### 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.

The Petitioner operates an international trading company and seeks to employ the Beneficiary as its president/CEO. The Petitioner's letter of support, submitted in April 2014, included a list of her broad responsibilities such as "directing and overseeing the company's business operations," "developing, determining and implementing the company's polic[i]es, strategies and goals," "setting up and supervising the management and personnel structure," "directing, planning and supervising business operations," and "formulating long term business development policies and strategies." Many of the duties merely paraphrased the statutory definitions of managerial and executive capacity and did not describe what she typically does on a day-to-day basis within the scope of the company's international trading 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).

In response to a request for evidence (RFE), the Petitioner provided a slightly expanded version of its initial description and added the number of hours per week the Beneficiary would allocate to each area of responsibility. The Petitioner stated that she will spend 15 hours per week "conferring with, receiving reports from and supervising the business manager in managing the operations of marketing and selling the products, securing supplies and overseeing products quality for marketing/sales, managing the marketing efforts of the products of the company . . . ." The Petitioner referred to the business manager as a full-time employee, but the record reflects that this employee's hours were significantly reduced subsequent to the filing of the petition. It is unclear that he even worked 15 hours per week, or that he relieved the Beneficiary from first-line supervision of sales and marketing tasks and other non-managerial duties as stated in the Beneficiary's duty description.<sup>1</sup>

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<sup>1</sup> The record contains an appointment letter identifying [REDACTED] as the "sales department manager." While this position title is not listed on the Petitioner's organizational chart, the sales department and its two claimed employees are under the supervision of the "business manager" and it appears that [REDACTED] is in fact the "business manager." He received \$1,800 per month at the end of 2013 and was the Petitioner's second highest paid employee. In 2015, he received a salary of \$500 per month.

The Petitioner further stated that the Beneficiary spends five hours per week making personnel decisions regarding the hiring and firing of staff, but the Petitioner has consistently employed five to six employees, and the record does not establish that personnel decisions would occupy a significant portion of her time. An additional 10 hours of the Beneficiary's time is allocated to "negotiating, approving and providing guidance on major transactions" and "expanding sales and source network in the United States, by "conferring with business counterparts in the industry," and "promotion and expansion of the company's products." These duties relate to the sales and marketing of the company's products, and the Petitioner does not indicate these non-managerial tasks would be delegated to her subordinates.

In addition, in some instances, the Petitioner's RFE response did not elaborate on the initial job description, but simply added a time allocation to the broadly described responsibilities. For example, the Petitioner did not further explain the Beneficiary's involvement in "planning and supervising business operations," directing and coordinating formulation of financial programs," and "reviewing activity reports and statements." These types of duties resemble a basic template for an executive position and do not provide insight into the nature of her role with the Petitioner. Reciting a beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Here, the Petitioner has not provided any detail or explanation of the Beneficiary's proposed activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co.* at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 she is claimed to direct. As discussed further below, the Petitioner has not provided a clear or complete picture of its staffing and structure at the time of filing, or of its ability to relieve the Beneficiary from significant involvement in the administrative and operational tasks required to operate its international 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. While 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 her 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 five employees at the time of filing in April 2014, but did not submit an organizational chart depicting its structure or provide evidence of wages paid to employees during the first quarter of 2014. In the last quarter of 2013, the Petitioner paid the Beneficiary and four other employees, who received monthly salaries of \$700, \$700, \$1,200, and \$1,800, respectively. In a supporting letter, the Petitioner stated that its employees included the Beneficiary, a secretary, a business manager, in-house sales, a shipping clerk, an outside sales contractor, and legal and accounting professionals.

In the RFE, the Director requested a detailed organizational chart with job titles, job duties, and education levels for all employees. The Director also requested IRS Forms W-2 for each employee for 2014 and 2015. In response, the Petitioner submitted a chart dated February 2014 which indicates that the Beneficiary directly supervised the business manager and a “secretary/shipping clerk.” The chart depicts a sales department with two sales people reporting to the business manager. The Petitioner did not identify any employees by name or provide the requested IRS Forms W-2 for 2014. As such, the record does not include evidence of wages paid to individual subordinate employees in 2014, although the Petitioner did submit its 2014 tax return indicating that it paid a total of \$37,945 in salaries and wages to all subordinate employees.

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). Therefore, we will also consider the most recent evidence available as it pertains to the Petitioner’s staffing levels, which includes both quarterly wage reports and IRS Forms W-2 for 2015. As of the fourth quarter of 2015, the Petitioner employed the Beneficiary and four other employees, including three employees earning \$500 per month and one earning \$1,000 per month. Therefore, the Petitioner had a clear reduction in manpower hours, even if the total number of employees remained the same. Although the Director noted the reduction in full-time employees and the lack of information regarding which individuals held which positions, the Petitioner does not directly address either of these issues on appeal. Rather, the Petitioner emphasizes that the Beneficiary “has successfully streamlined the operations to make [the company] more efficient” and asserts that this efficiency “is demonstrative of and tribute [*sic*] to the quality of the top management.”

However, in April 2016, in response to the RFE, the Petitioner clearly stated that the Beneficiary relies on the *full-time* services of the business manager to oversee all aspects of the day-to-day management of the company. The Petitioner also expressly stated in the response to the RFE that it had two full-time sales staff. Based on the payroll evidence, the Petitioner did not have a single full-time employee at the time of the RFE response, other than the Beneficiary, who is stated to work 48 hours per week. In fact, the \$6,000 annual wage paid to three of the four subordinate employees equates to less than 14 hours per week even if we assume that all three employees received minimum wage.

These limited working hours cast doubt on the credibility of the extensive job duties attributed to the subordinate employees. For example, the job description for the business manager states that this individual is responsible for growing the sales/marketing force, assisting the Beneficiary, presenting operating plans, conducting “major business negotiations,” negotiating with “outside sales representatives” negotiating with shipping and customs companies, recommending personnel actions, assigning duties to sales persons, setting pricing, inventory, and shipping requirements, and preparing reports. This duty list is not credible for an employee who is working approximately 14 hours per week. The Petitioner also attributes essentially all clerical, bookkeeping, shipping, administrative, customer service, and even some sales duties to a single part-time “secretary/shipping” employee with similar working hours, although it initially stated that it employed both a secretary and a shipping clerk. While the Petitioner’s subordinates may relieve her from performing some operational and administrative tasks, the record does not establish that the part-time staff is sufficient to relieve her from significant involvement in non-managerial duties.

Further, the record does not support a finding that the Beneficiary is primarily engaged in the supervision of subordinate managerial, supervisory, or professional personnel. 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. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees.<sup>2</sup> The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act. The term “essential function” is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, or more specifically, identify the function with

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<sup>2</sup> 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. Here, the Petitioner has not stated any educational requirements for the positions subordinate to the Beneficiary, nor has it provided evidence of educational credentials for any of its employees.

specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5).

The Petitioner indicates that the Beneficiary supervises a full-time business manager, who, in turn supervises a full-times sales staff and several key operational activities of the company. As discussed, the business manager is no longer a full-time position and this employee appears to earn the same salary as the other part-time employees he is claimed to supervise. The Petitioner has not indicated that any other employees have supervisory responsibilities and has not claimed to employ professional personnel. The evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; managerial job titles alone are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The Petitioner has not established that the Beneficiary will be employed as a personnel manager. The Petitioner has not claimed, in the alternative, that the Beneficiary manages an essential function of the organization.

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 size of a company may be especially relevant when USCIS notes discrepancies in the record. *See Systronics*, 153 F. Supp. 2d at 15. Here, the Petitioner maintained that the Beneficiary had the support of full-time staff at a time when all of her subordinates were working on a part-time basis.

While the Petitioner emphasizes that the reduction in manpower hours is a result of the Beneficiary's effective leadership and the company's evolving needs, it has not adequately supported its claim that the part-time staff in place at the time of the Director's decision was sufficient to relieve the Beneficiary from significant involvement in the day-to-day operations of the Petitioner's international trade business. The reasonable needs of a petitioner will not supersede the requirement that a beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

The Petitioner emphasizes that it submitted "700 pages" of documentation, but the evidence provided did not include, as required, a detailed description of the Beneficiary's expected day-to-day activities, or a sufficient explanation regarding how the company's reduced staff of four part-time employees would be able to relieve the Beneficiary from involvement in the daily operation of the business as its sole full-time employee.

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

### III. BENEFICIARY'S EMPLOYMENT ABROAD

In the denial decision, the Director briefly addressed the Petitioner's evidence of the Beneficiary's former employment abroad with its Chinese parent company. The Director acknowledged that the RFE response included a detailed statement of the Beneficiary's duties abroad and job descriptions for foreign employees she supervised in her role as vice president of the Chinese entity. However, the Director determined that the statements of duties were provided by the Petitioner, and not the foreign entity, as requested. The Director did not further discuss this evidence.

In addition, the Director found that the RFE response, which included a "Certificate of Employment/Proof of Compensation" from the foreign employer, did not adequately confirm the Beneficiary's exact dates of employment abroad or include sufficient evidence of wages paid to her during the period of qualifying employment between 2007 and 2012, as the evidence only addressed her wages in 2011 and 2012. For these reasons, the Director determined that the Petitioner did not establish that the Beneficiary was employed in a managerial or executive capacity abroad with a qualifying organization for at least one year in the three years preceding her entry to the United States as a nonimmigrant.

On appeal, the Petitioner asserts that the Director erroneously disregarded the evidence submitted in response to the RFE, as the statement of the Beneficiary's managerial and executive duties was signed by the foreign entity's legal representative and chairman (who is also authorized to sign for the Petitioner). Further, the Petitioner maintains that the evidence was sufficient to document that the Beneficiary had at least one full year of employment in the three year period preceding her entry to the United States in L-1A nonimmigrant status. In support of the appeal, the Petitioner provides copies of the Beneficiary's payroll records from the foreign entity for the period 2007 to 2012, as well as sample internal business documents signed by the Beneficiary in her capacity as the foreign entity's vice president.

Upon *de novo* review of the evidence, including the additional evidence provided on appeal, we will withdraw the Director's adverse finding pertaining to the Beneficiary's employment abroad. The totality of the evidence is now sufficient to establish that the foreign entity employed the Beneficiary from 2007 until her transfer to the United States in 2012. Further, the evidence shows that, as vice president, the Beneficiary performed primarily managerial duties that included supervising a staff of subordinate managers or supervisors, holding authority to hire and fire subordinates, and exercising discretionary authority over the day-to-day operations of the company.

### IV. PRIOR APPROVALS

We acknowledge that USCIS has approved other petitions that the Petitioner filed on behalf of the Beneficiary, specifically, nonimmigrant petitions granting her L-1A status as an intracompany transferee in a managerial or executive capacity. Each nonimmigrant petition filing is separate from this immigrant petition, with a separate record and a separate burden of proof. 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).



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 Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not be 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).

#### V. CONCLUSION

The appeal must be dismissed as the Petitioner has not established that the Beneficiary would be employed in the United States in a managerial or executive capacity.

**ORDER:** The appeal is dismissed.

Cite as *Matter of E-G-USA Inc.*, ID# 571853 (AAO Sept. 26, 2017)