



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

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

MATTER OF C-ABC, INC.

DATE: FEB. 29, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a wholesaler and distributor of consumer goods, seeks to permanently employ the Beneficiary as its president under the multinational executive or manager immigrant classification. *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 Direct, Texas Service Center, denied the petition. The Director concluded that Petitioner did not establish that the Beneficiary will be employed in a qualifying 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 applying only the regulations governing managerial capacity instead of those governing executive capacity. The Petitioner asserts that the Beneficiary will be employed in an executive capacity.

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

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.

## II. EMPLOYMENT IN A QUALIFYING 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.

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

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

(b)(6)

*Matter of C-ABC, Inc.*

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 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.

A. Facts

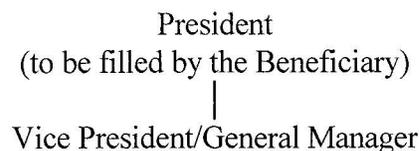
The Petitioner filed Form I-140 on February 28, 2014, and claimed that it had seven employees. At the time of filing, the Beneficiary was in the United States as a nonimmigrant, but not yet employed by the Petitioner.

A letter dated February 21, 2014, signed by [REDACTED] the Petitioner's vice president and general manager, included the following description of the Beneficiary's intended position:

As the President of the U.S. subsidiary in Florida, [the Beneficiary's] duties shall be in charge of the executive functions to make all decisions pertinent to the operations of the Petitioner corporation in the U.S. According to the business objectives set by the parent company, he will set up the company's goals and policies, confer with company officials to plan business objectives to develop organizational policies to coordinate functions and operations between divisions and departments, and establish responsibilities and procedures for attaining objectives. He will review activity reports and financial statements from each department to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions and direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. MOST IMPORTANTLY, he will spend a significant amount of time searching for new and advanced U.S. products to export and sell to the parent company or others through its customer network in China. He will supervise all seven (7) employees, including one (1) Vice President/General Manager, one (1) Finance Manager, one (1) Sales Manager[,] one (1) Inventory Supervisor and their respective subordinates. He will be in charge with authority of hiring, firing and promoting those subordinates he supervises.

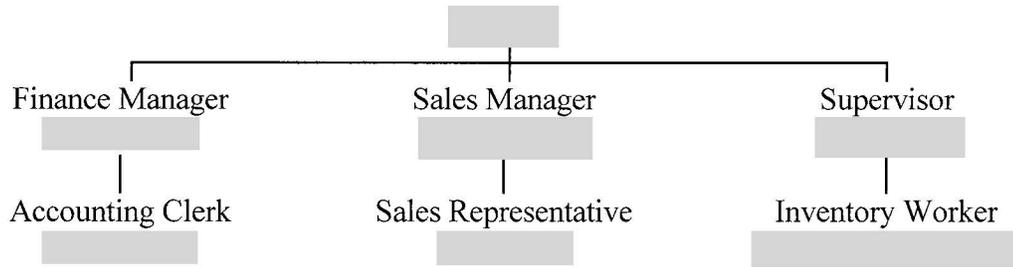
(Emphasis in original.)

The Petitioner's organizational chart shows the following structure:



(b)(6)

*Matter of C-ABC, Inc.*



The Petitioner’s 2013 IRS Form W-3, Transmittal of Wage and Tax Statements, shows that the company issued eight IRS Forms W-2, Wage and Tax Statements, that year. Florida Department of Revenue Employer’s Quarterly Reports show the quarters during which each employee worked for the Petitioner. Together, the tax documents and organizational charts show the following information:

Name	Title	Total wages	Quarters employed
[Redacted]	VP/General Manager	\$28,000.00	2, 3, 4
[Redacted]	Finance Manager	15,899.98	1, 2, 3, 4
[Redacted]	Accounting Clerk	11,893.19	2, 3, 4
[Redacted]	Sales Manager	15,836.39	1, 2, 3, 4
[Redacted]	Sales Representative	13,928.37	1, 2, 3, 4
[Redacted]	Supervisor	15,963.59	1, 2, 3, 4
[Redacted]	Inventory Worker	1,176.60	1
[Redacted]	Inventory Worker	14,015.84	1, 2, 3, 4

The record, therefore, shows that most of the IRS Forms W-2 reflect a full year’s pay.

The Director issued a request for evidence on November 25, 2014. The Director asked for a detailed description of the Beneficiary’s intended duties and the percentage of time spent on each duty, as well as an organizational chart showing all employees who would report directly to the Beneficiary.

In response, the Petitioner submitted the following breakdown of the Beneficiary’s proposed duties:

Job Duties	Percentage of time spent
Set up the annual budgets by working with the President of the foreign parent corporation and the Vice President/General Manager of the U.S. subsidiary.	15%
Set up company purchasing and sales policies, and sales targets with the Vice President/General Manager and the Sales Department head and staff.	15%
Set up the financial policies and goals with the Vice President/General Manager and Finance department	15%

(b)(6)

*Matter of C-ABC, Inc.*

personnel.

Review the financial reports and sales performance reports prepared by each department head with the Vice President/General Manager and respective department heads to ensure the operation is in line or better than the budgetary forecast. 30%

Meetings with the Vice President/General Manager and her staff to discuss and review the operational performance and recommend the measures for improvements. 10%

Review with the Vice President/General Manager the personnel performance reports prepared by each department heads [*sic*]; determine the promotion/demotion and the increase/decrease of the annual compensation of the directly-supervised department heads; final approval/disapproval of company hiring/firing of employees. 10%

Report to the foreign parent's board of directors regarding the company's operational performance; search for new products and explore the potential markets. 5%

The Petitioner stated that the only employee who would directly report to the Beneficiary would be [REDACTED] the vice president/general manager, whose duties are as follows:

- Direct supervision of the operations of Finance, Sales and Inventory Control Departments.
- Review each departments' reports and meetings with the department heads on the improvement of their performance.
- Evaluate all three department heads' performance and recommend the increase/decrease of annual compensation to the President/Beneficiary.
- Review the personnel evaluation reports with the department heads on each department's staff/subordinates.
- Meetings with the President/Beneficiary on the establishment of company policies and annual budget.
- Report to and review with the President/Beneficiary regarding the departmental performance to ensure the operations are within the set budgetary guidelines.
- Search for new products and make recommendations to the President/Beneficiary.

(b)(6)

*Matter of C-ABC, Inc.*

The Petitioner stated that [REDACTED] “voluntarily took a pay cut” in 2012 and 2013, but “resumed her annual compensation of \$48,000” in 2014. A copy of a 2014 IRS Form W-2 reflected this increase in pay. The Petitioner did not submit 2014 IRS Forms W-2 for any other employees.

The Director denied the petition on March 17, 2015, concluding: “The petitioner has failed to establish that the beneficiary will supervise and control other supervisory, managerial, or professional employees, or will manage an essential function of the organization.” Noting the salary figures on the 2013 IRS Forms W-2, the Director stated that “the petitioner’s employees appear to be non-professional employees at the time of filing. The wages paid to the employees are substantially low to be considered full time or professional.”

On appeal, the Petitioner contends that “the Director erroneously applied the regulations governing managerial capacity instead of those governing executive capacity,” and that the Petitioner has established that it intends to employ the Beneficiary in an executive capacity.

## 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.

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 does not attempt to establish, on appeal, that the Beneficiary would serve in a managerial capacity. Rather, the Petitioner contends that the Director erred by applying the statutory definition of managerial capacity, and actively asserts that “the Petitioner has sought the services of the Beneficiary as President in an *executive capacity*, and not in a managerial capacity.” Because the Petitioner has actively forfeited a claim of managerial capacity, we will not address whether the Beneficiary will be employed in such capacity.

The Petitioner cites section 3.01 of the Petitioner’s Stock Subscription and Shareholders Agreement, which stated that the Beneficiary “shall have the total management control and responsibility” over

the petitioning company. The Petitioner also notes that the organizational chart places the President atop the organization's hierarchy. The Petitioner asserts that the job description shows that the Beneficiary will devote "75% of his time" to "setting up financial, sales and purchasing policies and goals, determining the annual budgets, and ensuring that operational goals are met." Therefore, the Petitioner asserts, the Beneficiary's duties will primarily involve qualifying executive functions.

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 Petitioner, at the time of filing and in response to the RFE, described the proposed position in very broad language that did not sufficient explain what the Beneficiary would be doing on a day-to-day basis within the context of the Petitioner's business, which is described only generally as a wholesale and distribution business. 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).

As noted, 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 his 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,

(b)(6)

*Matter of C-ABC, Inc.*

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 record of proceedings contains minimal evidence establishing the nature of the Petitioner's business. As noted, it is self-described as a wholesaler and distributor of "general and consumer products." It provided evidence that it leases a 101,600 square foot building to be used for warehousing and distribution of general merchandise, an expired business tax receipt identifying the company as a wholesale merchant, and tax returns which indicate it is engaged in the wholesale trade of clothing. It is unclear how it distributes its goods as the Petitioner did not report any expenses for trucking, freight, shipping or customs in its latest tax return.

The record also contains minimal information regarding the Beneficiary's proposed subordinate staff. The Petitioner has shown that the Beneficiary would have seven subordinates, including a general manager, two department managers, a supervisor, an accounting clerk, a sales representative and an inventory worker. The Petitioner has submitted a job description for only one of the Beneficiary's intended subordinates, specifically [REDACTED] the vice president and general manager, and her job description, like the Beneficiary's is very general, with no clear correlation to the Petitioner's actual day-to-day business activities. Accordingly, it is unclear who performs the duties necessary for the Petitioner to operate as a wholesaler and distributor, such as purchasing, marketing, shipping and receiving, logistics and other company functions. Further, it is unclear how a company with a 101,600 square foot warehouse and engaged in wholesale distribution is able to operate with a single inventory worker and a single salesperson.

The Director had noted that the Petitioner's employees do not appear to earn full-time wages. Florida's minimum wage was \$7.79 per hour in 2013.<sup>1</sup> At this rate of pay, an employee working a 40-hour week throughout the year would have earned \$16,257.73, following the standard formula of 2,087 hours per year. Every employee except [REDACTED] including the claimed department managers, earned less than that amount in 2013. Absent more detailed information regarding the Petitioner's organizational structure and the actual job duties of its employees, the Petitioner's claim that its eight-person company will support three tiers of management is not supported by the record.

On appeal, the Petitioner acknowledges the Director's concerns, but does not address them except to state that "the Director did not take into consideration the recent acquisition of the Petitioner by the foreign parent company." The record shows that the petitioning company has existed and operated from the same location since 2010. The Petitioner does not explain why the timing of the acquisition (less than a month before the petition's filing date) would affect the compensation or work hours of its employees when the company had already been doing business for several years. Furthermore,

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<sup>1</sup> Source: <http://www.floridajobs.org/minimumwage/FloridaMinimumWageHistory2000-2013.pdf> (printout added to record January 6, 2016).

(b)(6)

*Matter of C-ABC, Inc.*

the figures on the 2013 IRS Forms W-2 reflect compensation paid before the February 2014 acquisition.

The minimal compensation paid to the subordinate employees calls into question the extent to which those employees would be available to relieve the Beneficiary from performing non-qualifying operational and administrative tasks for the Petitioner. Furthermore, the Petitioner has not established that the percentages allotted to the Beneficiary's stated duties are realistic in light of the company's minimal staffing. For example, the Petitioner employs one sales representative and one accounting clerk, yet the Petitioner asserts that the Beneficiary would devote 30% of her time, roughly 12 hours a week, to "[r]eview [of] the financial reports and sales performance reports."

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'l Comm'r 1972)). The Petitioner, on appeal, acknowledges this case law, but states that "[t]his is not a case of simply providing unsupported statements on the record," but the record contains no relevant supporting evidence, such as copies of these reports or evidence that each of them requires hours of review across several layers within the organization. In a similar fashion, the Petitioner has not established that the establishment of budgets and policies for an eight-employee organization would make the demands on the Beneficiary's time that the Petitioner claims.

For the above reasons, we find that the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary's proposed position in the United States would consist primarily of tasks within a qualifying executive capacity and on the basis of this finding the appeal will be dismissed.

### III. BEYOND THE DECISION OF THE DIRECTOR

Above, we have detailed the Director's stated grounds for denial of the petition, and explained that we are dismissing the appeal based on those same grounds. Apart from that discussion, we note that recent information raises questions about whether the Petitioner continues to do business.

The Petitioner must establish eligibility not only at the date of filing, but also continuing through the time of adjudication. *See* 8 C.F.R. § 103.2(b)(1). Following the filing of the appeal, the State of Florida administratively dissolved the petitioning corporation on [REDACTED] because the Petitioner had not filed a required annual report. As a result, the public website of the Florida Department of State, Division of Corporations, lists the Petitioner's current status as "inactive."<sup>2</sup> At this time, we do not base our dismissal decision on this new information. Nevertheless, if the Petitioner should choose to pursue this matter any further, USCIS could not properly approve the

<sup>2</sup> The relevant information can be found at [REDACTED]

[REDACTED] (printout added to record January 6, 2016).

petition without evidence to show that the Petitioner continues to do business. “Doing business” means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2). Therefore, it cannot suffice for the Petitioner to establish that the company continues to exist “on paper,” or that it continues to rent property or to employ staff. Rather, the Petitioner must establish that it continues to engage regularly in qualifying business transactions.

#### IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-ABC, Inc.*, ID# 15851 (AAO Feb. 29, 2016)