



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF F-D-

DATE: MAY 31, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a logistics and international trade company, seeks to permanently employ the Beneficiary as its general manager 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 Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it will employ the Beneficiary in a managerial or capacity, or that the Beneficiary was employed abroad in a managerial or executive capacity prior to his entry to the United States to work for the Petitioner as a nonimmigrant.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary was employed abroad, and will be employed in the United States, in an executive capacity.

Upon *de novo* review, we will withdraw the Director's decision with respect to the Beneficiary's employment abroad.¹ 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.

¹ Upon review of the totality of the evidence, including the Beneficiary's duties, the foreign entity's documented staffing levels and organizational structure, and new evidence submitted on appeal, we find that the Petitioner established by a preponderance of the evidence that the Beneficiary was employed abroad in a managerial capacity.

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 sole to be addressed is whether the Petitioner established that it will employ the Beneficiary in an executive capacity in the United States. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

“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, 8 U.S.C. § 1101(a)(44)(B).

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, we review the totality of the evidence when examining a beneficiary’s claimed 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 Petitioner’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 definition of 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 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 attributed to [REDACTED], vice general manager, the Petitioner provided a two-page job description for the Beneficiary, which is summarized below:

- 15% Preside over meetings of directors and managers
- 15% Establish the company's mission, policies, procedures, and set goals
- 20% In charge of company's overall operations with discretionary decision-making
- 5% Determine the internal organizational mechanism to effectively maximize profit and reduce operations costs
- 15% Create systems and procedures to improve services to customers and establish good relationships with leaders in the industry
- 10% Supervise and motivate department heads, including hiring, promoting, and discharging employees
- 20% Review financial statements, sales and activity reports, and other data to measure productivity and goals achievement in order to maximize cost reduction and implement program improvement

The Petitioner also provided a "glance of [the Beneficiary's] daily activities," by describing his typical day. The Petitioner stated that he: holds daily meetings with department managers and reviews their reports; oversees the performance of each department and analyzes the company's "overall operations"; reviews business documents and attends meetings; supervises company finances and provides "strategic leadership regarding potential acquisition, mergers, investments"; and is in daily contact with the CEO of the Petitioner's parent company.

In a request for evidence (RFE), the Director advised the Petitioner that the job duties and "daily activities" were described in general and ambiguous terms, and were therefore insufficient to establish that the Beneficiary would perform primarily executive duties. The Director requested a letter from the Petitioner with a more detailed description of the specific daily tasks the Beneficiary would perform. In response to the RFE, the Petitioner submitted a new letter, also attributed to [REDACTED] which was identical in content to the letter submitted in support of the petition and therefore non-responsive to the Director's request for a more detailed description of the Beneficiary's duties.

We agree with the Director's determination that the job description provided at the time of filing, and again in response to the RFE, was insufficient to establish what the Beneficiary would be doing on a day-to-day basis. The Petitioner described the Beneficiary's position in overly broad and repetitive terms. For example, the Petitioner indicated that the Beneficiary would hold meetings with department heads, oversee and evaluate the department heads, oversee the operation of each department, supervise and motivate the department heads, and confer with the department heads, but listed each of these as separate job duties. As a result, the description conveyed the Beneficiary's senior role in the company, but did not provide adequate insight into the nature of his specific daily tasks or the amount of time he actually spends on any clearly defined duty.

² The Petitioner's payroll records show that [REDACTED] left the company in October 2016. The Petitioner responded to the RFE in October 2017.

The initial job description also included duties that, without more detail, suggested the Beneficiary's involvement in non-executive functions. For example, the Petitioner indicated that the Beneficiary is expected to write daily reports to the parent company, attend client meetings, resolve conflicts with customers, oversee the work flow in the warehouse, resolve package processing problems, increase the speed of package processing, develop "beneficial relationships," and supervise finances. Based on the limited information provided, we cannot determine that these duties could be classified as executive in nature or the actual amount of time the Beneficiary would spend on these tasks.

On appeal, the Petitioner submits a third letter attributed to [REDACTED]. Again, since the supporting evidence indicates that this individual had left the company more than a year prior to the date on the letter, it is unclear who actually prepared this statement on the Petitioner's behalf and its probative value is limited. This version of the Beneficiary's job description lists the following duties:

- Convene meetings with department heads and discuss with them on budgets, operation cost, logistics, personnel, sales and marketing, quality control and distribution issues. (10%)
- Based on current economic and marketing conditions, establish strategies and effective marketing solutions to improve the company's profit margins and market share. (5%)
- Establish the company's mission, policies, procedures and set goals to optimize business opportunities and growth. (10%)
- Execute the strategic plans and exercises discretionary decisions on business strategies and overall direction of the company. (10%)
- Oversee and evaluate the performance of Vice General Manager, Marketing Department, Administrative Department, and Warehouse Department. (10%)
- Give direction and leadership toward the organization's achievement in mission, strategy and objectives. (5%)
- Receive general supervision from the Board of Directors and establish the U.S. company's management policies and planning processes for expansion into new markets. (10%)
- Exercise discretion over the day-to-day operations of the company. (10%)
- Supervise and motivate department heads to execute and accomplish assigned tasks. (5%)
- Recruit, terminate, evaluate and promote staff based on their job performance, qualifications, contributions and evaluations made by department heads. (5%)
- Confer with department heads on a month-to-month basis to establish new monthly goals, analyze past performance and effective solutions to performance. (5%)
- Analyze and approve department heads' recommendations to maximize efficiency and output for confirmation of feasibility of operational plans (10%)
- Based on operational plans and projected future growth and business goals, evaluate requests made by department heads to determine whether new systems need to be implemented. (5%)

This description is no more detailed than the one provided previously and does not overcome the Director's reasons for denial. The record does not contain examples of policies or procedures the Beneficiary has established, strategic plans he expects to execute, systems he will implement, or departmental reports he reviews to make executive decisions. Rather, the Petitioner has simply reworded some parts of the description and removed tasks that appear to fall outside of the definition of "executive capacity." However, 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. The actual duties themselves will reveal the true nature of the employment. *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). Here, the Petitioner has not provided the necessary detail or an adequate explanation of the Beneficiary's activities in the course of his daily routine.

The fact that the Beneficiary will direct a business as its senior employee does not necessarily establish eligibility for classification as a multinational executive. By statute, eligibility for this classification requires that the duties of a position be "primarily" executive in nature. Section 101(A)(44) 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 an executive capacity.

Whether the broad duties attributed to the Beneficiary qualify as 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 oversee 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.

B. Staffing and Organizational Structure

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 Petitioner states that it is engaged in logistics and international trade from its headquarters located in California and claimed to have 10 employees at the time of filing. The Petitioner also mentioned at the time of filing that it has an additional location in [REDACTED] Oregon. The Petitioner provided a warehouse and office lease for its California location, and a retail store lease for its Oregon location. The Petitioner explained that it provides logistics solutions for international e-commerce, by allowing foreign customers to purchase items on-line and have them delivered to the Petitioner's U.S. warehouse for packaging and shipment overseas.³

³ A "Company Flow Chart" submitted with the petition indicates that customers also order items for the Petitioner to directly purchase for them in the United States. In the "Tenant Business Information" section of its latest lease agreement, the Petitioner indicated that it sources 50% of its products in California from [REDACTED] etc."

The Petitioner's organizational chart shows that the Beneficiary supervises a vice general manager, who, in turn, supervises a marketing department manager, administrative department manager, warehouse manager, and a contracted accounting firm. The lower level employees on the chart include a sales representative in the marketing department, an administrative assistant in the administrative department, and three workers in the warehouse department (two packaging workers and one processing worker). Finally, the Petitioner stated that it has a vacancy for a logistic analyst position in its warehouse department. The Petitioner's payroll records show that the company actually had nine employees at the time of filing in April 2016, as the individual identified as the "processing worker" did not receive any wages after February 2016.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they 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 he "directs" the enterprise as the owner or sole managerial employee.

Here, although the Petitioner's chart shows two tiers of managers under the Beneficiary, the Petitioner has not shown that the he would be primarily directing the management of the company or that the company had sufficient staff to relieve him from involvement in its day-to-day operations.

We note that both the warehouse manager and sales representative identified on the organizational chart are residents of Oregon,⁴ where it appears the Petitioner operates or was operating a retail shoe and clothing store. The Petitioner did not directly acknowledge this retail operation beyond submitting the store lease. Further, the job descriptions provided for the warehouse manager and the sales representative suggest that they work in the California-based headquarters and not in a retail environment, and therefore appear to be inaccurate. The Petitioner must resolve this ambiguity 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).

Therefore, it is unclear who is actually managing the Petitioner's California warehouse or performing the sales functions attributed to the sales representative. In addition, the Petitioner has not shown that the Oregon-based sales representative actually reports to the marketing manager or that the marketing manager is performing managerial or supervisory duties. Rather, it appears that the marketing manager was the only employee available to assist with customers in the Petitioner's California-based international logistics business.

⁴ This determination is based on the addresses provided on the employees' IRS Forms W-2, Wage and Tax Statement, for 2016. The retail lease agreement indicates that the claimed warehouse manager is the "Branch Administrator" for the Oregon store location.

We take into account the reasonable needs of the organization and acknowledge that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity. See section 101(a)(44)(C) of the Act. However, it is appropriate 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).

At the time of filing, only seven workers, including the Beneficiary, were working at the Petitioner's headquarters, and the Petitioner has not shown how two administrative employees, a "vice general manager," a marketing manager, and two packaging employees were able to relieve the Beneficiary from significant involvement in the non-executive, day-to-day duties required to provide the company's products and services. The Petitioner reasonably requires staff to supervise its warehouse operations, sell its services, deal with customer service issues, handle logistics activities associated with shipment and customs, process orders for shipment, and purchase products for its customers, as outlined in the "company flow chart" mentioned above. The Petitioner has not shown that the staff in place at the time of filing performed any of these necessary functions and therefore has not met its burden to show how it would relieve the Beneficiary from spending a large amount of his time on non-executive duties.

In addition, 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). Here, although the Petitioner showed that it employed nine of the ten employees on the organizational chart at the time of filing in April 2016, six of those nine employees left the company between May and October 2016. Only the Beneficiary and the two administrative employees remained with the company at the end of 2016. The Petitioner hired additional staff later in 2016 and in 2017, but it did not submit an updated organizational chart to show which employees were replaced while the petition was pending. Even if the Petitioner had established eligibility at the time of filing, additional evidence would be needed to establish that the petition was approvable at the time of adjudication in 2017.

On appeal, the Petitioner submits copies of performance appraisals completed by the Beneficiary in July 2016.⁵ The Beneficiary's overall authority over the company and discretion to select, hire, appraise, and supervise employees is noted, but, for the reasons discussed, the Petitioner has not established how he would spend his time primarily on the broad policies and goals of the business, rather than participating in its day-to-day operations. The evidence does not support the Petitioner's claim that he would perform primarily executive duties under the extended petition.

⁵ The Petitioner also submits an exhibit it refers to as "*Administrative Appeals Office's Brief on Argument against any Hybrid Form of 'Executive-Managerial Capacity' for L-1A & E13 Visas.*" The referenced document is an *amicus* brief submitted to this office by a third party in 2015. The Petitioner did not explain its significance in this matter. We note that the Petitioner did not make a "hybrid" executive-managerial capacity claim with respect to the Beneficiary's U.S. employment capacity. Our analysis of the evidence reflects the Petitioner's consistent claim that the Beneficiary was and would be employed in an executive capacity.

Matter of F-D-

III. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of F-D-*, ID# 1318807 (AAO May 31, 2018)