U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-S-&S- INC.

DATE: JULY 21, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, which sells oilfield equipment, seeks to permanently employ the Beneficiary as its vice president (VP) of quality control under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in the United States 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 disregarding a detailed job description for the Beneficiary, and by misinterpreting information and evidence regarding the Beneficiary's subordinates.

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

I. LEGAL FRAMEWORK

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.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

> (3) Initial evidence—
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> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
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> (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
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> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity
>
> (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
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> (D) The prospective United States employer has been doing business for at least one year.

II. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity. The Petitioner does not claim that the Beneficiary will be employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in a managerial 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)(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.

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. Evidence of Record

The Petitioner filed Form I-140 on March 25, 2015. On the petition form, the Petitioner indicated that it had 10 current employees in the United States.

the Petitioner's president and chief executive officer (CEO), provided the following list of the Beneficiary's duties with the company, and the percentage range of time devoted to each duty:

- Review the Quality Control processes currently in place, improve those processes by integrating industry-standard best-practices, and provide effective leadership support and guidance to all company personnel (10% - 15%)
- Review sales and market data and other performance indicators . . . and make recommendations to CEO about process or product improvement, process controls,

continuous improvement and corrective/preventative action based on that data (10% - 15%)

- Develop and implement guidelines, systems and corporate practices to ensure effective ongoing review of the quality control and quality assurance functions (10% - 15%)
- Manage and lead Quality Control staff, including recruiting, training, evaluating, mentoring, and coaching them. Oversee these employees to ensure compliance with banking, shipping and customs regulations and work closely with our clients, suppliers, and shipping companies (20% - 30%)
- Develop programs and hold joint training sessions with suppliers, clients, and employees . . . (10% - 15%)
- Budget and managerial responsibility for Quality Assurance and Quality Control (15% - 20%)
- Train and oversee Managers in technical evaluation, regulatory compliance, and after sales strategies (10% - 15%)
- Provide early warning of emerging trends, themes, and concerns . . . (10% – 15%)
- Maintain relationships with clients in the Algerian market and represent [the Petitioner] in industry and client meetings . . . (10% – 15%)
- Work closely with the CEO to develop and implement sales and marketing strategies . . . (5% - 10%)

Although the Petitioner claimed 10 U.S. employees on the petition form, an organizational chart submitted with the petition shows 11 positions:

- Chairman & CEO
  - VP Sales & Marketing
    - General Manager Libya
    - Associate Sales & Marketing (V.W.)
    - Purchasing
  - VP Finance
  - VP Quality Control
    - VP Purchasing Algeria
    - Quality Control Manager
    - Associate Sales & Marketing (S.R.)
    - Shipping Receiving Manager

The Petitioner submitted a 2014 profit and loss statement showing that the Petitioner paid $1,574,450 in salaries and $10,552.50 for contract labor that year.

The Director issued a request for evidence (RFE), asking the Petitioner for more information regarding the Beneficiary's job and those of his subordinates. The Petitioner's response included a letter from [redacted] including a general description of the Beneficiary's authority:

> [The Beneficiary] will oversee the activities of the Quality Control team reporting to him. He will have the authority to hire and fire and make personnel decisions regarding these employees. [The Beneficiary] will continue to refine and design new [company] policies to improve our Quality Control issues. He will put into operation

> new training regimens to teach best practices to our employees and share these with suppliers and clients to adapt our products and services to their needs.
>
> In addition, [the Beneficiary] will also interface in a managerial capacity with our Algerian account managers and technical service manager as they interact with our key clients and ensure that our after-sales responsibilities continue to be upheld. Additionally, since [the Beneficiary] developed our sales strategies, he will continue to review [company] account managers['] sales proposals before submission to clients.

The Petitioner submitted a copy of the percentage breakdown that had accompanied the initial filing.

Asked to identify the Beneficiary's subordinates, the Petitioner submitted an updated organizational chart. Like the earlier chart, the later chart indicated that the Beneficiary has authority over four employees. The only change from the first chart is that a second sales and marketing associate has replaced the VP of purchasing for Algeria. [redacted] provided capsule descriptions for the subordinates' positions:

> [The shipping and receiving manager] deal[s] with every logistical issue that arises during the course of transactions between [the Petitioner], our suppliers, and our clients, spanning the Atlantic Ocean. These products are often very sophisticated and require expertise in our client's requirements. . . .
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> [The] Quality Control Manager [is] in charge of all quality control documentation and letters of credit . . . [and] coordinates the shipment of oilfield products and machinery, worldwide. She carefully reviews, analyzes the quality control certifications required for each shipment. . . .
>
> [One] associate of sales and marketing . . . plans and organizes the purchasing function for the Algeria Market. He prepares responses to a large number of inquiries and bid requests, identifies potential suppliers, visiting existing suppliers, building and maintaining business relationships, negotiates terms and conditions with vendors and is a liaison between suppliers, manufacturers and the other members of the [Petitioner's] team.
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> The . . . [other] Sales and Marketing associate . . . prepares oilfield-equipment tenders from different domestic and international clients and drilling companies, reviews technical data and input information into [the] company system, he communicates with file managers about important due dates, communicates with a large number of local and international suppliers, he processes suppliers' quotations and prepares [the Petitioner's] offers to the clients.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director stated that the

Beneficiary's job description includes "broad job responsibilit[ies]" but "does not identify any specific tasks associated with" them. The Director also found that "[t]he record does not show who in the organization does the non-qualifying operational or administrative work, such as the shipping and receiving of the oilfield equipment and replacement parts to other companies."

On appeal, the Petitioner submits documentation relating to its recent business activities, and a brief in which the Petitioner alleges that the Director erred in denying the petition.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties. *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 in a managerial or executive capacity. *Id.*

In the denial notice, the Director stated that "the RFE asked for a detailed description that clearly described the [Beneficiary's] proposed duties." On appeal, the Petitioner claims "there is no such request . . . in the RFE," but the record shows that the Petitioner is in error. On the third and final page of the RFE, the Director asked the Petitioner to submit "[l]etters from authorized officials of the foreign organization and the petitioner, clearly describing the beneficiary's actual job duties" both "in the United States and abroad."

The Director found that the Petitioner had identified "broad job responsibilit[ies]" but not the specific duties that the Beneficiary would perform relating to those responsibilities. As examples, the Director cited the Petitioner's assertion that the Beneficiary would maintain relationships with clients in Algeria and implement guidelines and practices. The Director found that the Beneficiary did not explain what specific duties these goals entail.

On appeal, the Petitioner submits copies of correspondence from suppliers and clients. These materials indicate that the Beneficiary has a leadership position within the petitioning company, but they do not provide any information about his specific duties.

states that the company "started a new business" in Tunisia in the autumn of 2015 and that the Beneficiary "is to play a significant role in the establishment of" "a new Joint Venture in ' The Petitioner must establish eligibility at the time of filing, continuing through adjudication of the petition.[1] The Petitioner cannot become eligible through new developments after

[1] *See* 8 C.F.R. § 103.2(b)(1).

the date of filing.[2] The evidence regarding newly established offices cannot establish eligibility as of the filing date, because they did not exist at that time. Even then, the new materials indicate that the Beneficiary plays a significant role in setting up the new offices, but they provide no further details that would describe the Beneficiary's specific duties.

The percentage breakdown of the Beneficiary's job duties cannot be accurate. If we add the minimum percentage figures for each of the duties, the sum is a minimum of 110%.

More significantly, some of the categories combine qualifying and non-qualifying duties. Hiring and evaluating subordinates are managerial functions, but training is not, but the Petitioner has grouped all of these activities together within one category. We further note that the position description includes categories with vague descriptions, stating for instance that the Beneficiary would ensure that subordinates performed certain tasks, without saying what the Beneficiary would do in this regard. The Petitioner did not specify how the Beneficiary would "provide effective leadership support and guidance," or what steps he would take to "[p]rovide early warning of emerging trends, themes, and concerns." Also, the job description indicated that the Beneficiary would personally provide training. The Petitioner did not establish how this activity is managerial. 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.[3]

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 a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers."[4] The Petitioner has not claimed that the Beneficiary will be a function manager, and therefore we will focus on the claim that the Beneficiary is a personnel manager. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that 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."[5] If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions.[6]

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[2] *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).
[3] *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).
[4] *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii).
[5] Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i).
[6] *See* 8 C.F.R. § 204.5(j)(2).

To determine 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.[7] The Act 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."[8]

In the RFE response, the Petitioner stated that four of the Beneficiary's subordinates are professionals. (The Petitioner did not revisit this issue on appeal.) Specifically, the Petitioner cited the résumés of the Beneficiary's subordinates, indicating that the individuals identified as quality control manager, shipping and receiving manager, and one of the sales and marketing associates hold bachelor's degrees. Simply holding a bachelor's degree, however, does not make one a member of the professions. The position must require such a degree. The Petitioner did not establish that any of the positions have such a requirement. In the case of the sales and marketing associate position, another employee said to hold that title was still studying for his bachelor's degree.

The Petitioner's response to the RFE included a copy of an employee payroll record dated June 24, 2015. The document did not list the CEO or any VP other than the Beneficiary. Instead of the ten employees claimed on Form I-140, the payroll document listed five current employees and a sixth listed as "Terminated 04/30/15." The payroll document identified the Beneficiary as the VP of quality control, but most of the other job titles listed on the payroll document do not match the titles on the organizational chart and in [redacted] letter:

Name	Title (Organizational Chart)	Title (Payroll)
[redacted]	Quality Control Manager	Document Manager
	Sales & Marketing Associate	Administrative Assistant
	Shipping & Receiving Manager	Shipping Manager
	Sales & Marketing Associate	Purchasing Associate
	Sales & Marketing Associate	Admin - Terminated

The Petitioner did not explain or acknowledge the discrepancies between the payroll records and the organizational chart. Because the Petitioner's own internal documents do not agree with the Petitioner's claims regarding the number of employees, or their titles, those claims lack credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies.[9]

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[7] *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation").
[8] Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32).
[9] *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

If the Petitioner inflated the subordinates' job titles, then the subordinates likely perform a greater share of operational and administrative tasks than letters suggest. But this does not resolve the credibility questions or establish the Petitioner's eligibility for the classification sought.

On appeal, the Petitioner submits a letter from an official of stating that the Petitioner's shipping and receiving manager "oversees the shipping activities" contracted to and "spends a great deal of time at [the contractor's] facility" without actually supervising its employees. This letter sheds some light on one aspect of the Petitioner's business, but it does not answer all of the questions and concerns surrounding the Beneficiary's subordinates and their actual duties.

The Beneficiary's subordinates are not supervisors, and the Petitioner has not established that they qualify as managers or professionals. The record contains conflicting information about their titles. Therefore, the Petitioner has not met its burden to show that the Beneficiary is a personnel manager.

The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial 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.[10] 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 in nature.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial capacity in the United States.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C-S-&S- Inc.*, ID# 17481 (AAO July 21, 2016)

[10] Section 101(A)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).