



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

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

MATTER OF T-J-US CO.

DATE: OCT. 1, 2018

APPEAL OF NEBRASKA 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/manager 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 Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it will employ the Beneficiary in the United States in a managerial or executive capacity; and (2) 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 regarding the Beneficiary’s employment abroad, asserts that the Director placed undue emphasis on the size of the U.S. company, and contends that the Beneficiary was employed abroad, and would be employed in the United States, in an executive capacity.

Upon *de novo* review, we will withdraw the Director’s finding that the Petitioner did not establish that the Beneficiary was employed abroad in an executive capacity.¹ However as the Petitioner did 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 The Director’s determination was based on a finding that the Beneficiary’s foreign job description lacked detail. On appeal, the Petitioner has further explained the Beneficiary’s job duties abroad and provided additional evidence that he supervised a staff of more than 35 employees as the foreign entity’s managing director, including subordinate department managers who oversaw the company’s day-to-day operations. Accordingly, the Petitioner has now established by a preponderance of the evidence that he was employed abroad in an executive 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 issue we will address is whether the Petitioner established that it will employ the Beneficiary in an executive capacity in the United States. On appeal, the Petitioner claims that the Beneficiary's position is in an executive capacity, and does not assert that he will be employed in a managerial 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 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

At the time of filing, the Petitioner provided a very broad overview of the Beneficiary's responsibilities, noting that he would divide his time between board meetings, business planning, networking, business projections, staff training, finance, reporting to the parent company, visiting customers and vendors, approving sales projects, and internal meetings.

In a request for evidence (RFE), the Director advised the Petitioner that the description was lacking specificity regarding the Beneficiary's actual day-to-day duties and the amount of time he would spend on each duty. In response to the RFE, the Petitioner submitted the following overview of the Beneficiary's responsibilities, accompanied by a six-page breakdown of duties:

- 1) Communication with mother company – 10%
 - [Parent company] board meeting

- [Petitioner] board meeting
 - Business report meeting
 - Daily report
- 2) Business Planning - 35%
 - New products finding and research
 - New business mode projecting
 - New sales project approval
 - New market locating
 - 3) Internal Meeting - 25%
 - Weekly meeting (every Tuesday morning)
 - Quarter meeting (first working day of each quarter)
 - Annual meeting (first working day after new year)
 - 4) Customer Relations – 10%
 - Teleconference with customers
 - Customers visiting
 - Marketing events
 - 5) Supplier Relations – 10%
 - Teleconference with supplier
 - Suppliers visiting
 - Attend supplier event
 - 6) Social Activities – 10%
 - Attend government event
 - Attend association event
 - Plan and perform [REDACTED] event

The accompanying lengthier description of the Beneficiary’s position included a combination of high-level duties, non-executive operational tasks, and duties that were not consistent with the Petitioner’s claims regarding its staffing. Because the Petitioner did not assign percentage figures to the more detailed description, we cannot determine the amount of time the Beneficiary would allocate to executive duties.

For example, the Petitioner stated that the Beneficiary’s business planning duties, requiring a total of 35% of his time, include studying the market, speaking with customers to determine their needs, analyzing customer inquiries, making weekly product demand lists, and conducting internet searches to determine what types of turbocharger products and parts are in high demand. In addition, the Petitioner states that the Beneficiary will attend trade shows and conduct customer research to identify new markets for the products. The Petitioner has not established that these customer and market research duties are executive in nature, or indicated how much time the Beneficiary would spend on them.

The Petitioner’s description of the Beneficiary’s “internal meetings” responsibility contains references to weekly meetings with the “purchase department” and the “market inspector,” neither of which appears in the company’s organizational charts. In addition, the Petitioner indicates that these meetings include a daily 30 minute meeting, one annual meeting, one quarterly meeting, and one

weekly meeting. Based on this information, it is unclear how these meetings account for 25% of the Beneficiary's time.

The Petitioner has also not shown that the Beneficiary's responsibilities for visiting and teleconferencing with customers and suppliers and attending industry events, which require an additional 30% of his time, would require him to perform primarily executive tasks. The Petitioner did not describe the nature and purpose of these interactions and activities in sufficient detail to establish that they are higher-level tasks, rather than operational tasks necessary to sourcing, marketing, and selling the company's products.

Therefore, the job description provided in response to the RFE, while lengthy, was still insufficient to establish the nature of many of the Beneficiary's day-to-day tasks as it included both qualifying and non-qualifying duties. We are unable to determine whether the claimed executive duties constitute the Beneficiary's primary duties, or whether the Beneficiary would spend a significant portion of his time performing non-qualifying operational duties. The Petitioner's description of the Beneficiary's job duties does not establish what proportion of the duties will be executive in nature, and what proportion will be non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

On appeal, the Petitioner maintains that the Beneficiary frequently travels on business, spends time outside the United States, and is "too busy being an executive to handle the day to day business of [the Petitioner]." 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 direct. As discussed further below, the Petitioner's descriptions of the scope of its business and its staffing needs are unclear and do not support its claim that it requires him to perform primarily executive duties.

The fact that the Beneficiary will direct a business as its senior employee and shareholder 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)(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 that his employment will be in an executive capacity.

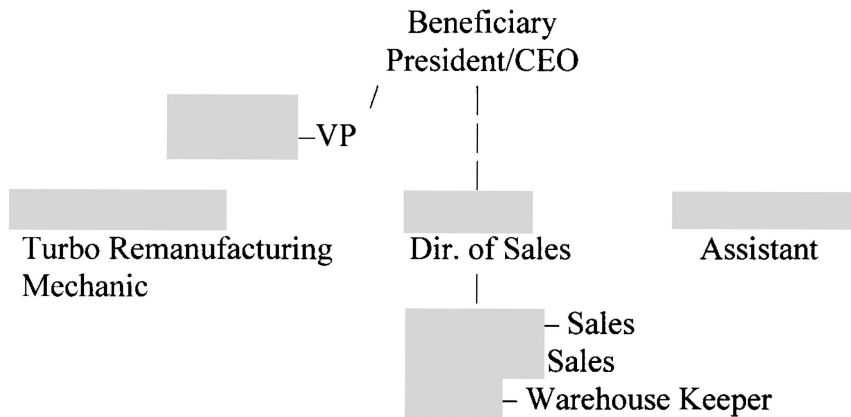
B. Staffing and Organizational Structure

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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.

In the denial decision, the Director focused on the Petitioner's staffing levels and questioned whether it had sufficient staff to allow the Beneficiary to spend his time primarily on executive duties. On

appeal, the Petitioner maintains that it has sufficient staff to perform all of the company's non-executive tasks; however, the record does not contain a consistent description of the scope of the company's activities or the duties performed by its employees beginning with the date of filing in September 2016. 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 Petitioner stated on the Form I-140 that it had eight employees, and provided the following organizational chart² dated "2016":



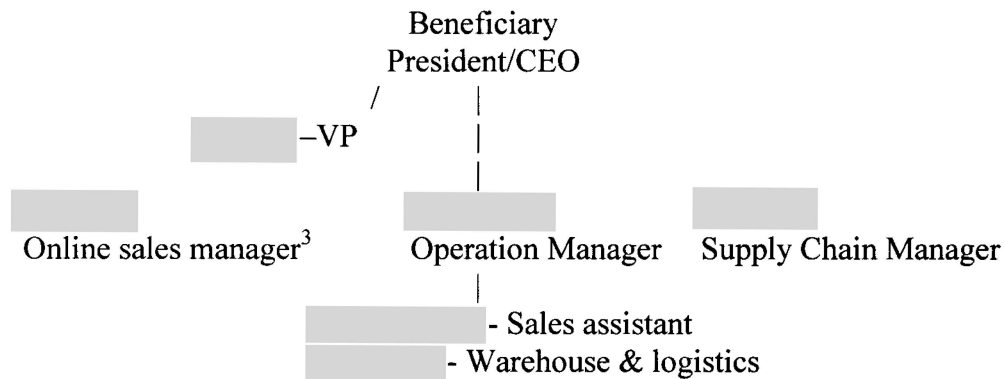
A different chart showed that the Petitioner was operating two business divisions – auto parts (including turbochargers and brake pads) and plastic furniture. The Petitioner identified three locations – a main office and warehouse in California, a turbocharger remanufacture workshop in and an office and warehouse in California. A third chart describing the Petitioner's sales channels indicated that it offered online retail sales through its own websites as well as through eBay and Amazon stores. The sales channel chart also indicated that the Petitioner had "offline retail" through "retail stores" located in and. Finally, the chart depicted a "wholesales team."

The Petitioner also submitted "2015 Business Highlights" indicating that its revenues were derived from sales of turbochargers, turbocharger repair services, the plastic furniture business, and a turbocharger "tech consulting and service division."

Later, in response to the Director's RFE, the Petitioner provided a copy of its state quarterly wage report for the third quarter of 2016, which corroborated the employment of seven of the eight workers on the organizational chart, but did not include the individual identified as "director of sales." However, it does show that the Petitioner had eight employees at the time of filing; the eighth employee was identified as a "warehouse and logistics" employee.

² A second version of this chart submitted at the time of filing identified as one of the Beneficiary's direct reports and specified that was engaged in "automobile sales," while was responsible for "furniture sales."

In addition, the RFE response submitted in December 2017 included an updated organizational chart and the Petitioner's most recent quarterly wage report. The updated chart illustrated the company's structure as follows:



While the updated chart identified a total of seven employees, the Petitioner's quarterly wage report for the third quarter of 2017 indicated only five employees, and did not include the individuals identified as the supply chain manager or sales assistant.

With respect to its business activities, the Petitioner provided a new lease for a larger office and warehouse space, signed in 2017. It made no mention of the retail sales or furniture sales noted at the time of filing, and did not claim to have multiple locations at the time of the RFE response. A newly submitted company brochure listed the brands and types of turbocharger products the Petitioner sells, and indicated that its "turbocharger services" include full rebuild, troubleshooting, parts cleaning, assembly upgrades, and remanufacturing of various parts.

In the denial decision, the Director emphasized that the Petitioner's staffing had been reduced to five employees by the time it responded to the RFE, and noted that some of the employees were not working full-time. The Director therefore found that the Petitioner did not establish that it had sufficient staff to allow the Beneficiary to spend his time primarily on executive duties.

On appeal, the Petitioner maintains that it has seven employees, but does not provide additional evidence showing wages paid to the supply chain manager or sales assistant. The Petitioner briefly states each claimed employee's primary responsibility and asserts that it has established that the Beneficiary is not the one who handles, sales, purchasing, communications with customers or suppliers, or shipment of products. The Petitioner states that its operations include wholesale of turbochargers to eight U.S. distributors, and direct sales to customers via telephone sales, on its two company websites, and online sales through eBay and Amazon stores.

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

³ In an accompanying document titled "Company Duties and Descriptions," the Petitioner identified [redacted] position as "sales representative."

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 they "direct" the enterprise as the owner or sole managerial employee.

The record remains unclear as to the scope of the business at the time of filing and thereafter, and does not contain consistent descriptions of the functions and activities performed by the Beneficiary's subordinate staff. At the time of filing the Petitioner claimed to be offering turbocharger remanufacture services, retail and online sales for two product lines, wholesales, and consulting and technical services with a staff of eight employees and three company locations. The duty descriptions for the employees reflected their involvement in retail and online sales, warehouse tasks, and remanufacturing activities. Although the Petitioner indicated that the Beneficiary had one managerial subordinate - a director of sales - to oversee the day-to-day management of retail and internet sales and warehouse activities, it did not establish that this position was filled at the time of filing.⁴ Further, the Petitioner stated that the director of sales performed other duties, such as visiting customers, sales forecasting, seeking new customers, retail customer service, warehouse keeping, trade show planning, inventory, preparing shipments, receiving goods, and other operational functions. It is not clear how his claimed duties were distributed among the remaining workers at the time of filing.

Further, despite her job title, the Petitioner did not establish that the vice president was acting or would act as a subordinate manager. Neither organizational chart shows that she had a subordinate staff, and her duties include accounting and finance tasks, rather than managerial duties. Therefore, the Petitioner has not established that there was a tier of management staff to oversee the company's day-to-day operations, or that the staff in place at the time of filing was able to relieve the Beneficiary from involvement in the company's activities across its claimed business lines.

In response to the RFE and on appeal, the Petitioner indicates that its activities are limited to online sales of turbochargers and related parts (through its own online store and through Amazon and eBay), and wholesales through eight distributors. It did not discuss the change in the scope of its business or provide an explanation for its earlier claim that it is providing consulting services, remanufacturing services, retail sales, furniture sales, or that it is operating from three different locations. Further, the company brochure submitted in response to the RFE indicated that the company offers various turbocharger repair and remanufacture services, despite the fact that the Petitioner no longer claims to employ a mechanic to perform these services.

⁴ The Petitioner last paid this individual during the second quarter of 2016 and he appears to have left the company in June of that year, three months before this petition was filed.

In addition, despite the Director's determination that the Petitioner documented its employment of only five workers at the time of the RFE response, the Petitioner has not addressed this finding on appeal by providing additional evidence of its staffing; it simply states that it has seven employees. The Petitioner's unsupported statement regarding its staffing is insufficient to establish the claimed number of employees.

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

In light of the Petitioner's changing descriptions of the nature and scope of the company's operations and the lack of evidence of its staffing levels at the time of the RFE response, we cannot determine that it had a reasonable need for the Beneficiary to perform primarily executive duties at the time of filing and continuing through adjudication. As noted, his job description included several non-executive duties and the Petitioner did not adequately explain how much time he would spend on these tasks, which include market and customer research and interactions with customers and suppliers. Nor has it consistently shown its ability to relieve the Beneficiary from performing these and other non-qualifying duties. Accordingly, the Petitioner has not met its burden to show that his duties would be primarily executive in nature.

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 T-J-US Co.*, ID# 1528708 (AAO Oct. 1, 2018)