



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

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

MATTER OF S-USAE- INC.

DATE: APR. 8, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an owner and operator of convenience stores and gas stations, seeks to permanently employ the Beneficiary as its president under the first preference immigrant classification for multinational executive or managers. *See* Immigration and Nationality Act (the Act) § 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, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not giving deference to the prior approval of earlier petitions granting the Beneficiary L-1A nonimmigrant status. The Petitioner also states that the Director drew unwarranted conclusions from an incomplete review of the evidence of record.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A U.S. 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.

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.

## II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term “executive capacity” as 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.

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. *See* section 101(a)(44)(C) of the Act.

### A. Facts

The Petitioner filed Form I-140 on November 7, 2013, and claimed that it employed 18 employees.

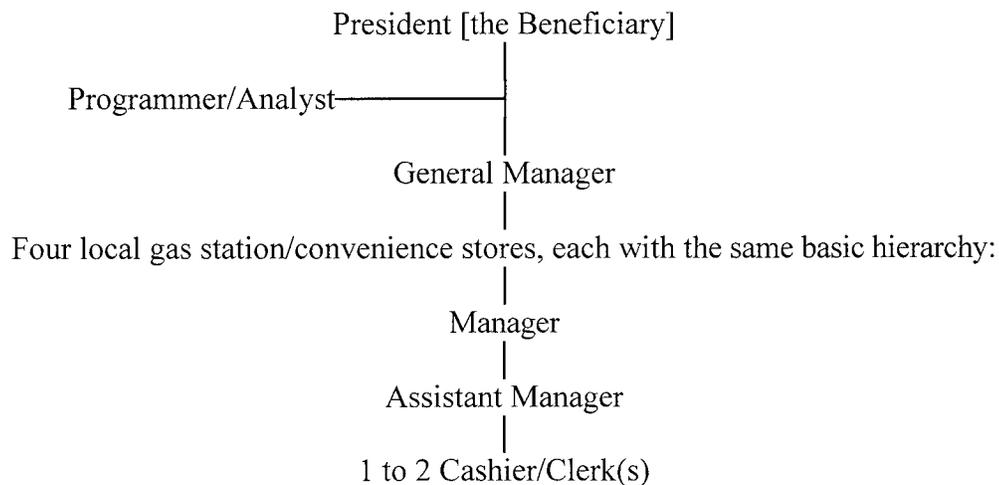
A separate, unsigned statement submitted with the petition indicated that the Petitioner owns “four (4) convenience stores and gas stations” with “a total of seventeen (17) employees.” The statement included the following passage regarding the Beneficiary’s role in the organization, with the approximate percentage of time devoted to each task:

[The Beneficiary] will confer with the managers and assistant managers to plan business objectives, to develop organizational policies, to coordinate functions and

operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives (35%). She will review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plan in accordance with current conditions (20%). She will direct and coordinate formulation of financial and sales programs to provide new sources of income, to maximize returns on investments, and to increase sales (15%). She will work with suppliers and distributors to obtain the best prices for the products that the business sells (10%). In addition, she will hold regular staff meetings to insure that the above goals are realized, and to evaluate staff performance (5%). In that regard, she is ultimately responsible for the hiring and firing of all employees of the business.

Most importantly, at the present time, she is actively looking for additional investments in the United States (15%). For instance, the company has plans to open one or two more similar businesses that it will operate as truck stops, with full restaurant facilities.

The Petitioner's organizational chart showed the following structure:



The Petitioner identified 17 employees, including the Beneficiary, by name on the organizational chart and indicated that it has a position opening for a cashier at one of its stores.

The Petitioner's 2012 IRS Form 1120, U.S. Corporation Income Tax Return, showed that the company paid \$131,970 in salaries that year. IRS Forms 941, Employer's Quarterly Federal Tax Returns, show that the Petitioner paid 17 employees \$49,457.50 during the second quarter of 2013 and \$58,947.50 during the third quarter of 2013. Separate Arkansas quarterly wage reports break down the salaries paid to the Petitioner's employees during those two quarters. The totals match the totals on the IRS Form 941 returns, but the reports identify only 15 workers in the second quarter

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and 16 in the third quarter of 2013. Every store employee earned between \$320 and \$4,400 per quarter.

The quarterly returns show payments to three of the four managers named on the organizational chart. During the two quarters, one manager earned \$640 and \$1,920; a second earned \$3,520 and \$3,600; and the third earned \$3,600 in each quarter.

The Petitioner submitted copies of two IRS Forms W-2, Wage and Tax Statements, showing wages the Petitioner paid to the Beneficiary. One form shows \$10,440 in wages; the other shows \$36,000. The Petitioner stated that both forms are from the same year, “showing the wages paid from the different business locations.”

The Petitioner also provided year-to-date payroll records for each of its store locations which showed wages paid to employees through September 2013. These records show that the Petitioner’s [redacted] Arkansas location paid seven employees, its [redacted] location paid six employees, its [redacted] store paid three employees, and its [redacted] store paid one employee, the programmer/analyst. The Beneficiary and one of the cashiers received wages from two locations. The [redacted] location paid only the general manager and two cashiers. Finally, the payroll records show that one claimed employee of the [redacted] location was terminated in July 2013.

The Director issued a notice of intent to deny on February 6, 2015. The Director acknowledged the Beneficiary’s discretionary authority over the business, but found that the Beneficiary’s primary responsibility appeared to be “first-line supervision of nonmanagerial, nonsupervisory, nonprofessional personnel.” The Director stated that the Petitioner had not shown that it employs sufficient subordinate staff to “relieve the beneficiary from performing the day to day duties required to operate the business.”

In response, the Petitioner asserted that, given the size of the company, “there should no longer [be] any question that the beneficiary is acting in an executive capacity,” and that “having to manage four business locations in different cities more than 60 miles apart would make it nearly impossible for [the Beneficiary] to be working in the day-to-day operations of the company.” The Petitioner asserts that the record contains “nothing . . . to indicate that [the Beneficiary] has in fact performed any of the tasks necessary to produce the products or provide the services of the organization.”

The Petitioner stated that a fire destroyed one of its stores in April 2014, and that it had to sell another of its stores after the Beneficiary’s injuries in a December 2013 motor vehicle accident left her unable to travel “to oversee the operations of that location.” As a result, the Petitioner stated that “the business currently only has ten (10) employees” but intends to return to its previous size, and pursue its earlier expansion plans. The IRS Form 941 return for the fourth quarter of 2014 indicated 12 employees earned a collective total of \$45,030.36.

A copy of IRS Form 1120, U.S. Corporation Income Tax Return, shows that the Petitioner paid \$176,625 in wages in 2013. The fire and sale described above both occurred in 2014, and so would not have affected the Petitioner's staffing in 2013.

The Director denied the petition on July 7, 2015, concluding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial or executive capacity. Citing the figures on the Petitioner's quarterly and annual tax returns, the Director concluded that "most, if not all employees are part time employees" which "would leave the beneficiary to do most of the day-to-day work." The Director further stated that the "broad job responsibilities" in the job description "fail to convey an understanding of what the beneficiary would actually be doing on a daily basis."

On appeal, the Petitioner submits a brief and a copy of its 2014 IRS Form 1120 tax return. The Petitioner also subsequently submitted a supplemental brief on appeal, along with additional documents, all dated after the date of filing.

## B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that it will employ the Beneficiary in a qualifying managerial or executive capacity. The Petitioner asserts that the Beneficiary will be employed in an executive capacity. Therefore, we will restrict our analysis to whether the Petitioner established that the Beneficiary will be employed in an 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 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

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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.*

The Petitioner asserts that the Beneficiary will review reports and statements and will coordinate financial and sales programs, which are vague and do not include the specific tasks the Beneficiary performs in carrying out such generic duties. Accordingly, it is not possible to conclude that these tasks are primarily managerial or executive duties rather than the daily operational tasks necessary to operate one or more convenience stores. The few tasks more concretely described by the Petitioner suggest that the Beneficiary is actively participating in the performance of non-qualifying duties. For example, working with suppliers and distributors is a requisite operational task and is not a duty that is primarily managerial or executive. Likewise, looking for additional investments appears to be the duty of an investor, not an individual primarily engaged in current managerial or executive duties.

Further, the Petitioner has asserted that each store has two layers of management as well as one or more cashiers/clerks. The Petitioner did not submit detailed position descriptions for the general manager and store managers, and therefore the Petitioner did not establish the managerial nature of those positions. Also, the Petitioner has not shown that any store employees work full-time. As noted, the Petitioner’s 2013 payroll records for each location are not consistent with the information provided in the organizational chart with respect to the location of each employee and the structure of the company. For example, the Petitioner depicted three employees assigned to its [REDACTED] location. The payroll records show that the claimed manager of this location was assigned to the [REDACTED] location, the assistant manager was assigned to the [REDACTED] location, and the cashier had been terminated prior to the filing of the petition. The only employee on the payroll for this location was the programmer/analyst, and it is unclear how he operated a retail business singlehandedly. The Petitioner’s [REDACTED] location, based on the payroll records, also appears to be understaffed, and there is no evidence of wages paid to the claimed store manager. Rather, the payroll records show that the general manager works at this location along with two part-time cashiers. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, the Petitioner states: “The fact that the businesses continued to operate while the Beneficiary was in the hospital recovering from her injuries directly refutes the director’s contentions that there was no supervisory personnel to run the businesses.” The Petitioner also asserts, however, that one of its “locations was sold because the beneficiary was temporarily unable to oversee the business operations.” This information does not overcome the lack of evidence in the record to support the Petitioner’s assertion that it had adequate staff to sufficiently relieve the

Beneficiary from performing non-executive duties. To the contrary, and as discussed above, the staffing records do not corroborate the structure depicted in the Petitioner's organizational chart.

The fact that the Beneficiary manages or directs 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, 8 U.S.C. § 1101(a)(44). 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 her actual duties, as of the date of filing, would be primarily managerial or executive in nature.

We also consider the proposed position in light of nature of the Petitioner's business, its organizational structure, and the availability of staff to carry out the Petitioner's daily operational tasks. Federal courts have generally agreed that in reviewing the relevance of the number of employees a Petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Director noted that, according to the Petitioner's 2013 IRS Form 1120 return, the average employee's annual salary was no higher than \$12,616. The quarterly returns show that even the managers earned less than the federal minimum wage for a 40-hour week in 2013, and the cashier/clerks earned substantially less than that amount. This suggests that these managers have operational duties at the stores at times when there are no lower-level employees present to perform those duties. The Petitioner appears to have one store with no assigned store employees, and has not documented any wages paid to another store's claimed manager. These are businesses which are generally open seven days per week beyond normal 9 to 5 operating hours so it is unclear how the two businesses with only one to three employees are able to maintain one person at a cash register during operating hours, much less operate with a three-tiered structure.

The Petitioner asserts that "the director's decision makes it appear that [the Beneficiary] was traveling from store to store . . . to personally perform the hands on operation at the four different locations." The Director did not state that this was the case. Rather, the Director found that the Beneficiary's job description implied a level of organizational complexity that is not otherwise evident from the materials in the record.

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In the denial notice, the Director stated:

There does not appear to be sufficient managerial staff for the beneficiary to “confer” with regarding business plans, objectives, organizational policies, etc. Moreover, no financial or administrative staff is designated to prepare “activity reports and financial statements.” It is not apparent who, other than the beneficiary, will direct and coordinate sales programs, obtain the best prices on needed items, and evaluate employees, all the activities necessary for the business to operate.

The Petitioner, on appeal, does not address these specific concerns. The Petitioner relies, instead, on the assertion that it employs several layers of managers and supervisors, and contends that, therefore, there is no reason to conclude that the Beneficiary needs to perform operational duties herself. Referencing broadly-cast business objectives is insufficient to establish the beneficiary’s actual role within the organization. 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. 1108. The Petitioner noted generally that the Beneficiary will confer with managers to plan business objectives and to develop policies and coordinate functions between the divisions and departments as well as hold regular staff meetings to insure that the goals of the organization are realized. However, such general statements do not convey an understanding of what is actually discussed and the record includes no evidence that the Beneficiary developed policies or established business objectives or how or what she coordinates between divisions and departments. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)).

In the supplemental brief on appeal, the Petitioner states: “the petitioning company has now . . . completed the purchase of another business location in ██████ Arkansas . . . [which] currently employs seven (7) individuals. Therefore, there are once again three active business locations, with a total of seventeen (17) employees.” The Petitioner states that the new submission includes Exhibit 5, “Forms W-4 for the current seven (7) employees of the business.” Exhibit 5 consists of six photocopies of IRS Forms W-4, Employee’s Withholding Allowance Certificates, all dated late December, 2015. The Petitioner submits no information about the duties performed by the new employees.

Documentation relating to this purchase shows that the Petitioner completed the purchase of the new business on January 4, 2016, while the appeal was pending, and more than two years after the petition’s filing date of November 7, 2013. The six new employees were also hired more than two years after the filing date. The Petitioner must establish eligibility for the requested benefit at the time of filing the petition and must continue to be eligible through adjudication. See 8 C.F.R. § 103.2(b)(1). Therefore, if the petition was not approvable at the time of filing, and did not remain approvable throughout the period of adjudication, subsequent events cannot cause a previously ineligible petitioner to become eligible after the filing date. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

Finally, the Petitioner notes that “on three separate occasions, [the Beneficiary] was given L-1A status based on her executive position with the US petitioning company.” The denial notice does not indicate whether the Director reviewed the prior approvals of the nonimmigrant petitions. The approved nonimmigrant petitions are not part of the record of proceeding before us, and therefore we cannot determine whether or not the Director approved them in error. 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. The decision of a service center director is not binding on us. *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).

Without sufficient evidence of the employment of subordinates to perform non-executive functions, including administrative functions that would be involved in overseeing four businesses or researching expansion opportunities, we find that the Petitioner has not sufficiently supported the claim that the Beneficiary’s proposed position in the United States would consist primarily of tasks within an executive capacity. For this reason, the appeal will be dismissed.

### III. ABILITY TO PAY

Beyond the decision of the Director, we find that the Petitioner has not established its ability to pay the Beneficiary’s wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires every petitioning U.S. employer to establish its 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.

Part 6, line 8 of Form I-140 instructed the Petitioner to specify the Beneficiary’s intended wages. The Petitioner left this line blank. Without this information, we cannot compare the Petitioner’s available income or assets to the Beneficiary’s proffered wage, and thus we cannot find that the Petitioner has established its ability to pay that wage.

We may deny a petition that does not comply with the technical requirements of the law even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003).

### IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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, that burden has not been met.

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**ORDER:** The appeal is dismissed.

Cite as *Matter of S-USAE- Inc.*, ID# 16120 (AAO Apr. 8, 2016)