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

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

MATTER OF ABCF-, LLC

DATE: SEPT. 18, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of retail sporting goods stores, seeks to employ the Beneficiary as its president and chief executive officer (CEO) under the immigrant classification of a multinational executive or manager.¹ See Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas 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.

¹ In an addendum to the Form I-140 petition, the petitioner indicates that it had filed an earlier petition on the beneficiary's behalf, with receipt number [REDACTED] on July 26, 2005. The Director denied that petition on July 26, 2005, and after the filing of a motion to reopen and reconsider, the Director certified the denial to the AAO for review. The petitioner states: "According to the USCIS Online Case Status, both Form I-140 and Form I-290C are still pending; however, neither the Petitioner, nor the Petitioner's previous Attorney have received any notice regarding the appeal." U.S. Citizenship and Immigration Services (USCIS) records show that the AAO affirmed the denial of the petition on April 26, 2006, and sent copies of the decision to then-current addresses of record of both the petitioner and the petitioner's attorney at the time.

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.

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 sole issue addressed by the Director is whether the Petitioner has established that it will employ the Beneficiary in a managerial or executive capacity in the United States.

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.

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(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, 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 October 8, 2013. The Petitioner submitted an introductory statement dated October 7, 2013, indicating that the Petitioner owns two “brick and mortar store(s)” in Florida: The [REDACTED] and [REDACTED]. The statement indicated that the Beneficiary’s duties would include six key functions (subdivided into more specific tasks), each occupying a particular percentage of the Beneficiary’s time, as follows:

Organizational Management Administration	25%
Financial Management	25%
External Relations	15%
Planning Administration	17%
Property Management	10%
Workplace Administration/Management	8%

An organizational chart showed the Beneficiary at the top level, with four departments on the second level: Brick & Mortar Stores, Online Store, Marketing, and Accounting. The chart indicated that an “Outside Firm” handled the Petitioner’s accounting functions. The chart listed one employee (a marketing manager) under Marketing, and one vacant e-commerce manager position under Online Store. The remaining department, Brick and Mortar Stores, encompassed a manager and four shop assistants.

On June 5, 2014, the Director issued a request for evidence (RFE), instructing the Petitioner to submit more detailed job descriptions for the Beneficiary and any subordinates who report directly to

him. The Director also requested copies of additional IRS Forms W-2 for the Petitioner's employees.

In response, the Petitioner submitted a revised breakdown of the Beneficiary's duties, showing the same six key functions, but with different percentages of the Beneficiary's time:

Organizational Management Administration	15%
Financial Management	25%
External Relations	20%
Planning Administration	15%
Property Management	5%
Workplace Administration/Management	20%

Within these six major categories, the Petitioner listed several individual functions occupying 2% or more of his time.

The Petitioner identified three full-time managers who report directly to the Beneficiary: a store manager; a vacant e-commerce content manager; and a marketing manager. Because the Petitioner did not employ the e-commerce content manager at the time of filing, we will not consider this position as a subordinate manager. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or Beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The Petitioner provided position descriptions for the store manager and marketing manager as follows:

Store manager: merchandising – selecting the right merchandise and managing stock levels of the selected merchandise; daily store supervision – managing sales team, ensuring the quality customer service and resolving potential customer complaints, organizing in-store special promotions, reporting the sale figures; monitoring the local and online competition and responding to them; analyzing the sales figures and trends and planning/budgeting the future sales targets; ensuring compliance with health and safety legislation.

E-commerce content manager: Overseeing the creation and accuracy of the web content; writing up the description for the e-commerce products and ensuring correct price information; organizing all e-sales sales activities and e-sales promotions; supplying the online customers with the purchased merchandise.

Marketing manager: creating marketing strategies based on the buying trends in general; promoting the store locally with local newspapers and community in general; creating customer satisfaction programs, promotional packages with coupons and incentives; preparing material for media (TV shots, etc.); preparing materials for social media (FB, Twitter, etc.); preparing and promoting own networking and online shopping website (www.tennisrus.com).

Further, the Petitioner provided a 2013 IRS Form 1065 U.S. Corporation Income Tax Return transcript indicating that the Petitioner earned -\$40,050 in net income and paid \$58,311 in wages and salaries during 2013. The Petitioner's 2013 Form W-2s reflect that the store manager earned \$11,969.80 and the marketing manager earned \$27,050.00. The other four employees that year, all shop assistants, earned between \$1,417.50 and \$8,590.66.

In the denial notice, the Director stated: "In reviewing the W-2 forms, it appears that the beneficiary supervises part-time employees . . . and that the beneficiary's subordinates have received less than . . . a full-time professional wage." The Director concluded that "USCIS must question the petitioner's ability to employ the Beneficiary in a managerial or executive capacity if it lacks sufficient staff to relieve him or her from having to perform primarily non-qualifying duties."

On appeal, the Petitioner states that the Director's decision is inconsistent and filled with errors, and that the Petitioner had submitted "overwhelming evidence that the Beneficiary performed executive duties." The Petitioner submits a new organizational chart, sales summaries for 2012-2014, and documentation showing that four of the Beneficiary's current or former subordinates hold bachelor's or master's degrees. The Petitioner also submits printouts from a new web site.

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 can be classified as a position that falls within the statutory and regulatory parameters of managerial or executive capacity.

B. Analysis

For the reasons discussed herein, the Petitioner has not established that the Beneficiary will be employed in 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). 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 either in an executive or managerial capacity. *Id.* 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.

The Petitioner submitted two conflicting lists of his own duties, with no explanation for the sometimes significant shifts in percentages of allotted duties. The second, more detailed list, repeated on appeal, includes many general assertions, such as: "Administer the affairs of the corporation," "Provide vision regarding overall financial health of the company," and "Promote effective communication." These

statements shed little light on the actual nature of the Beneficiary's day-to-day duties. Other duties are said to involve oversight of functions, with no information about who performs those functions. For example, one of the Beneficiary's claimed duties is to "[e]nsure that all staff members receive appropriate training," but the Petitioner gave no indication of who provides this training. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to a comprehensive understanding of a beneficiary's actual duties and role in a business.

The Petitioner claims to operate two separate retail stores, and states that the Beneficiary supervises one Manager for its "brick and mortar stores," who in turn supervises four shop assistants. As noted earlier in this decision, this manager earned \$11,969.00, and each shop assistant earned between \$1,417.50 and \$8,590.66 in 2013. Because the Petitioner operates two retail businesses, the total number of hours worked by its employees is relevant in determining how work is allocated within the company and whether the employees are available to relieve the Beneficiary from performing non-qualifying operational, administrative, and first-line supervisory duties.

The Petitioner has not demonstrated that it employs a full time store manager or shop assistant staff. Given the nature of the retail business, the Petitioner's operating levels, and its staffing levels at the time of filing, the subordinate manager would reasonably need to perform the duties of the store manager and the shop assistants in order to keep the retail store staffed. Therefore, the Petitioner has not demonstrated that the Beneficiary performs primarily managerial or executive duties with respect to its "brick and mortar stores" because the Beneficiary does not have a sufficient staff to relieve him of non-managerial or non-executive duties.

Further, the marketing manager does not manage or supervise any subordinate employees, and his job duties do not reflect any managerial duties. In evaluating whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817, 818 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35, 36 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686, 687-8 (D.D. 1966). The petitioner has not demonstrated that the marketing manager position meets the statutory definition of professional. Therefore, we cannot conclude that the marketing manager functions in a professional, managerial, or supervisory role.

Finally, the Petitioner claims that the Beneficiary supervises an e-commerce manager position, which was vacant at the time of filing. Because the Petitioner did not employ the e-commerce content manager at the time of filing, it is reasonable to conclude that the Beneficiary assumes the non-managerial and non-executive duties associated with that position. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or Beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the present matter, the totality of the record does not support a conclusion that the Beneficiary's subordinates are supervisors, managers, or professionals. Overall, the record indicates that the Beneficiary's subordinates, and more likely than not the Beneficiary himself, would need to perform the actual day-to-day tasks of operating the retail stores and the marketing tasks. As such, the Petitioner has not provided evidence that the Beneficiary qualifies as a personnel manager. The Petitioner does not claim that the Beneficiary will serve in a function manager capacity.

The Petitioner asserts that it has consistently portrayed the Beneficiary as an executive, but the Director has erroneously focused on the requirements of a manager. For instance, the Petitioner contends that that the RFE had focused on "evidence of the Beneficiary's executive role . . . yet the denial is based on failure to supervise professional staff which is a role reserved for a manager." The denial notice discusses managerial functions, but also includes the finding that the Petitioner has "not established that the beneficiary will be employed in an executive capacity."

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. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). 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 the beneficiary to direct and the 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 the owner or sole managerial employee. The 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." *Id.*

Here, the Petitioner emphasizes that the Beneficiary's role of President and CEO as evidence of his performance of qualifying executive duties. As discussed, the Petitioner's description of the Beneficiary's duties, considered within the totality of the evidence, does not support a finding that the Beneficiary primarily focuses on the broad goals and policies of the organization rather than its day-to-day operations.

For the reasons discussed above, the Petitioner did not provide sufficient detail regarding the Beneficiary's job duties to determine that he would serve in a qualifying executive capacity. In

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addition, the Petitioner did not demonstrate that the Beneficiary has subordinate staff to relieve him from performing non-qualifying executive duties. The appeal will be dismissed.

We find that the Petitioner has not provided reliable, probative evidence sufficient to establish that the Beneficiary will be employed in the U.S. in a qualifying managerial or executive capacity. For this reason, USCIS cannot approve this petition.

III. CONCLUSION

We will dismiss the appeal for the above stated reasons. 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 ABCF-, LLC*, ID# 13331 (AAO Sept. 18, 2015)