



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

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

MATTER OF Y-B-P-G- INC.

DATE: SEPT. 24, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, which sells products derived from yew trees and other botanical sources, seeks to permanently employ the Beneficiary as its chief executive officer (CEO), deputy general manager, and treasurer 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 record did not establish, as required, that: (1) the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred by rendering a decision that conflicts with the prior approval of nonimmigrant petitions on the Beneficiary's behalf.

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

At times, the record ambiguously refers to the Beneficiary's positions as "managerial or executive," but on appeal, the Petitioner refers to the Beneficiary as an "experienced executive" and specifies that "the beneficiary's duties would be executive functions." Therefore, we will restrict our analysis to whether the Beneficiary will be, and has been, employed 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, 8 U.S.C. § 1101(a)(44)(B).

Based on the statutory definition of 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 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

The Beneficiary began working for the Petitioner in the United States in 2014, as an L-1A nonimmigrant intracompany transferee. A "[s]ample week schedule" indicated that the Beneficiary performed the following tasks:

Monday: assign tasks for the week and review prior week's performance.

Tuesday: market research, product development.

Wednesday: operational activities, A/R, A/P, etc.

Thursday: operational activities, product development, R&D, inventory, etc.

Friday: review week performance, hold management meeting, set targets, etc.

Asked to provide further details, the Petitioner submitted a translated statement from its foreign subsidiary, indicating that the Beneficiary “was responsible for all [the Petitioner’s] daily business affairs.” Separate, unsigned statements listed her responsibilities as the Petitioner’s CEO, deputy general manager, and treasurer. To a large extent, these statements attested to the degree of the Beneficiary’s authority without providing significant details about her actual duties:

CEO responsibilities

1. Creating, communicating and implementing the company’s vision, mission, and overall direction. Leading the development and implementation of the overall company’s strategy.
2. Leading, guiding, directing, and evaluating the work of the general manager, finance department and marketing department. In the process of leading the departments, [the Beneficiary] makes certain that the strategic direction filters down through the company and is performed well.
3. Soliciting advice and guidance from the board and spread through employees.
4. Overseeing the complete operation of the company in accordance with the direction established in the strategic plans.
5. Develop company culture.
6. Evaluating the success of the company in reaching its goals, make sure each outcome is measurable.
7. Maintaining awareness of both the external and internal competitive landscape, opportunities for expansion, customers, markets, new industry developments and standards.
8. Regularly participate in board meetings, press releases and interviews.

Deputy General Manager of the corporation job description

1. Preside over the daily production, operation and management of the corp and make sure the corporation is operated under safety precautions. Operate the implementation of board resolution[s] and report the implementation issues to board meetings.
2. Organize and implement the annual operation plans and investment plans.
3. Propose the setup, adjustment or cancellation of specific plans of corp management.
4. Draft fundamental management system of the corp.
5. Formulate specific rules and regulations of the corp.
6. Employ or dismiss staffs that are should [*sic*] not be directly employed or dismissed by the board.
7. Design award, promotion, salary and staff appointment system according to relevant regulations and rules.
8. Represent the company and deal with external operational communications.

9. Assist the general manager with other issues authorized by the board and allocate work to relevant departments.

Treasurer responsibilities

1. Budgets
2. Financial statement
3. Tax report
4. Stock management
5. Payments
6. Banking
7. Checks and wires
8. Employees
9. Reimbursements
10. Report to CFO [chief financial officer]

For the CEO and treasurer responsibilities, the descriptions included additional information associated with the listed items. The additions to the CEO responsibilities did little to describe the Beneficiary's activities, but the treasurer responsibilities indicated that the Beneficiary personally prepared budgets, managed bank accounts, and sent wire transfer payments. The Beneficiary's three job titles indicated that she was simultaneously superior and subordinate to the general manager and the CFO. A "daily job breakdown" consisted largely of meetings and monitoring work, progress, and financial issues.

The Director found that the Petitioner did not specify whether it sought to employ the Beneficiary as a manager or executive, and that the job description was too vague to establish either option. The Director also observed that the Petitioner did not provide enough information to show how the Beneficiary would divide her time between the duties of her three distinct positions at the company, which include non-qualifying tasks such as banking functions.

On appeal, the Petitioner submits a two-page job description and a three-page schedule for the Beneficiary, in both Chinese and English. Listed duties include:

- Attend board meetings;
- Make, approve, and oversee the implementation of plans;
- Review and approve the budget, financial documents, and expenditures;
- Hire and fire managers and staff;
- Sign contracts and other legal documents;
- Release information to the public; and
- Have discretion in the event of "company emergencies."

The latest version of the work schedule breaks events down into blocks of time, but still provides insufficient information about the nature of the Beneficiary's duties. The Petitioner also claims that the Beneficiary spends two hours of her six hour (9 am – 3 pm) work day signing "legal documents

and contracts,” but the Petitioner has not established that a company its size produces such a volume of documents that signing them occupies such a significant proportion of the Beneficiary’s working time.

With respect to time spent reviewing reports, the Petitioner submits the annual “Work Summary and Report” for 2014–2016, and the annual “Work Plan” for 2015–2017. Each document is between half a page and two pages in length, a size that includes the full text in both English and Chinese. The 2015 work plan, for instance, is two sentences long, primarily concerned with sales targets. The brevity of these reports does not suggest that the activities described make significant demands on the Beneficiary’s time.

The *level* of the Beneficiary’s authority is not in doubt, but the Petitioner has not established that the Beneficiary *primarily* exercises executive authority.

B. Staffing

If staffing levels are used as a factor in determining whether an individual is acting in an 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.

At the time of filing, the Petitioner claimed four U.S. employees. That number increased in later submissions. The Petitioner stated that it “will be doing research and development,” but claimed no existing staff with that responsibility. Instead, the Petitioner claimed that the Beneficiary’s subordinate staff in the United States consisted of a full-time staff attorney, a general manager, and a marketing team that reported to the general manager. An organizational chart also indicated that the Beneficiary is in charge of foreign subsidiaries and an accounting department with unspecified staff.

The Petitioner submitted job descriptions for some of the subordinate employees. Most of these are for lower-level marketing and sales positions. The positions are described as full-time, but tax documents show that each worker’s 2016 income was less than \$10,500. That same year, the attorney identified as in-house counsel received a combination of salary and contractor payments.

The general manager’s job description appears to derive from a general template. For example, it states that the general manager will “provide educational opportunities,” but the record does not show where these opportunities exist within the minimal U.S. staffing structure (which includes no training or human resources departments). The description further indicates that the general manager will “participat[e] in professional societies,” but does not elaborate, and the record does not show that the general manager belongs to any such societies. It also states that the general manager establishes budgets, a task also listed in the Beneficiary’s own job description.

The Director determined that the tax documents in the record do not support the Petitioner’s claimed organizational structure, and that the Petitioner had not established that all its initially claimed employees were, in fact, on staff at the time of filing. The Director concluded: “It is questionable

whether the petitioner was sufficiently operational as of the date of the petition to support the beneficiary in a qualifying managerial or executive capacity.” The Director also found that, according to the job description, the Beneficiary would perform a number of non-qualifying tasks, rather than delegate them to subordinates.

On appeal, the Petitioner refers to “[f]ocusing on Research, Development and Marketing,” but the Petitioner claims no research and development staff. The Petitioner also acknowledges that it “is not doing production on any of [its] products.” These functions appear to be performed by staff of the Petitioner’s foreign subsidiary, although the Petitioner has provided insufficient information about the organization and personnel of the foreign entity (as we will discuss below).

The Petitioner asserts that its marketing department is staffed with full-time employees, and that its in-house attorney “is currently assisting the beneficiary in making changes to the company’s Employee Handbook.” According to a revised organizational chart submitted on appeal, all the subordinate U.S. employees report directly to the Beneficiary, including a sales clerk, making the Beneficiary a first-line supervisor. The Petitioner contends that some of the other positions are professional, which would be consistent with a managerial (but not executive) capacity, but the Petitioner has not shown that three sales/marketing workers and an attorney require enough supervisory oversight to make significant demands on the Beneficiary’s time.

The employment agreement with the individual whom the Petitioner identified as in-house counsel indicates that, although the individual is an attorney, his title is “Assistant Business Development Director.” The organizational chart refers to the individual as a full-time employee, but the employment agreement set a base salary of only \$24,000 per year and did not specify that the employment would be full-time, only that the individual “will devote . . . whatever time and resources are required to fulfill his responsibilities to the business of the Company.”

The Petitioner submitted employment agreements for the other U.S. employees as well. All of these agreements took effect after the petition’s filing date in November 2016, and therefore it is not evident that these agreements reflect the arrangements that were in place at the time of filing. 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 does not directly address the Director’s finding that tax documents in the record show a smaller U.S. staff than what the Petitioner initially claimed.

The Petitioner’s foreign subsidiaries have more employees and perform more functions than the U.S. employer itself, but the record does not fully establish the extent of the Beneficiary’s ongoing, direct authority over those foreign entities.

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. 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 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 an 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.” Section 101(a)(44)(B) of the Act.

A beneficiary’s general authority over a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. 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 managerial or executive in nature.

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

III. FOREIGN EMPLOYMENT IN AN EXECUTIVE CAPACITY

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

A. Duties

The Petitioner indicated that the Beneficiary had served as the vice general manager of the Petitioner’s foreign subsidiary in China. An unsigned statement on the foreign employer’s letterhead indicated that the Beneficiary had authority over purchasing plans, procurement, and “coordinat[ing] the balance of supply, production, and sales,” while also “presid[ing] over the overall work of administration and management.” The statement indicated that the Beneficiary “drafts the reports, documents and compiles data and arranges the company meetings and activities.” The remainder of the foreign company’s statement was less a job description than an exposition on the Beneficiary’s management style.

In the denial notice, the Director found that the Beneficiary’s foreign job description was “only a broad overview,” lacking details about “the nature of her actual day-to-day tasks.” On appeal, counsel states that “the beneficiary’s job description seemed vague and broad” because, in China,

high-ranking officials not only make a company's major decisions, but also are routinely "multitasking on daily operational activities," not by performing those activities but rather "monitoring the professionals who work directly under [their] supervision." The Petitioner also asserts that the Beneficiary's involvement in the company's banking activity "is very normal in any Asian owned companies."

The above statement sheds no further light on the specific duties the Beneficiary performed abroad. Acknowledging that they "seemed vague and broad," while claiming that they actually were not, does not suffice to resolve the Director's concerns about this issue. The Beneficiary may have held a position of high authority with the foreign employer, but the Petitioner has not sufficiently shown that the Beneficiary's duties were *primarily* those of an executive.

B. Staffing

An organizational chart indicated that the Beneficiary oversaw three departments: Material Control, Forest Resources (with four local "bases"), and Administration. Unsigned job descriptions listed the functions, powers, and responsibilities of each department's manager, but did not indicate the internal structure and staffing of the departments.

Correspondence in the record indicated that the Beneficiary had 44 subordinates abroad, but monthly payroll records from 2014 identified between 15 and 24 employees, up to five of whom earned a salary equal to or greater than the Beneficiary's, and therefore do not appear to have been her subordinates.

The Director found that the Petitioner provided "vague functions, powers, and responsibilities" for the positions subordinate to the Beneficiary at the foreign entity. The Director also noted that the payroll records lacked context in terms of how the named employees fit into the organizational structure.

On appeal, the Petitioner does not address the above findings specifically. Instead, the Petitioner briefly notes the approval of two nonimmigrant petitions on the Beneficiary's behalf. The Petitioner asserts that these approvals demonstrate that the Petitioner has met its burden of proof to establish the qualifying nature of the Beneficiary's employment.

It must be emphasized that each petition filing is a separate proceeding with a separate record. In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record we reviewed on appeal does not include the records of proceeding for the approved nonimmigrant petitions.

Under current binding policy, "[a]n adjudicator's fact-finding authority . . . should not be constrained by any prior petition approval, but instead, should be based on the merits of each case." USCIS Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior*

Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status 3 (Oct. 23, 2017), <https://www.uscis.gov/laws/policy-memoranda>. The previously approved petitions are not before us at the Administrative Appeals Office, and therefore we cannot comment on how their records of proceedings may be similar or different to the one under review here.

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. at 597. USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

Based on the deficiencies discussed above, the Petitioner has not established that the Beneficiary was employed in an executive capacity abroad.

IV. DOING BUSINESS

Beyond the grounds for denial specified by the Director, the record does not establish that the Petitioner has been doing business in the United States for at least one year prior to the date of filing the petition. The regulations define key terms:

Multinational means that the qualifying entity, or its affiliate or subsidiary, conducts business in two or more countries, one of which is the United States.

Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

8 C.F.R. § 204.5(j)(2). The Petitioner must establish that the prospective United States employer has been doing business for at least one year. 8 C.F.R. § 204.5(j)(3)(i)(D). A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1).

Taken together, the above regulations require that the prospective employer has been actively doing business in the United States – not simply owning an interest in foreign companies – for at least a year prior to the petition's filing date. The prospective United States employer in this case is the Petitioner, not any foreign affiliate or subsidiary. The regulations distinguish between employment abroad by the petitioning employer and by a foreign subsidiary. *See* 8 C.F.R. § 204.5(j)(3)(i)(A). A subsidiary is a separate legal entity from its parent company, and foreign business activity by any such subsidiary does not establish that the parent company itself has been doing business.

The Petitioner filed its articles of incorporation in Nevada in November 2007, nine years before it filed the petition in November 2016. But a company does not provide goods or services merely by existing on paper as a corporation. The introductory letter submitted with the petition stated that the

petitioning company “was established in year 2007 as a holding company and has [had] no active business operations in the past 8 years.” (Later statements have included variations on this assertion.) The same letter indicated that “the company is now ready to start business in the United States. [The Petitioner] will be doing Research and Development on new products, [and acting as a] wholesaler and Retailer of [REDACTED] products throughout the United States.” Another passage described the future activities that the Beneficiary would perform “to start the business.” On its face, the quoted correspondence acknowledged that the Petitioner had not been doing business in the United States for at least one year at the time of filing.

The Petitioner did not report any gross receipts or sales on its 2014 income tax return (the only such return in the record). In the initial submission, the Petitioner identified Exhibit 17 as “Various Proof of Business Activities (Agreements, Contracts, Invoices and Receipts).” Some of the documents in Exhibit 17 relate to goods or services that the Petitioner purchased, rather than provided. Other documents relate to the subsidiary’s business activities in China. These materials do not show that the Petitioner was doing business in the United States. Still other documents relate to sales activity less than one year before the filing date.

The record contains two documents relating to business activity by the Petitioner (rather than foreign subsidiaries) more than a year before the filing date. A June 2015 contract relates to the Petitioner’s sale of yew extract to a customer based in [REDACTED]. In September 2014, the Petitioner entered into an agreement to distribute a medical device. Although the Petitioner is a party to the agreement, the identified sales territory is China. The record does not establish to what extent, if any, the distribution agreement resulted in the Petitioner’s provision of goods or services in the United States.

The two documents described above relate to individual transactions, and do not suffice to show that the Petitioner engaged in the regular, systematic, and continuous provision of goods or services a year or more before the filing date.

The Petitioner’s seller’s permit from the California State Board of Equalization is dated November 18, 2015, exactly one year before the petition’s filing date. The Petitioner did not show that the company was authorized to sell products in any U.S. jurisdiction prior to that date, or that sales commenced on the date on the permit.

The Petitioner stated that it developed a dietary supplement “which had been launched to the market at the end of 2015.” The record does not clarify this vague assertion or establish that sales began on or before November 18, 2015. Other products named on the company’s “Production Business Plan / Year 2015 to 2020” were introduced in 2016 or later. Documents submitted on appeal show that the Petitioner launched a U.S. marketing campaign in March 2017, several months after the filing date. The earliest consignment agreement submitted on appeal dates from September 2016.

The record does not show that the Petitioner has been doing business — regularly, systematically, and continuously providing goods or services — in the United States for at least a year prior to the filing date. For this additional reason, the petition cannot be approved.

V. CONCLUSION

The Petitioner did not establish that the Beneficiary has been employed abroad, and will be employed in the United States, in a primarily executive capacity. The Petitioner also did not show that it has been doing business for at least a year prior to the filing date.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-B-P-G- Inc.*, ID# 1641291 (AAO Sept. 24, 2018)