



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

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

MATTER OF G&DW-, INC.

DATE: JAN. 24, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a distributor and retailer of cell phones and accessories, seeks to permanently employ the Beneficiary as its president and 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 the Beneficiary would be employed in the United States in a managerial or executive capacity. The Director further found that the Petitioner did not establish that it is “a legal entity desiring and intending to employ the Beneficiary” due to a discrepancy in the record regarding the Petitioner’s federal employer identification number (FEIN).

On appeal, the Petitioner asserts the Director overlooked extensive evidence of the Petitioner’s staffing levels and its explanation regarding the FEIN discrepancy, which resulted in the erroneous denial of the petition. After our preliminary review of the appeal, we issued a request for evidence (RFE) and have received the Petitioner’s timely response.

Upon *de novo* review, we will withdraw the Director’s determination that the Petitioner is not a legal entity that intends to employ the Beneficiary. The Petitioner submitted sufficient evidence to corroborate its FEIN and provided a reasonable explanation for the discrepancy noted by the Director. However, as the Petitioner has not overcome the remaining ground for denial, 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).

“Managerial capacity” means as an assignment within an organization in which the 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, or a department or subdivision of the organization; has authority over 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.

“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

The Director found that the Petitioner did not establish that the Beneficiary would be employed in the United States in a managerial or executive capacity. This finding was based primarily on the Director’s determination that there were discrepancies in the record regarding the Petitioner’s staffing levels, and thus insufficient evidence to show that the Beneficiary’s subordinate staff would be able to relieve him from performing the non-managerial duties required for the day-to-day operations of the Petitioner’s business.

On appeal, the Petitioner maintains that the Director did not give sufficient weight to evidence of the Petitioner’s staffing, including state and federal quarterly tax returns showing the number of employees. We issued an RFE to request further information regarding the scope of the Petitioner’s operations at the time of filing, as well as evidence regarding the company’s current operations. 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 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.

The Petitioner, which operated two retail cell phone stores at the time of filing in February 2010, did not provide a detailed job description with its initial evidence. The Petitioner provided the following description of the Beneficiary's duties in response to our RFE:

- Direct the Management and Discretionary Functions (40%): Formulate plans, oversee growth and direct the operations of the Company at the highest level of authority.
- Direct the Development Functions (30%): Direct the overall development of the Company at the highest level of authority.
- Direct the Financial Functions (15%): Supervise and oversee the financial operations of the Company at the highest level of authority.
- Direct the Marketing Functions (15%): Direct the marketing objectives and programs of our company.

The Petitioner also identified the "specific tasks" associated with each area of responsibility. For example, the Petitioner indicated that the Beneficiary's responsibility to "direct the management" of the company would require him to establish "strategies and policies" and "goals and policies," to "analyze the operations" and "supervise productivity," and to "organize growth" by making pertinent decisions. The Beneficiary's responsibility for directing "development functions" required him to establish commercial relationships in the United States and abroad, identify new markets and opportunities for expansion to Latin America, direct negotiations with clients, oversee development of the business, and supervise business processes.

The description, while lengthy, does not provide sufficient insight into the nature of the Beneficiary's duties on a day-to-day basis within the context of the Petitioner's retail business. Rather, the broad duties listed could apply to any managerial or executive employee within almost

any type of business. The Petitioner did not offer examples of goals, strategies, or policies that the Beneficiary was expected to establish, explain the specific tasks he would perform to supervise productivity or business processes, or identify the “individual clients” he would negotiate with in a retail setting. Although these responsibilities are intended to establish the Beneficiary’s managerial or executive capacity and his senior position in the company, the duty description is far too broad to provide any meaningful insight into what the Beneficiary would actually do on a daily basis. Reciting the 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. The Petitioner has not provided any detail or explanation of the Beneficiary’s activities in the course of his daily routine. *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 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 managerial or executive in nature depends in large part on whether the Petitioner established that he would have sufficient subordinate staff to supervise and perform the day-to-day company activities he is claimed to manage or direct. As discussed further below, the Petitioner has not shown its ability to relieve the Beneficiary from significant involvement in the operational tasks required to operate its business.

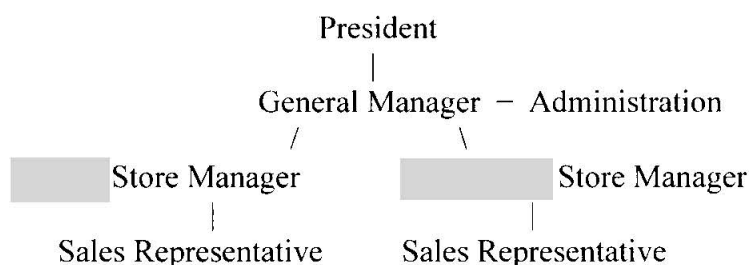
The fact that the Beneficiary will manage or direct a business as its senior employee does not necessarily establish eligibility for classification as a multinational manager or executive. By statute, eligibility for this classification requires that the duties of a position be “primarily” executive in nature. Section 101(A)(44)(B) of the Act. Even though the Beneficiary may exercise discretion over the Petitioner’s operations and possess authority with respect to discretionary decision-making, the position description alone is insufficient to establish his employment will be in a managerial or executive capacity.

B. Staffing and Organizational Structure

The Director determined that the Petitioner did not demonstrate that it had sufficient staffing to relieve the Beneficiary from involvement in the day-to-day operations of the business.

The Petitioner stated on the Form I-140 that it had eight employees when the petition was filed in February 2010, but later explained that it actually had seven employees.¹ The Petitioner did not submit an organizational chart at the time of filing but has now provided a chart reflecting its 2010 staffing in response to our RFE.

The chart shows the following structure:



The Petitioner states that the general manager: supervised the day-to-day operations of the company; implemented operational policies and procedures; established procedures and supervised administrative operations for both stores; oversaw contractual negotiations with manufacturers; assisted the Beneficiary with setting policies and objectives; and supervised subordinate employees. The administrative manager or “administration” employee was responsible for: preparing operational reports and schedules; planning and coordinating administrative procedures and systems; monitoring office supply inventory; maintaining databases; monitoring costs and expenses; and assessing staff performance.

With respect to the store employees, the Petitioner states that the sales representatives are responsible for day-to-day sales while the store managers established retail store policies, goals and objectives, performed personnel functions, planned and directed sales promotions, maintained inventory and store conditions, and dealt with all issues arising from staff or customers.

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. 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.”² Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other

¹ The Petitioner’s state tax filings show that the company employed eight workers in January 2010.

² 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.”

employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act.

In response to our RFE, the Petitioner stated “[i]n February of 2010, the Beneficiary was the only professional employee at [the Petitioner]” and therefore does not claim that the Beneficiary qualifies as a personnel manager based on his supervision of professional personnel.

The Petitioner’s organizational chart depicts a multi-tier structure, with three levels of supervision above the part-time sales representatives. However, in order to establish that the Beneficiary supervises subordinate managers or professionals, the Petitioner’s evidence must substantiate that the duties of the Beneficiary and his subordinates correspond to their placement in the organization’s structural hierarchy. Managerial job titles assigned to subordinates are not probative and will not establish that the organization was sufficiently complex to support an executive or managerial position.

The Petitioner indicates that its [redacted] store was open from 9:30 a.m. to 6:00 p.m. daily and its [redacted] store was open from 9:30 a.m. to 6:00 p.m. daily. Based on their wages in the first quarter of 2010, the [redacted] store manager and sales representative worked no more than 28 to 30 hours per week, even assuming that both employees were paid minimum wage. Other employees earned wages commensurate with full-time employment, with the exception of the [redacted] store’s sales representative who earned only \$512 in the first quarter of 2010.

The position description for the general manager substantially overlaps with the Beneficiary’s own description and the Petitioner did not explain why it needed two senior employees to perform nearly identical duties. In addition, the Petitioner has claimed that a total of four of its seven employees have responsibility for developing and implementing company policies and procedures, while two part-time staff were responsible for actually providing the sales and services of a company whose stores are open for business for 136.5 hours per week. Based on the totality of the evidence submitted regarding the company’s structure, it is more likely than not that the store managers were actually responsible for selling the Petitioner’s products, as the company did not have sufficient sales staff to perform this essential operational duty. In fact, the [redacted] store, with a sales employee who worked extremely limited hours, could not have reasonably remained open for 77 hours per week without additional assistance from either the general manager or the Beneficiary.

Therefore, the evidence does not support a conclusion that the Beneficiary’s subordinates are supervisors, managers, or professionals. Instead, the Beneficiary’s subordinates more likely than not perform the actual routine, operational tasks of the company. The Petitioner has not provided evidence of an organizational structure sufficient to support the Beneficiary in an executive position or established that he would act primarily as a personnel manager.

Section 101(a)(44)(C) of the Act requires that USCIS must take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. 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).

Here, the Petitioner submitted job descriptions for the Beneficiary and for the claimed subordinate managers employees that are incongruous with the nature and size of the organization, as it has not shown that it had sufficient lower-level staff in place to actually provide the company's products and services. The lack of lower-level staff casts doubt on the accuracy and completeness of the job descriptions provided for the Beneficiary and his direct subordinate.

For the reasons discussed above, the Petitioner has not established that the Beneficiary would be sufficiently relieved from involvement in the day-to-day operations of the company, despite his senior position in the company hierarchy. Accordingly, the Petitioner has not met its burden to show that his duties would be primarily managerial or executive in nature as of the date of filing.

III. CONCLUSION

The appeal must be dismissed as the Petitioner has not demonstrated that it would employ the Beneficiary in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of G&DW-, Inc.*, ID# 584261 (AAO Jan. 24, 2018)