



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

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

MATTER OF E-E- INC

DATE: JULY 9, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a gas station/convenience store operator, seeks to permanently employ the Beneficiary as its president and chief executive officer under the first preference immigrant classification for multinational executives or managers. 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 record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

On appeal, the Petitioner asserts that the Director did not sufficiently explain the grounds for denial.

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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner has consistently referred to the Beneficiary's position as executive. Therefore, we restrict our analysis to whether the Petitioner will employ the Beneficiary in an executive capacity.

"Executive capacity" means 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.

Based on the statutory definitions of managerial and executive capacity, the Petitioner must first show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must 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.

When examining the claimed executive capacity of a given beneficiary, we will look to the petitioner's description of the job duties. The petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *See* 8 C.F.R. § 204.5(j)(5). Beyond the required description of the job duties, we examine 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, we will discuss evidence regarding the Beneficiary's job duties along with evidence of the nature of the Petitioner's business and its staffing levels.

A. Duties

In a statement submitted with the petition, the Petitioner outlined its growth plans and the strategies it intended to pursue in order to realize those plans. But the Petitioner must meet the applicable eligibility requirements at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). When it filed the petition in October 2013, the Petitioner operated one store in [REDACTED] Older evidence referred to a second location in [REDACTED] owned by [REDACTED] but the Petitioner no longer managed that store at the time of filing. Therefore, we will only consider evidence relating to the store in [REDACTED] that the Petitioner operated at the time of filing.

The Petitioner listed the Beneficiary's duties, paraphrased below:

- Major decision making relating to financing, marketing, personnel, and advertising;
- Approve renovations, remodeling, and repairs;
- Educate staff on promotions and policies;
- Develop expansion plan;
- Hiring, firing, and performance reviews;
- Report to the parent corporation in India;
- Liaise with landlord;
- Negotiate and sign contracts;
- Oversee administration relating to purchase and sale contracts and accounting and management controls; and
- Establish human resources policies and procedures and administer employee benefit programs.

The Petitioner stated that, on a near-daily basis, the Beneficiary “[r]eports to the parent corporation in India.” In the same letter, however, the Petitioner stated that the business in India is a sole proprietorship. Financial documents in the record identified the Beneficiary as the proprietor, and the Beneficiary personally purchased the shop where the foreign business operates. By definition, a sole proprietorship is not a corporation; it has no legal existence separate from its proprietor. The Petitioner did not submit documentary evidence of the foreign employer's incorporation. Therefore, it is not clear to whom the Beneficiary would be reporting. Also, there is no operational connection between the Petitioner (which operates convenience stores) and the foreign business in India (which manufactures cloth). Therefore, any time that the Beneficiary spends running the foreign business cannot constitute executive functions for the petitioning U.S. employer.¹

The Director determined that the Beneficiary performs a number of non-qualifying tasks, and that the Petitioner had not provided enough details about the Beneficiary's duties to show that he works in a primarily executive capacity. On appeal, the Petitioner states “the decision did not really address why the specific real world job duties . . . did not qualify.” The Petitioner maintains that the Beneficiary's duties are consistent with the statutory definition of an executive capacity. The most appropriate and expedient remedy is to discuss the Beneficiary's duties in more detail here.

The Petitioner asserts that, “in the reply to the request for evidence, the [Petitioner] tried to detail each duty the beneficiary [performed].” That reply, however, simply repeated the same job description submitted initially, with no further expansion or clarification.

¹ Another issue arises if the Beneficiary ceases to run the foreign business. The Petitioner has not explained what arrangements are in place for the foreign business to remain in operation in the permanent absence of its sole proprietor. If the foreign employer were to cease doing business, then the Petitioner would no longer be part of a qualifying multinational organization, which is a fundamental requirement of the immigrant classification that the Petitioner seeks for the Beneficiary in this proceeding.

Although the Beneficiary may have discretionary authority over the company, the level of his authority does not establish that the Beneficiary works in a *primarily* executive capacity. The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as a multinational executive within the meaning of section 101(a)(44)(B) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive nature. *Id.* While the Beneficiary may exercise discretion over the Petitioner’s day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily executive in nature.

The Petitioner initially broke down the Beneficiary’s work schedule as follows:

Description of duties	% Time spent
1) Time spent on Management Decisions	25%
2) Time for Organizational Development	10%
3) Supervising day to day operations	25%
4) Financial Representations	15%
5) Representing the company	15%
6) Business Negotiations	10%

The record does not provide enough information about the Beneficiary’s day-to-day activities to support the above figures. For example, the Petitioner claimed that the Beneficiary spends 10% of his time, roughly four hours per week, on “Organizational Development.” The Petitioner did not define this term, but it appears to correlate to the Petitioner’s plans to expand the company. But the record does not show that expansion planning has occupied a significant fraction of the Beneficiary’s time. The Petitioner apparently ran two convenience stores at the time of filing in October 2013, and the only documented activity that might resemble expansion occurred three and a half years later, when the Beneficiary purchased ██████████ in April 2017. (This purchase took place two months after the Director issued the request for evidence, and cannot establish eligibility at the time of filing as required by 8 C.F.R. § 103.2(b)(1).) The record contains no further information about ██████████. We note that the ██████████ Ownership Transfer Agreement identifies the purchaser not as the Petitioner, but the Beneficiary personally. In the absence of evidence showing that the Petitioner absorbed ██████████, the purchase appears to show that the Beneficiary now divides his time between two separate U.S. businesses.

The Petitioner claimed that the Beneficiary spent a quarter of his time, perhaps 10 hours per week, on “Business Negotiations” and “Representing the Company.” The record does not describe or document examples of these negotiations, so we cannot tell whether the time estimate is accurate or realistic. Likewise, the Petitioner does not define “Financial Representations.” The Petitioner asserts that an outside accountant handles the company’s financial matters, and the Petitioner does not explain what sort of “Financial Representations” would require about six hours of the Beneficiary’s time during an average week. The Petitioner asserted that the Beneficiary “deals

directly with [P]etitioner's bankers regarding obtaining loans and lines of credit," but the Petitioner has not shown that this activity places significant demands on the Beneficiary's time.

The Petitioner asserted that the Beneficiary spends 25% of his time on "Management Decisions," but does not define the term. These decisions presumably do not involve finances, negotiations, or supervising operations, because each of these matters occupies a separate segment of the percentage breakdown.

We agree with the Director's finding that the Petitioner did not provide enough details about the Beneficiary's duties. In addition, as we will discuss below, the Petitioner has not shown that its staffing is sufficient to relieve the Beneficiary from performing non-qualifying tasks.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

We also consider the proposed position in light of the nature of the petitioner's business, its organizational structure, and the availability of staff to carry out the petitioner's daily operational tasks. 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. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On the petition form, the Petitioner indicated that it had six employees. The Petitioner stated that the Beneficiary oversees the following workers:

- General Manager
- Manager (Purchasing Manager)
- Assistant Manager
- Two Cashier/Clerks
- Accountant

The Petitioner stated that the accountant was "outsourced" and the managers were "hired through [redacted] while the cashier/clerks are "[d]irect hires on [the Petitioner's] payroll." The Petitioner did not document these claimed arrangements. The record does not contain enough evidence to establish the relationship between the Petitioner and [redacted]

Tax records show that the Petitioner had four employees in 2013, of whom only the Beneficiary received a full-time salary. Each of the other three employees earned between \$2700 and \$7540 for the year. The Petitioner identified two of these employees as cashier/clerks. The Petitioner did not

provide a job title for the remaining employee, who is also the Beneficiary's spouse. (The Petitioner appears to have hired the Beneficiary's spouse late in 2013, after preparing and filing the petition.)

In the denial notice, the Director found that the record did not support the Petitioner's claim to have six employees at the time of filing. The Director also determined that the Petitioner had not documented its claimed use of contractors in 2013.

On appeal, the Petitioner asserts: "the [B]eneficiary is able to direct the management of the organization through line managers who have lower-level employees reporting to them (albeit part-time and contract employees)." The Petitioner does not address the crucial issue of corroboration. The Petitioner identified three subordinates with managerial titles, but their names are absent from the submitted tax records for 2013. On two occasions – the request for evidence and the denial notice – the Director raised this issue, but on appeal, the Petitioner offers no explanation, and no evidence that the company employed "line managers" as claimed.

The Petitioner notes that an executive may permissibly rely on outside contractors rather than employees. This statement is correct, but the Petitioner must still show who is performing the daily operational work of the company. The Petitioner claimed to employ a general manager, manager, and assistant manager, but the submitted documentation from 2013 did not confirm their employment. In the request for evidence, the Director noted that the Petitioner had only documented part-time salaries paid to the cashier/clerks. The Petitioner's response did not address this deficiency. If these claimed managers were contractors, then there should still be evidence of their engagement, such as tax records and contracts explaining the services to be rendered and the terms of compensation.

We acknowledge the Petitioner's assertion that its managers were "hired through [REDACTED] [REDACTED]" but the Petitioner submitted no documentation from [REDACTED] to confirm this arrangement or specify its terms. A vague and uncorroborated reference to a third party or contractor is not sufficient to meet the Petitioner's burden of proof.

The Petitioner has not established that its convenience stores had sufficient staff available at the time of filing to relieve the Beneficiary from performing non-executive tasks such as running the cash register, ordering supplies, stocking shelves, and cleaning the stores.

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary will be employed in an executive capacity in the United States.

III. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a primarily executive capacity in the United States.

Matter of E-E- Inc

ORDER: The appeal is dismissed.

Cite as *Matter of E-E- Inc*, ID# 1351354 (AAO July 9, 2018)