



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

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

MATTER OF C-USA LLC

DATE: OCT. 2, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a computer software services business, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) 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 Petitioner did not establish, as required, that: (1) it will employ the Beneficiary in an executive capacity¹; and (2) that it has the ability to pay the Beneficiary's proffered wage.

On appeal, the Petitioner submits additional evidence, contends that the Director improperly disregarded the evidence it submitted, and maintains that it has met all eligibility requirements for the benefit sought. We issued a request for evidence to obtain copies of missing record evidence and have incorporated the Petitioner's response.

Upon *de novo* review, we will withdraw the Director's finding with respect to the Petitioner's ability to pay the Beneficiary's proffered wage.² 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 The Petitioner did not claim that it will employ the Beneficiary in a managerial capacity, so the Director properly limited his review to the Petitioner's claim that the Beneficiary will work in an executive capacity.

² The Director denied the petition because the Petitioner did not submit a tax return, audited financial statement, or annual report showing that it had the ability to pay the Beneficiary's wage. *See* 8 C.F.R. § 204.5(g)(2). On appeal, the Petitioner has submitted a 2016 tax return which, upon review, satisfies this requirement.

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 issue in this matter is whether the Petitioner established that it will employ the Beneficiary 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 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 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.

The Petitioner is self-described as a one-person company focused on “computer software development and services with a particular focus on public educational systems.” At the time of filing, the Petitioner stated that it had entered joint ventures with two other U.S. companies, [REDACTED] and [REDACTED], and described the services provided under each joint venture agreement. In a supporting letter, the

Petitioner indicated that it requires the Beneficiary's services as CEO to "manage services provided to its U.S. client, [REDACTED] and to develop further business in the United States."

The Petitioner also provided an offer of employment letter, addressed to the Beneficiary, which indicates that his responsibilities will include "establishing the company, hiring employees, engaging new business, and establishing company procedures and policies," as well as being responsible for the company's "financial growth and direction."

These brief statements did not meet the Petitioner's burden to clearly describe the duties to be performed by the Beneficiary, and rather seemed to broadly describe responsibilities that could apply to any owner or leader of a relatively new business. Therefore, the Director issued a request for evidence (RFE) asking for additional evidence to establish that the Beneficiary would be employed in an executive capacity.

In response to the RFE, the Petitioner stated that the Beneficiary would be responsible for "overseeing the U.S. entity, including: hiring employees and establishing company policy, setting marketing strategy, and managing and directing" the company's growth. It further stated:

As CEO of the U.S. entity, [the Beneficiary] has the express authority of trust to act on its behalf and he will not submit or report his decisions to any board or higher authority for approval. Similarly, [the Beneficiary] will make executive level decisions for contracting services on behalf of the U.S. entity, hiring key personnel, and will be directing all aspects of the operation of the business.

....

In addition to making business decisions . . . , as CEO [the Beneficiary] will decide which projects the company will pursue, which companies the U.S. entity will develop relationships, and respond to market conditions in deciding when, where and how to provide services in the U.S. market. These decisions range from deciding to provide only consulting expertise on one job, and on another job provide software development, data administration as well as hardware installation services. These decisions require someone with the authority to commit company resources, whether it be capital, materials, labor and consulting services. These decisions affect the direction, viability, and future growth of the company. [The Beneficiary's] job is to make business decisions for the company, and he is responsible for deciding how his decisions, plans and policies will be implemented.

The Petitioner went on to state that the Beneficiary's executive duties will "consist primarily of making business decisions of any consequence to the business," further noting that he will "direct the management of the organization by meeting with subordinates" to ensure that company objectives are being met, establishing and communicating goals and objectives to "company employees and associates," and holding wide latitude in discretionary decision-making.

Later in response to a NOID, former counsel stated:

It appears the Service has not properly considered the work [the Beneficiary] has been performing as CEO of the petitioning company. The beneficiary employee has negotiated joint ventures, contracts, and other business agreements on behalf of the petitioning company without direct supervision or oversight from any person or governing body. It is the clearest evidence [the Beneficiary] functions in an executive capacity. The decisions to joint venture with [REDACTED] and [REDACTED] [REDACTED] are illustrative of the job duties performed by the beneficiary on a day to day basis. The detail and complexity of the [REDACTED] Business Plan previously submitted further demonstrates beneficiary performs work at an executive level rather than providing goods or services. The preponderance of the evidence shows business development decisions at the corporate level is the primary work of the beneficiary, and not work geared toward the provision of goods or services.

On appeal, the Petitioner maintains that the Director overlooked the statement of duties in the RFE response and ultimately based the decision on the summary of duties provided in former counsel's letter and in the offer of employment letter. We agree with the Petitioner's claim that the Director did not consider the description provided in response to the RFE;³ however, we disagree with its statement that "all of the Beneficiary's duties are described in detail" in the RFE response.

The Petitioner has repeatedly referenced the Beneficiary's senior position and his authority to make discretionary decisions and set the company's policies and goals as evidence of his eligibility as a multinational executive. However the duties attributed to him paraphrase the statutory definition of "executive capacity" and provide little meaningful insight into the nature of his day-to-day tasks. Conclusory assertions regarding the Beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *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); *Avyr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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.

While the Petitioner's description of the Beneficiary's duties does not include any clearly non-qualifying tasks, the evidence in the record suggests that his primary role would not be performing executive duties for the petitioning company, but providing services to [REDACTED]. Although the Petitioner describes its relationship with [REDACTED] as a "joint venture," the terms of the submitted agreement do not indicate that the two companies formed a true joint venture whereby they each own and control 50 percent of a third subsidiary entity. See 8 C.F.R. 204.5(j)(2) (defining "subsidiary"). Rather the agreement indicates that [REDACTED] sought to partner with the

³ Upon preliminary review, we determined that the record of proceeding did not include a copy of the Director's RFE or the Petitioner's response. The Petitioner provided copies of these documents in response to a request issued by our office.

Petitioner specifically so that the Beneficiary could serve as [REDACTED] CEO and develop and execute its business plan for the development of a data center in [REDACTED] Georgia, in exchange for compensation. In other words, it is a contractual agreement for the provision of services. While such services may require the Beneficiary to perform executive duties for [REDACTED] we cannot determine what duties he performs for the Petitioner, or what the Petitioner does other than make the Beneficiary's services available to [REDACTED]. For example, the Petitioner notes that the Beneficiary was profiled in a real estate industry magazine as evidence that he is "widely recognized as an executive by his peers in the business world," but the magazine identifies him as [REDACTED] CEO and does not mention the petitioning company.

The Petitioner also submitted invoices that it issued to its other claimed joint venture partner, [REDACTED] between 2014 and 2016. Each invoice lists the Beneficiary's name under the item description "Consulting" and indicates that [REDACTED] paid the Petitioner \$7000 per month in exchange for his services. There is no description of how the Beneficiary divided his time between providing services to [REDACTED] providing services to [REDACTED] and performing duties directly for the Petitioner. The Petitioner did not specifically claim or provide evidence that it has a qualifying relationship with either claimed joint venture partner,⁴ and has not shown that its activities extended beyond providing services, including the Beneficiary's services, to these two companies.

Therefore, based on the evidence submitted, the Beneficiary would be performing the duties necessary for the Petitioner to provide its services to its business partners, rather than spending his time primarily performing executive duties for the petitioning company.

The fact that the Beneficiary is the Petitioner's sole owner and the senior employee does not necessarily establish his eligibility for classification as a multinational executive. Even though the Beneficiary may exercise discretion over the Petitioner's operations and possess authority with respect to discretionary decision-making, the general position descriptions alone are insufficient to establish his proposed employment with the Petitioner will be in an executive capacity.

B. Staffing and Organizational Structure

At the time of filing in September 2016, the Petitioner stated on the Form I-140 that it had one employee. As noted, the Petitioner's offer of employment indicated that the Beneficiary would be responsible for "establishing the company" and "hiring employees." An organizational chart submitted at that time depicted the Beneficiary as the Petitioner's only employee and did not indicate his direct or indirect oversight of any employees, contractors or other staff, either in the U.S. or abroad, where the Petitioner's affiliate operates a similar type of business.

⁴ On appeal, the Petitioner submits a letter from [REDACTED] chairman, [REDACTED] who states that his company "has given [the Petitioner] an ownership position in [REDACTED] but this statement is not corroborated by supporting evidence showing common ownership between the two companies.

The description of job duties included with the Petitioner's RFE response including references to the Beneficiary's subordinates and other employees. However, the Petitioner did not submit evidence identifying the Beneficiary's subordinates. A revised organizational chart appeared to show proposed positions for a business development manager, a sales person, a project manager, and two technology leads. This version of the chart, submitted in November 2016, was accompanied by a "press release" indicating that the Petitioner was attempting to fill five positions by "June 2015." The Petitioner re-submitted the same organizational chart and 2015 press release in response to the NOID. The Petitioner did not provide supporting evidence demonstrating that it had employees at the time of filing or at the time it responded to the RFE and NOID. Therefore, it is unclear to whom the Petitioner was referring when it stated that the Beneficiary was delegating tasks to subordinates and employees.

On appeal, the Petitioner states that, under the terms of its joint venture agreement, [REDACTED] provides and compensates contract employees who work under the Beneficiary's direction in his capacity as the Petitioner's CEO. The Petitioner also provides, for the fourth time, a copy of its joint venture agreement with [REDACTED]. However, the Petitioner states that the signed agreement submitted the first three times was an "earlier, undated version" while the newly submitted version, dated November 18, 2015, is "the controlling agreement between the parties."

This version of the agreement is different in several respects. First, it does not include the provision indicating that the Beneficiary would act as [REDACTED] CEO. Second, it states that the Petitioner will have access to and will be responsible for managing and directing staff and or employees paid for by [REDACTED]. Lastly, it indicates that [REDACTED] would compensate the Petitioner \$7000 per month for the duration of the agreement, rather than \$12,000 as stated in the previously submitted version of the same document.

The Petitioner does not explain why it submitted what it now claims is an invalid version of the agreement on three separate occasions, or why it did not mention the claimed [REDACTED] staff when asked to identify any employees or contractors who would work subordinate to the Beneficiary. Further, although the newly submitted version of the agreement does not mention that the Beneficiary serves as [REDACTED] CEO and president, that role is corroborated in [REDACTED] business plan and in published articles about [REDACTED] and its data center project, among other documents in the record. The Petitioner submits a letter from the chairman of [REDACTED] confirming the terms of the agreement, but does not provide corroborating evidence, such as evidence of [REDACTED] payments to the Petitioner or evidence of [REDACTED] payments to the "contract staff" who are claimed to work exclusively under the Beneficiary's control.

Instead, the Petitioner submits letters from all four claimed contractors, including [REDACTED] (community development manager), [REDACTED] (chief software engineer), as well as an operations manager who states that he joined the Petitioner in October 2016, and an administrative assistant who indicates a March 2017 hire date. Since the petition was filed in September 2016, we would not consider the latter two contractors even if their work for the Petitioner were sufficiently documented. 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).

_____ and _____ are both mentioned in the _____ business plan as key contributors to the _____ data center project. The Petitioner maintains that _____ was employed by the Petitioner's parent company in South Africa at the time of filing and is now employed or contracted by _____. We note that his name was included as a provider of "consulting services" on the Petitioner's invoices to _____ along with the Beneficiary's. We do not doubt either individual's involvement in _____ data center project, but the evidence indicates that these individuals support the Beneficiary in his role as _____ CEO, rather than in his role as the Petitioner's CEO, and the record does not contain evidence revealing the identity of either employee's direct employer. The Petitioner has not shown that _____ was providing it with staff to support the Beneficiary in the petitioning company's other endeavors, or that it even had other endeavors beyond the _____ data center project. In this regard, we note that the Petitioner's relationship with _____ has not been well explained and the record does not include a signed copy of its agreement with that company, although, as noted, the Petitioner has been invoicing _____ for consulting services.

Again, if the Beneficiary's position with the Petitioner requires him to primarily perform consulting services for a different company or companies on a contract basis, then the Petitioner has not established how he can also be performing primarily executive duties on behalf of the petitioning company, which has not established that it has its own employees or contractors or that it performs any activities outside of the two above-mentioned agreements.

Section 101(a)(44)(C) of the Act requires that we 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. Here the Petitioner, based on the nature of its documented activities, has not shown that it has a reasonable need for the Beneficiary to primarily perform executive duties. While the Petitioner emphasizes the Beneficiary's authority to form "joint ventures" the record shows that the terms of the agreements he has negotiated require him to directly provide services to the company's partners in his area of expertise, and that such services would more likely than not require most of his time.

For the reasons discussed, the Petitioner has not established that it will employ the Beneficiary in an executive capacity.

III. CONCLUSION

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

ORDER: The appeal is dismissed.