



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

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

MATTER OF U-A-S-

DATE: SEPT. 26, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, claiming to be a motor vehicle exporter, seeks to permanently employ the Beneficiary as its manager of international sales 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 the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity. The Director also determined that [REDACTED], the individual who signed the petition and extended the Beneficiary a job offer, lacked signing authority, thus leading to the conclusion that the petition was not properly filed and that the job offer was not bona fide.

On appeal, the Petitioner disputes the Director's findings, asserting that the Beneficiary assumed the position of a function manager during her employment abroad and that she would assume a similar role within the petitioning organization. The Petitioner also points to evidence of [REDACTED] authority to sign the petition and extend the Beneficiary a bona fide job offer.

Upon *de novo* review, we find that the Petitioner did not overcome the two findings regarding the Beneficiary's employment capacity in her foreign and proposed positions. Therefore, we will dismiss the appeal. However, we find that the Petitioner provided sufficient evidence to demonstrate that [REDACTED] had the authority to both sign the petition and extend a bona fide job offer. Therefore, we will withdraw the Director's findings on these two issues.

## 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. MANAGERIAL OR EXECUTIVE CAPACITY

The primary issues concern the Beneficiary's employment capacity in his foreign and proposed positions. Therefore, our objective is to determine whether the Petitioner provided sufficient evidence to establish that the Beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

### A. U.S. Employment

First, we will address the Beneficiary's proposed employment with the U.S. entity. The Petitioner originally paraphrased the statutory definition of executive capacity, contending that the Beneficiary would perform duties that are consistent with that of an executive. However, the Petitioner did not pursue this claim in its response to the request for evidence (RFE) or on appeal, claiming instead that the Beneficiary will assume a function manager role and will be employed in a managerial capacity. As the Petitioner chose not to pursue its original claim, we will only consider whether the Beneficiary would be employed in a managerial capacity.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

#### 1. Staffing

In determining whether the Beneficiary would be employed in a managerial capacity, we will examine the Petitioner's organizational structure, including any subordinates the Beneficiary may have, their job duties, the presence of other employees to relieve the Beneficiary from performing operational duties, and the nature of the business along with any other factors that will contribute to understanding the Beneficiary's actual duties and role within the petitioning organization.

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

The petition form indicates that the Petitioner was established in 2003 and had five employees and no net income at the time of filing. The Petitioner submitted an organizational chart depicting a three-tiered hierarchy comprised of seven, rather than five, employees. The chart shows [REDACTED] at the top tier as the president and “financial officer,” followed by two subordinates at the second tier – [REDACTED] as the secretary/treasurer and [REDACTED] as vice president of purchasing – and four employees at the bottom tier – one subordinate to [REDACTED] and three subordinate to [REDACTED]. [REDACTED] subordinates include the Beneficiary in the position of “Sales Manager/Translator,” alongside a transportation manager and an operations manager.

In an RFE, the Director instructed the Petitioner to provide evidence addressing its staffing within the nature and scope of its business by providing the following, in pertinent part: (1) a list of employees in the Beneficiary’s immediate division and their job duties and educational levels; (2) a description of the products or services the Petitioner provides accompanied by a list of the administrative tasks that are necessary to produce those products or provide those services and an explanation of who performs such tasks as receiving purchase orders, soliciting sales, and handling the shipping logistics; (3) an organizational chart showing the Petitioner’s overall structure and staffing levels and identifying all employees and contractors within the Beneficiary’s division; and (4) payroll evidence in the form of Form W-2 statements, quarterly tax returns, and Form 1099s.

In response, the Petitioner provided Form 1099s for four individuals in 2016, a Form W-2 for one employee in 2016, and four federal quarterly tax returns for the last quarter in 2016 and the first three quarters in 2017, all indicating that the Petitioner had one employee during each quarter. The Petitioner also provided an amended organizational chart; although the new chart names the same seven people who were listed in the first chart, it includes five amended position titles. Specifically, [REDACTED] position title was changed from secretary/treasurer in the original chart to accountant in the new chart; [REDACTED] position title was changed from vice president of purchasing to vice president/executive administrator; the Beneficiary’s position title was changed from sales manager/translator to “Sales Director Asia”; and the transportation and operations managers’ position titles were changed to sales assistant coordinator and both are depicted as the Beneficiary’s subordinates. The Petitioner did not acknowledge or explain the reason for these changes, nor did it clarify how or if these changes would affect the Beneficiary’s proposed position.

Further, although instructed to provide job duty descriptions for employees within the Beneficiary’s division, the Petitioner provided only their broad areas of responsibility, indicating only that one sales assistant coordinator is responsible for coordinating vehicle purchase and transportation while the other is responsible for coordinating vehicle maintenance and repair. The Petitioner did not list the actual duties that are associated with these broad responsibilities to establish that the two sales assistants would help relieve the Beneficiary from having to allocate her time primarily to non-managerial functions. Although the Petitioner provided a printout from the company website stating

that it provides vehicle inspection, loading, and delivery services, it did not state who performs the underlying tasks associated with these services. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Also, the evidence must substantiate that the duties of a beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently staffed to support a managerial position.

In the denial decision, the Director acknowledged the Petitioner's submission of payroll evidence, noting that most of the Petitioner's staff consisted of contractors as opposed to employees; this observation was based on the fact that the wages of four individuals were reported on Form 1099s and only one employee was issued a Form W-2. The Director also pointed to the absence of requested information pertaining to the contractors' job duties and the amount of time they would spend providing services to the Petitioner. The Director questioned how the Beneficiary would control the work of contractors who are not the Petitioner's employees; she also questioned the organizational hierarchy and the most recent organizational chart, which depicts the Beneficiary in a position that is directly subordinate to a contractor rather than an employee of the company.

On appeal, the Petitioner asserts that the Beneficiary is a function manager and that she does not need to oversee employees to establish that she manages an essential function. The Petitioner contends that the Beneficiary would "head an integral part" of its organization, stating that its previously submitted evidence is sufficient to support this claim. We disagree and find that the Petitioner also has not articulated how the Beneficiary will manage an essential function.

The term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Although the Petitioner has defined a specific function – international sales – and established that this function is critical to its operation, it has not established that it has the staffing necessary to ensure that the Beneficiary would allocate her time primarily to managing, as opposed to performing the duties associated with, the essential function. As discussed above, the Petitioner provided two different organizational charts that did not consistently depict its employees' position titles and management structure. Despite the original organizational chart's depiction of the Beneficiary at the bottom tier of its organizational hierarchy and having no subordinates, this information was altered in a second chart where the Beneficiary was given a different position title and depicted at a higher organizational level where she was shown as overseeing two individuals with whom she had shared

the same organizational placement in the original chart. Moreover, the original chart did not depict the Beneficiary at a senior level with respect to an essential function. Rather, the Beneficiary's direct superior – [REDACTED] – was depicted as the vice president in charge of purchasing; therefore the original organizational chart indicated that [REDACTED] rather than the Beneficiary, assumed a senior position with respect to an essential function while the Beneficiary was depicted in a subordinate position, alongside a transportation manager and operations manager, and was assigned sales responsibilities that are associated with a component of the purchasing function.

The more recent organizational chart changed [REDACTED] position title from vice president of purchasing to vice president and executive administrator and indicated that the Beneficiary would not be a "Sales Manager/Translator," as originally indicated, but rather that she would assume the position of "Sales Director Asia," which would involve overseeing two sales assistants claimed to be responsible for the underlying duties associated with the sales function. The Petitioner must resolve the noted inconsistencies 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).

Although the RFE asked for job descriptions for the employees or contractors within the Beneficiary's division, the response contained only general references to each individual's main responsibility; such information is not sufficient to establish that the Petitioner would have the staffing capacity to carry out the underlying duties associated with the Beneficiary's essential function. We note that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988). Without a staff to perform the duties associated with the Beneficiary's essential function, the Beneficiary would likely have to carry out the duties that are critical to that function and thus would not be able to primarily manage that function.

## 2. Duties

Based on the statutory definition of managerial 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). The Petitioner must also demonstrate that the Beneficiary will be *primarily* engaged in managerial 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. Accordingly, in order to establish eligibility, the Petitioner must provide a job description that clearly describes the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In a supporting cover letter, the Petitioner stated that the Beneficiary will "completely manage the international sales department," direct the management of the international sales department,

establish the department's goals and policies, have discretionary authority to make decisions, and receive only general supervision from top-level executives.

As noted earlier, in the RFE response the Petitioner provided a statement indicating that the Beneficiary would be employed in a managerial capacity – more specifically, that she would assume the role of a function manager. However, the Petitioner provided a job duty breakdown that does not establish that the Beneficiary's time would be primarily allocated to managing, as opposed to carrying out the duties of, an essential function. More specifically, the Petitioner stated that the Beneficiary would spend 65% of her time contacting dealerships in Asia “for the purpose of selling pre-owned vehicles” that are purchased in the United States, providing Asian dealers with “complete internet access” to digital images of vehicles being sold, and providing “prompt communication and itemization of all air-shipments of documents, reports, accessories, and titles to the client.” The Petitioner did not establish that these sales and customer-based job duties are indicative of managing an essential function. The remaining 35% of the Beneficiary's time would be allocated to overseeing vehicle purchase, transportation, and maintenance, overseeing outsourced companies that are assigned to store, transport, and export vehicles to Asia, and managing “all aspects of the process to deliver vehicles to Asia in a timely manner.”

In the denial decision, the Director found that the Petitioner provided a broad job description that lacked an adequate account of the Beneficiary's day-to-day job duties and indicated that the Beneficiary would spend a significant amount of time performing non-managerial functions that involve directly working with clients and suppliers. While the Beneficiary is not required to allocate 100% of her time to managerial-level tasks, the Petitioner must establish that the non-qualifying tasks the Beneficiary would perform would only be incidental to the proposed position. As previously noted, an employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See, e.g.*, sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *Matter of Church Scientology Int'l*, 19 I&N Dec. at 604.

On appeal, the Petitioner merely reiterates the claim that the Beneficiary would manage an essential function, asserting that a function manager does not need to oversee employees. The Petitioner also contends that the Beneficiary will “head an integral part” of its organization by virtue of “running its international purchase department.” However, the Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner does not provide further insight about the Beneficiary's job duties to explain how she will focus on managing, rather than performing the critical duties associated with a key function. Therefore, the Petitioner has not overcome the Director's finding that the Beneficiary would allocate her time primarily to non-managerial job duties.

## B. Employment Abroad

Because the above issue concerning the Beneficiary's proposed employment is dispositive of this appeal, we will provide a condensed discussion of the remaining issue pertaining to the Beneficiary's employment abroad.

The Director determined that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity. Based on our review of the Petitioner's supporting evidence, including the Beneficiary's job descriptions and the foreign entity's organizational and management structures within the scope of an automobile sales business, we find that the Petitioner has not adequately demonstrated that the Beneficiary assumed a position where she primarily devoted her time to performing duties that involved managing an essential function of the purchasing department. Although the Petitioner's statement on appeal addresses the essential nature of the purchasing function, it does not describe the Beneficiary's duties or explain how the department functioned to relieve the Beneficiary from having to allocate her time primarily to non-managerial job duties. Therefore, we agree with the Director's finding on this issue.

## III. ABILITY TO PAY

Finally, while not addressed in the Director's decision, we find that the record does not contain sufficient evidence to establish, as required, that the Petitioner had the ability to pay the Beneficiary's proffered wage at the time this petition was filed.

When filing a Form I-140, a petitioner is required to provide copies of its annual reports, federal tax returns, or audited financial statements to establish that it had the ability to pay the beneficiary's proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

In the present matter, the petition was filed in September 2016. Although the Petitioner provided a 2015 federal tax return, it did not provide its annual reports, federal tax returns, or audited financial statements for 2016 to account for the year it filed this petition. Therefore, the Petitioner did not meet the requirements associated with establishing the ability to pay.

## IV. CONCLUSION

For the reasons discussed above, we find that the Petitioner has not established that the Beneficiary was employed abroad and would be employed in the United States in a managerial capacity or that it had the ability to pay the Beneficiary's proffered wage at the time of filing.

**ORDER:** The appeal is dismissed.