



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

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

MATTER OF I-T- CORP.

DATE: JULY 26, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a food importer and distributor, seeks to permanently employ the Beneficiary as its chief executive officer (CEO) 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, Texas 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 an 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 issuing a vague and unsupported decision that provided no specific basis for denial of the petition.¹

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

¹ Apart from disputing the merits of the denial, the Petitioner also protests delays in the adjudication of the petition. Those delays did not cause the denial of the petition, and lie outside the scope of our appellate review of the matter.

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—

(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:

(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

(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

(D) The prospective United States employer has been doing business for at least one year.

II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

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

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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. U.S. Employment in an Executive Capacity

1. Evidence of Record

The Petitioner filed Form I-140 on December 12, 2013. On the Form I-140, the Petitioner indicated that it had two current employees in the United States.

██████████ vice president of the petitioning company, stated in a letter that the Petitioner is the sole U.S./Canadian distributor of certain brands of Italian specialty food products, produced by the foreign companies that jointly own the petitioning U.S. company. ██████████ stated that the Beneficiary “will continue to direct the management of” the petitioning company, while delegating “a number of functions to . . . ██████████”

██████████ president of ██████████ stated a letter that his company has provided accounting/financial services, administrative services, customer service management, and logistics/warehousing management to the Petitioner since 2009. Examples of these provided services include:

- Maintaining client books and records;
- Payroll;
- Assisting in retaining legal, accounting and banking services;
- The provision of a dedicated phone line and P.O. box for correspondence;

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- Providing a principal place of business and a principal point of contact;
- The provision of a seconded employee whom [sic] handles correspondence, voice mails, telephone messages and customer service related inquiries;
- Interact with [the Petitioner's] customers to provide them with information to address inquiries regarding products and services;
- Evaluating trade-offs between transportation costs, inventory costs, and service levels.

added that, since 2011, has also provided “a sales/marketing team comprised of professionals [sic] sales agents whom [sic] handle sales in designated regions in [the] United States as follows with the overall supervision of the CEO.” Although referred to “designated regions . . . as follows,” there followed no list of designated regions or associated sales agents.

stated that “the following executive level duties . . . will occupy 100% of [the Beneficiary's] time”:

- Overseeing handling of [the Petitioner's] accounting, financial, administrative, customer services and logistics departments;
- Reviewing [the Petitioner's] business strategy, enumerating objectives and implementing policies and procedures in order to maximize companywide efficiency, profitability and client satisfaction;
- Overseeing and assessing performance of vendors and distribution networks;
- Reviewing and analyzing financial statements, sales and activity reports to ensure that her goals and objectives are being met, and to determine change in strategies;
- Overseeing the development of new, and maintaining existing, client relationships;
- Managing outside legal counsel on any new projects and/or issues;
- Evaluating the performance of in-house and outside personnel in meeting objectives or to determine areas for improvement or change;
- Responding to any concerns and/or suggestions raised by the Italian parent companies;
- Coordinating activities, policies and goals with the Italian parent companies;
- Exercising discretionary approval of new product development (including packaging and labeling) and pricing policies;
- Overseeing marketing and advertising campaigns, including, website and social media presence; and
- Representing [the Petitioner] at conferences, industry events, etc.

On the petition form, the Petitioner claimed two employees as of the December 12, 2013 filing date. The Petitioner stated that the second employee (besides the Beneficiary) is a sales manager who reports to the Beneficiary, and who oversees contractors and other outsourced workers.

The Director issued a request for evidence to ask for a more detailed description of the Beneficiary's position, identifying “[a]ll specific daily duties (rather than categories of duties)” and specifying the “[p]ercentage of time spent on each duty.” The Director requested copies of IRS Forms W-2, Wage

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and Tax Statements, “for each employee” of the petitioning company, and evidence that the Petitioner paid its contractors.

In response, the Petitioner submitted a copy of its agreement with [REDACTED] and copies of invoices and checks, dated between December 2013 and August 2014, to show payment for [REDACTED] services. The Petitioner did not submit any IRS Forms W-2, or any other evidence that it had any employees, including the individual previously named as the Petitioner’s sales manager. The Petitioner submitted a new organizational chart, which did not show the previously claimed sales manager.

The Petitioner submitted a longer job description, dividing the Beneficiary’s individual tasks into seven broad categories, stating the time devoted to each as a percentage and as a number of hours:

- Client Management and Business Development (40%, 16 hours/week)
- Planning and Direction (20%, 8 hours/week)
- Financial Management (10%, 4 hours/week)
- Executive Reporting and Consultation (10%, 4 hours/week)
- Management (10%, 4 hours/week)
- Employee/Contractor Oversight (5%, 2 hours/week)
- Policy Formulation (5%, 2 hours/week)

The Petitioner divided each of the above categories into narrower tasks, but did not indicate the amount of time devoted to each of those tasks. For instance, the “Management” category included the following tasks:

- Establish and implement [the Petitioner’s] policies, goals, objectives and procedures via weekly meeting with [REDACTED] directors and managers. Oversee the operation of [the petitioning company] and manage its compliance with the legal and regulatory requirements;
- Supervise professional level employees at [REDACTED] by reviewing their performance and provide management advice to the directors at [REDACTED] in monthly conference calls with their directors;
- Evaluate the organization’s and [REDACTED] performance on a daily basis by reviewing the daily emails received from [REDACTED] directors and managers with respect to duties and performance of [REDACTED] for [the Petitioner];
- Identifying and developing solutions that will increase [the Petitioner’s] market presence and share.

The Director denied the petition, stating that “the petitioner did not provide the time spent on each function,” and that the Petitioner’s new organizational chart “does not identify the two employees claimed on the Form I-140.” The Director concluded: “The evidence submitted does not establish that the beneficiary’s duties will [be] mostly executive in nature.”

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On appeal, the Petitioner states that “the denial notice is vague and lacking specific reasons for the denial.” The Petitioner contends that the Director did not consider the Petitioner’s “extremely detailed description of the proffered position.”

2. 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 an executive capacity in the United States.

When examining the executive 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.*

The Petitioner broke down the time devoted to broad groups of duties, but not to individual functions as the Director had requested in the RFE. Under the general category of “Planning and Direction,” said to occupy eight hours per week, the Petitioner included “[p]rovide annual and quarterly plans to [redacted] managers,” although planning of this nature is not likely to represent a continuous demand on the Beneficiary’s time.

The Petitioner stated that the Beneficiary spends 16 hours per week on “Client Management and Business Development,” including “[i]nternational travel to visit lines of production, and farms.” International travel does not appear to be a regular weekly occurrence, but the breakdown, as structured, does not show how much time the Beneficiary spends traveling in this way. “Client Management and Business Development” also encompasses “[m]eetings with opinion leaders, professional advisors, politicians and government offices.” The Petitioner has not documented such activity or identified the other participants. Further, some listed duties are repetitive; for example, there are two separate listings for negotiating and finalizing sales contracts, and two for reviewing reports. As a result of the above, the Petitioner has listed many functions the Beneficiary is said to perform, but provided no information about the time devoted to individual duties.

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.

Managing or directing a business does not necessarily mean that a given beneficiary is eligible for classification as an intracompany transferee in an executive capacity. By statute, eligibility for this

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classification requires that the duties of a position be “primarily” of an executive nature.² 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 the 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.”³ 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).

At the time of filing in December 2013, the Petitioner claimed two employees, specifically the Beneficiary and a sales manager who would interact with [REDACTED] and relieve the Beneficiary from non-executive functions relating to those interactions. The initial submission, however, included no evidence to show that it employed anyone other than the Beneficiary at the time of filing. When the Director, in the RFE, asked for IRS Forms W-2 for the Beneficiary’s subordinates, the Petitioner did not submit the requested evidence. Instead, the Petitioner asserted that the Beneficiary could qualify as an executive even if she did not have any subordinate employees.

The record indicates that the Beneficiary did not employ a sales manager in December 2013, as the Petitioner claimed at the time. The Petitioner submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2010 through 2013. Each of these returns shows the Beneficiary’s annual salary of \$78,360, reported under “compensation of officers.” Under the separate heading of “salaries and wages,” the Petitioner reported paying \$23,640 in 2011 and \$26,033 in 2012. The Petitioner’s 2013 return, submitted on appeal, shows the Beneficiary’s annual \$78,360 officer compensation, but does not show any salaries or wages paid to anyone else. This indicates that the Beneficiary was the Petitioner’s only employee throughout all of 2013, and that the sales manager had left the company a year or more before the petition’s filing date even though the Petitioner claimed that individual as a current employee at the time of filing.

If, as the evidence shows, the Petitioner did not employ a sales manager at the time of filing, then the Petitioner’s claim to the contrary raises questions of credibility.⁴ All the information about the

² Sections 101(A)(44)(B) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

³ *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).

⁴ Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the

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Beneficiary's claimed duties comes from the same source (the Petitioner) as the discredited claim that the Petitioner had two employees at the time of filing.

Attempts to verify the Petitioner's claims have revealed new, disqualifying information. The Petitioner must establish eligibility not only at the time of filing, but continuing throughout the adjudication of the petition.⁵ The Petitioner has asserted that its contract with [REDACTED] relieves the Beneficiary from having to perform non-qualifying functions. [REDACTED] website includes a "Clients" page which identifies the Petitioner's [REDACTED] brand under "Premium Food Brands – Past," rather than under "Premium Food Brands – Current," indicating that the Petitioner is no longer a client of [REDACTED].⁶ Because the petition relied on the assertion that [REDACTED] performs essentially all of the company's operational functions, it is not evident that anyone relieves the Beneficiary from performing those duties herself. Also in question is the Petitioner's continued ability to conduct business without employees.

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

B. Foreign Employment in a Managerial or Executive Capacity

Further inquiry reveals additional grounds for dismissal. If a beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the petitioner must demonstrate that, in the three years preceding entry as a nonimmigrant, the beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.⁷

The Petitioner has submitted conflicting information about the Beneficiary's past employment abroad. The Beneficiary's résumé, submitted with the present petition, indicated that she worked as area manager, North America, in the export department of [REDACTED] from December 2005 to December 2006, and as CEO of the petitioning company beginning in January 2007. But the Petitioner filed an earlier petition in 2012, which included a different version of the Beneficiary's résumé. That earlier résumé listed her foreign employment dates as January 2006 to July 2007, followed by employment in the United States beginning in August 2007. These conflicting statements diminish the evidentiary weight of the résumés.

The most direct evidence in the record regarding the Beneficiary's foreign employment consists of copies of twelve pay receipts from [REDACTED] dated between August 2006 and July 2007. The earliest pay receipt shows a commencement date of August 3, 2006. The Beneficiary entered the United States to work for the Petitioner less than 11 months later, on July 1, 2007. This evidence indicates that the Beneficiary did not work for the foreign entity for a full year, as required, prior to her admission to the United States as a nonimmigrant.

remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁵ See 8 C.F.R. § 103.2(b)(1).

⁶ Address: [REDACTED] (printout added to record on March 9, 2016).

⁷ Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(B).

Also, U.S. government records show the Beneficiary was in the United States on the following dates:

- November 27, 2006, to December 20, 2006 (24 days)
- December 30, 2006, to March 26, 2007 (87 days)
- April 14, 2007, to June 24, 2007 (72 days)

Between August 3, 2006 and the time the Beneficiary entered the United States to work for the Petitioner on July 1, 2007, the Beneficiary was outside the United States for only 149 days, substantially less than the one year required by the statute. Therefore, it is not evident that the Beneficiary was able to work for the overseas employer for the required year.

Because this information originated from outside the record, we issued a notice of intent to dismiss advising the Petitioner of the information and allowing the Petitioner 33 days to respond. The allotted time has elapsed with no response from the Petitioner.

Based on the above information, the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad for at least one year.

III. 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, 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 I-T- Corp.*, ID# 16253 (AAO July 26, 2016)