



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

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

MATTER OF C-USA, INC.

DATE: OCT. 26, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an importer and wholesaler of coffee, is a subsidiary of a Brazilian agricultural cooperative.¹ It seeks to employ the Beneficiary as its executive director under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision only to those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

¹ The Petitioner, at times, refers to itself as a branch of the foreign entity, but the record shows that the Petitioner is separately incorporated as a legal entity in its own right, with the foreign entity as its sole shareholder.

A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

II. ISSUE ON APPEAL

The Director found that the Petitioner had not established that the Beneficiary will be employed in a qualifying managerial or executive capacity.

Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), provides:

(A) The term “managerial capacity” means an assignment within an organization in which the employee primarily—

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) 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;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.

(B) The term “executive capacity” means an assignment within an organization in which the employee primarily—

(i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

The Petitioner filed Form I-140 on May 13, 2014. Part 5 of that form indicated that, at the time of filing, the Petitioner had two employees in the United States. The Petitioner submitted a letter dated April 22, 2014, signed by the Beneficiary in his capacity as the Petitioner's executive director. The Petitioner described the Beneficiary's duties in the United States:

[The Beneficiary] has been following the general direction from the Board of Directors of the [foreign parent company], implementing the [Petitioner's] operations and businesses, including in the areas of logistics, finances and marketing. [The Beneficiary] is in charge of the policy and decision making of the company, and responsible for hiring and evaluating employees, creating and managing production and financial goals.

To date, [the Beneficiary] has completed the company's incorporation process; has set up the branch office; has worked on structuring [the company], making it fully operational. He has been managing the branch's operation, administering the arrival, storage and the distribution of the . . . coffee . . . in the North American market.

To implement and develop the [Petitioner's] vision, [the Beneficiary] counts with [*sic*] some support of [the parent company's] staff, as well as the support of the locally hired employees. Over the last 12 months, [the Petitioner] has hired three full time employees, and has had support from other independent contractors. . . . These workers have assisted [the Petitioner] in its operations, all under the management of [the Beneficiary].

The Director issued a request for evidence (RFE) on October 20, 2014. The Director asked for a detailed description of the Beneficiary's intended duties; the percentage of time spent on each of

(b)(6)

Matter of C-USA, Inc.

those duties; and information about the company's activities and the subordinate staff performing those activities.

In response, the Petitioner submitted a table of the Beneficiary's duties, indicating that the time the Beneficiary devoted to each task has changed over time. The percentage figures listed below are for 2014. The table also included duties that the Beneficiary performed in earlier years but no longer performs. We have omitted this information because it does not relate to the Beneficiary's prospective duties in the United States.

Read and answer emails	7%
Meeting with directors and managers, collecting information, understanding the mission and vision of the company and expected goals	4%
Develop and monitor business plan. . . .	5%
Different meetings – customers, partners. . . .	25%
Meetings with the companies [redacted] develop processes, monitoring and supervision of new processes created. . . .	1%
Meeting with the Agricultural Manager . . . , explain the process and how to organize the team of technicians who will collect information from producers. - Publicize the project - Story producer - Varieties of coffee - Procesos [sic]	2%
Supervising the implementation of the new export processes along with the Commercial Manager	5%
Oversee the assembling of presentations, creating rules, processes, procedures, organizational chart, flow charts	3%
Several presentations [to] groups of farmers, partners, coffee roasters	5%
Signing checks and checking payments	1%
Individual meetings with employees, explaining the importance of the project and where we want to go. Hiring and firing employees	1%
displacement air or land [sic]	15%
Dissemination of the [redacted] region – Making the concept of [redacted] region” known worldwide. Participation in fairs and events, visiting the roasters, making presentations and, after 2012 beginning to sell coffee 100% [sourced from] “region of the [redacted] in the United States, touring the region along with the product	7%
Implement and monitor the [Petitioner's] financial and . . . accounting system. . . .	5%
Implement and monitor the [Petitioner's] CRM system. . . .	10%
Analyze administrative reports and sales reports (CRM)	2%
. . . Run reports to the Management Board	2%

In the above table, the Petitioner specified that the Beneficiary works “8 hours per day.”

The Petitioner also submitted tables of the Beneficiary’s “Daily Tasks” for 2014, indicating that a typical day follows one of two overlapping schedules:

Start	End	Tasks (3-4 days a week)	Tasks (1-2 days a week)
8:00	8:30	Arrive[] at the office. I check on what was pr[e]viously prepared.	
8:30	9:30	Read and respond to incoming emails	
9:30	10:30	Analyze the market and set strategies for the day with the sales team. I define which visits . . . will be made, I also establish prices that will be charged for the day according to the stock market.	Commuting
10:30	11:30	Meeting With the board: - Discuss the strategies and talk about the next steps the company will take. With the managers: - I define which types of coffee to be sent to the US; - I decide when the next shipment should leave Brazil.	Visit customers and follow ups
11:30	12:00	I listen to the message box and return calls	
12:00	13:15	Lunch	
13:15	14:00	Contact new customers from other areas in the US	Visit with 3 or 4 customers – depending on the distance between each client
14:00	15:00	With internal staff, I delegate the following: - accounts receivable - invoices to be charged - coffee stock - samples to be sent - coffee bags pick ups	
15:00	15:30	I check the following documents: - Management reports; - Financial reports; - Sales commissions; - Growth indicators	
15:30	16:15	Check CRM on how the team is performing its tasks, verifying	

		potential new customers, analyzing and defining the strategy for each new customer	
16:15	16:40	Check if the numbers are hitting with planning, or if we need to adjust the planning	Commuting back to the office
16:40	17:30	I deal with services issues and/or product suppliers, talk to customers, schedule visits, check the planning and make sure that the numbers are ok	
17:30	17:40	I check how the sales closed for the day, and define tasks for the next day.	
17:40	18:30	I take notes necessary for the following day.	
18:30	21:00	Organize record papers, immigration papers and others.	

In a separate table, the Petitioner also indicated that the Beneficiary is responsible for the first four steps in the process of importing coffee:

- Receipt of Brazil ISF (Importer Security Filing) request. . . .
- Receipt of the “Romaneio” (packing list with all lots that are coming) from [the foreign parent company], and sends it to the warehouse. . . .
- [The Petitioner] receives all digital documents from [the foreign parent company] and sends them to the Broker
- [The Petitioner] receives the samples of coffees regarding incoming container

The Petitioner indicated that its logistics and/or sales departments are responsible for the other steps in the process, except for warehouse processing which is handled by a contractor. The Petitioner also stated that, in the process of attracting new customers, the Beneficiary is responsible for explaining the company to visiting prospective customers and contacting those individuals to ensure their satisfaction.

The Petitioner provided an organizational chart that included employees located in both Brazil and in the United States. The four U.S. employees consisted of a secretary, one worker in logistics, and two in sales. The chart indicated that workers shown in a green border are “inactive employees.” Three of the four U.S. employees were shown as inactive, leaving one active U.S. employee (in sales) subordinate to the Beneficiary.

An “Employees and Individual Contractor’s [sic] List” also included workers located in both Brazil and in the United States. The list indicated that the Petitioner’s secretary worked from January 2013 to August 2013; the logistics worker worked from July 2013 to September 2014; and a sales consultant worked from July 2013 to September 2013, while the current sales employee was hired on April 21, 2014. This information indicates that the workers listed as “inactive” on the organizational chart had left the company. Payroll records for the period from May 1, 2014 to November 15, 2014 are consistent with this information, showing salaries paid to three employees (including the

Beneficiary) until September 15, 2014, and two employees (the Beneficiary and a sales employee) after that date.

The Director denied the petition on January 15, 2015, concluding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial or executive capacity in the United States. The Director found “there is only one employee . . . that the Beneficiary would be managing,” and concluded: “The petitioner has not established that the beneficiary will manage a subo[r]dinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing the day-to-day duties required to o[per]ate the business.”

On appeal, the Petitioner asserts that the Petitioner had submitted “overwhelming evidence . . . showing that the Beneficiary has and will continue managing and administering the petitioning organization,” and that “the Director improperly based his decision almost exclusively on the size of the U.S. Petitioner” instead of taking into consideration “the Beneficiary’s subordinate employees located at the Petitioner’s parent company in Brazil.” The Petitioner also asserts that the Beneficiary’s prior L-1A nonimmigrant status shows that the Petitioner has established, to USCIS’ satisfaction, the Beneficiary’s eligibility as a manager or executive.

B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that the Beneficiary’s proposed position with the petitioning entity meets the requirements of a managerial or executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary’s proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary’s employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). We then consider the beneficiary’s job description in the context of the petitioner’s organizational structure, the duties of the beneficiary’s subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary’s actual duties and role within the petitioning entity.

In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary’s duties, the petitioner still has the burden of establishing that the beneficiary is “primarily” performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

The Petitioner’s RFE response included three descriptions of the Beneficiary’s duties, which were not mutually consistent. The percentage breakdown of the Beneficiary’s tasks does not include aspects of the importation process that the Beneficiary performs, according to the Petitioner’s flowchart, and it does not appear to correlate well with the schedules of daily tasks. The percentage

breakdown specified an eight-hour workday, but the table of daily tasks runs from 8:00 a.m. to 9:00 p.m.

Also with respect to the percentage breakdown, the task said to take the second highest percentage of the Beneficiary's time is "displacement air or land." The Petitioner has not explained or elaborated. The phrase does not begin with a capital letter, suggesting the omission of an earlier passage, or "displacement" may be a mistranslation of a word pertaining to transportation. Without further clarification, we cannot determine that this activity is managerial in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Id.*

The Beneficiary's claimed daily schedule includes meetings with "sales staff," "internal staff" and "managers," but the organizational chart showed only one other employee at the U.S. company (as opposed to the parent company in Brazil). The Petitioner claimed two U.S. employees at the time it filed the petition, and while that number increased to three for part of 2014, it was back to two by the end of September 2014. One of the employees who have left the company is the logistics worker who was said to be solely responsible for several steps of the importation process. The Petitioner has not explained who handles this work now that the identified employee is no longer there.

The Petitioner maintains that the Beneficiary has the authority of a chief executive officer, with full discretionary authority over the petitioning company. While we do not doubt the Beneficiary's discretionary authority over the company, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The daily tasks schedule indicates that the Beneficiary spends up to 13 hours per week traveling and visiting customers on what appear to be sales calls. The same schedule refers to organizing papers and arranging schedules. These are administrative functions that the Beneficiary must perform on his own behalf, as the U.S. company no longer employs a secretary to perform those functions. Further, as noted, the Beneficiary is responsible for coordinating several steps of the importation process, a duty that is not included in the percentage breakdown of his duties, and the record shows that his responsibilities in the logistics area of the business have likely increased following the departure of the Petitioner's only logistics employee. Accordingly, the Petitioner's descriptions of the Beneficiary's duties do not show that he allocates his time primarily to managerial or executive duties related to the Petitioner's coffee import, sale and distribution operations.

Rather, the assertion that the Beneficiary devotes his time primarily to qualifying managerial or executive tasks relies on the assertion that he continues to control the parent company in Brazil.

The Petitioner, on appeal, asserts that the Beneficiary continues to control “subordinate employees located at the Petitioner’s parent company in Brazil, which is all part of the petitioning *Organization*, as well as independent contractors supervised by the Beneficiary who work or have worked for the U.S. petitioner on a permanent basis” (emphasis in original). The Petitioner asserts that the two companies, together, meet the statutory definition of the term “organization”:

The term “organization” means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

Section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28). However, it is not enough for the Petitioner to be part of an “organization,” a word that does not appear in section 203(b)(1)(C) of the Act. The statutory language refers, instead, to “a firm or corporation or other legal entity.” As a United States corporation, the Petitioner is a distinct legal entity, separate from the parent company in Brazil.

We must consider the activities of the petitioning United States employer, and the Beneficiary’s role within the petitioning employer, on their own merits, without folding them into the overseas activities of the parent company. The Beneficiary cannot qualify for this classification based on his continued oversight of a foreign entity and the foreign entity’s operations. However, we will consider whether the Petitioner provided evidence that the foreign entity’s employees contribute to performance of the Petitioner’s operational and administrative functions.

The workers in Brazil are not employees of the petitioning U.S. company, nor are they contractors whom the Petitioner has hired and paid. The Petitioner has not shown that the employees and independent contractors in Brazil perform the operational work of the U.S. company, and thereby relieve the Beneficiary from performing those functions. Instead, the documents in the record indicate that the company in Brazil purchases coffee, and then sells it to buyers in Brazil or exports it. The employees and contractors in Brazil are performing the functions of the parent company. The role of the U.S. company is to sell products exported by the parent company in Brazil, and the record shows that the Beneficiary’s primary role is to oversee these activities and the further development of the United States market. For the reasons discussed above, the Petitioner did not establish that the Beneficiary primarily performs managerial or executive duties associated with the sale and distribution of coffee in the United States.

The Petitioner has not established that a single sales employee is able to perform the bulk of the company’s operational and administrative activities, sufficient to relieve the Beneficiary from primarily having to perform such tasks. The Petitioner, likewise, has not established that the employees of the parent company in Brazil perform the non-qualifying operational activities of the petitioning U.S. company. Overall, based on the prevalence of non-qualifying duties in the

Beneficiary's position description, and the lack of staff to support the business activities of the petitioning employer, the evidence of record does not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity.

The Petitioner notes the Beneficiary's prior admission as an L-1A nonimmigrant, and the renewal of that status. The Petitioner asserts that the denial of the present petition is inconsistent with those prior approvals, and that the Director has not explained this departure from past actions.

The Director's decision does not indicate whether the Director reviewed the prior approvals. If the previous nonimmigrant petitions were approved based on the same facts found in the current record, the approval would constitute material and gross error on the part of the Director. 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, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Each petition filing represents a separate proceeding with a separate record. The documentation from the Petitioner's nonimmigrant petition filings is not contained within the record provided to us for appellate review. In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

For the above reasons, the Petitioner has not established that the Beneficiary meets the statutory and regulatory requirements of a multinational manager or executive. Therefore, USCIS cannot properly approve the petition.

III. ADDITIONAL ISSUE

Because we review the record on a *de novo* basis, we may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Review of the record has identified another issue that prevents a finding of eligibility.

As noted above, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires the Petitioner to establish that the prospective United States employer has been doing business for at least one year, and the regulation at 8 C.F.R. § 204.5(j)(2) specifies that "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.

The Petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). The Petitioner filed Form I-140 on May 13, 2014, and therefore the Petitioner must establish that it has been doing business for at least one year as of that date. The Petitioner does not claim to sell any goods other than coffee, and the Petitioner has not identified any service that the company provides. Therefore, the Petitioner has been doing business only for as long as it has been selling coffee. Start-up operations do not amount to the provision of goods and/or services. Rather, those operations amount to preparations for the future provision of goods and/or services.

The record does not establish that the Petitioner has been regularly, systematically, and continuously providing goods and/or services since May of 2013. The Petitioner submitted copies of 12 invoices issued in 2013 and 2014. Invoice number 1001, for \$202 worth of green coffee, is dated August 15, less than nine months before the petition's filing date. A "Profit and Loss Detail" report, with itemized entries dating back to December 30, 2012, does not list any earlier or lower-numbered invoices. There is no evidence that the Petitioner made any sales before August 15, 2013, and therefore there is no evidence that the Petitioner was selling coffee a year before the filing date of May 13, 2014.

Furthermore, the record does not establish that the Petitioner's regular, continuous, and systematic provision of goods began with the Petitioner's first sale on August 15, 2013. Invoice number 1002, for \$2,513.26, is dated November 4, 2013, nearly 12 weeks after the date on invoice number 1001. The Petitioner has not established that two documented sales more than two months apart represent regular, continuous, and systematic provision of goods in the wholesale coffee industry.

For the above reasons, we find that the Petitioner had not been doing business for at least one year as of the petition's filing date. For this additional reason, USCIS cannot properly approve the petition.

IV. CONCLUSION

We will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-USA, Inc.*, ID# 14191 (AAO Oct. 26, 2015)