



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

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

MATTER OF P-H-&R-(G), INC.

DATE: JULY 26, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, which operates a [REDACTED] seeks to permanently employ the Beneficiary as its food and beverage (F&B) operations manager 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 capacity, or that the Beneficiary has been employed abroad in a managerial 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 submitted evidence, and by issuing a decision that was inconsistent with earlier approvals of nonimmigrant petitions filed on the Beneficiary's behalf.

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—

- (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 A MANAGERIAL CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial capacity; and (2) the Beneficiary has been employed abroad in a managerial capacity. The Petitioner does not claim that the Beneficiary will be or has been employed in an executive capacity. Therefore, we restrict our analysis to whether the Beneficiary will be, and has been, employed in a managerial 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)(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 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 a Managerial Capacity

1. Evidence of Record

The Petitioner filed Form I-140 on November 26, 2014. [REDACTED] the Petitioner’s director of human resources, stated that the Beneficiary would “supervis[e] two (2) managers with a staff in excess of seventy (70) employees,” “manage all essential functions of the petitioner,” and “[h]ave the authority to hire and fire or recommend those as well as other personnel actions . . . for other employees he directly supervises.”

The Petitioner submitted an organizational chart, which showed five departments under the authority of the general manager. One of those departments, Food & Beverage, showed the following hierarchy:

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- Director of F&B
- Assistant Director of F&B
- F&B Operations Manager (the Beneficiary)
- F&B Bar & Lounge Manager, F&B Consultant, and Banquet Manager

According to the chart, the F&B department oversees six outlets. The bar & lounge manager has authority over three of these outlets; the consultant manages two; and the banquet manager runs the remaining outlet, aided by an assistant manager. Each outlet also has servers; five of the six have at least one supervisor; and three have interns.

The Petitioner submitted a job description for the Beneficiary's position, with the average percentage of time devoted to each of the described duties. The job description is on the letterhead of [REDACTED]. The document indicated that the Beneficiary's position reports to the assistant director of food and beverage.

- 35% Work with the individual outlet managers concerning food and beverage quality, service, cleanliness, merchandizing and promotions.
- 35% Interview, select, train, supervise, counsel and discipline restaurant staff for the efficient operation of the outlet. Organize and conduct pre-shift and departmental meetings communicating pertinent information to the staff, such as house count and menu changes. Schedule and direct staff in their work assignments.
- 10% Maintain profitability of outlet to support overall hotel operation. Control payroll and equipment costs (minimizing loss and misuse). Ensure par stock levels are maintained by calculating inventory, ordering and retrieving supplies and stocking shelves by stooping, bending, lifting heavy articles and reaching overhead. Evaluate cost effectiveness of all aspects of operation. Develop and implement cost saving and profit enhancing measures. Review, prepare and update forecasts as needed.
- 10% Utilize prescribed cash handling procedures to accurately charge customers, create forecast and revenue reports and write correspondence.
- 10% Assist managers in training and development of staff in order to provide most positive customer service and employee well being. Oversee divisional matters as they relate to federal, state and local employment and civil rights laws.

The description also listed five "supportive functions" without indicating the time devoted to each:

- Monitor outlet activity and trouble shoot as needed.
- Computer proficiency in order to prepare budgets, forecasts, etc.
- Assist Chef and Food & Beverage Manager with tastings, plate presentations, etc.
- Attend outside as well as internal promotions, meetings, or training to remain current with food and beverage knowledge.

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- Perform other duties as assigned by Director, Food & Beverage or Food & Beverage Manager.

The Director issued a request for evidence (RFE), asking for more detailed job descriptions for the Beneficiary and for his subordinates. In response, the Petitioner submitted a new job description. Like the first job description, the revision is on [REDACTED] letterhead, but where the first version was unsigned, the second version bears [REDACTED] signature. The new description is mostly identical to the earlier version, except with certain changes and substitutions to be discussed below.

The Petitioner submitted capsule job descriptions for the Beneficiary's immediate subordinates:

Bar & Lounge Manager: Responsible for managing the day-to-day operations of the bars and lounge in order to meet and exceed guests' needs and business requirements while ensuring adherence to service standards and operating procedures.

Banquet Manager: Responsible for effectively monitoring the daily operations of the Banquet Department, including providing support and guidance to fellow banquet personnel to ensure a successful and effective operation ending in a positive guest experience.

F&B Consultant: Responsible for developing, implementing, and maintaining quality standards for outlets, including supervision and direction of service staff. Ensure excellent customer service.

The Director denied the petition, concluding, in part, that the Petitioner did not establish that the Beneficiary will be employed in a managerial capacity in the United States. The Director found that the Beneficiary's primary duties were non-managerial, and that the Petitioner had not shown that the Beneficiary's subordinates work in supervisory, managerial, or professional positions.

On appeal, the Petitioner states that it has met all the elements of the definition of a managerial capacity. The Petitioner also asserts that prior approvals of nonimmigrant petitions for the Beneficiary indicate that, in the past, USCIS has been satisfied with the Petitioner's evidence.

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 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.¹ The Petitioner's description of the job duties must

¹ See 8 C.F.R. § 204.5(j)(5).

clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity.²

The first version of the Beneficiary's job description included a percentage breakdown, but only for five broad groups of duties. Those broad groups combined managerial and non-managerial functions. For example, the second group included selection and discipline of subordinates, which are managerial, but it also included the non-qualifying function of training those employees. Other elements are clearly non-managerial, such as "stocking shelves by stooping, bending, lifting heavy articles and reaching overhead." The job description indicated that the Beneficiary must be able to occasionally pull or push carts weighing up to 250 pounds.

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 Job elements such as "[m]aintain profitability" refer to overall goals without describing what the Beneficiary does to achieve those goals. Because the first job description lacked important details, the Director asked the Petitioner for a more comprehensive description. The Petitioner submitted a new description, but it did not contain more details. Instead, the Petitioner altered the first description to add more references to managerial leadership.

For example, the Petitioner changed "[w]ork with the individual outlet managers" to "[d]irecting and supervising individual outlet managers," and changed "[a]ssist managers in training and development of staff" to "[l]eading managers in training and development of staff." The Petitioner also revised some of the "supportive functions," changing "[m]onitor outlet activity" to "[o]versee outlet activity" and "[a]ssist Chef and Food & Beverage Manager" to "[a]dvice Chef and Food & Beverage Manager." The new list omitted the item regarding "[c]omputer proficiency."

The changes tended to inflate, rather than clarify, the job description. Instead of adding detail as requested, the Petitioner changed essential elements of the description, indicating that he supervised functions that he was previously said to perform himself. As a result, the two versions of the job description are incompatible and cannot both be correct. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements.⁴

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.

² *Id.*

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 *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner states that “[t]o insist that an Operations Manager in charge of six hotel outlets operations does not have ‘managerial capacity’ is without common sense.” The record, however, does not place the Beneficiary entirely in charge of those outlets. Rather, he reports to the assistant director of F&B, who in turn reports to the director of F&B. The record does not show that those higher officials have any responsibilities apart from the Petitioner’s six F&B outlets. These nested positions appear to limit the scope of the Beneficiary’s authority.

In the denial notice, the Director found that the Petitioner did not “establish that the subordinate workers are supervisory, managerial, or professional employees.” The Director quoted the three subordinate job descriptions discussed above, and concluded that the Petitioner had not shown that any of the Beneficiary’s subordinates work in professional occupations. The Petitioner, on appeal, does not dispute this specific finding, but maintains that there are several layers of subordinates below the Beneficiary, and therefore he oversees supervisors and/or managers.

As discussed above, the record is inconsistent as to the level and extent of the Beneficiary’s authority over supervisors in the individual food outlets. The Petitioner has not shown that the Beneficiary primarily managed or supervised professional, managerial, or supervisory subordinates.

A position can have managerial elements without being primarily managerial in nature. The Petitioner has established that there are managerial elements to the Beneficiary’s position, such as hiring authority and oversight over individuals who are, themselves, supervisors of lower-level employees. The Petitioner, however, has not shown that these managerial elements constitute the Beneficiary’s primary duties. As explained above, the Director issued an RFE to obtain more information about the Beneficiary’s position, but the Petitioner responded by changing rather than clarifying the job description.

The Petitioner observes that USCIS had approved several nonimmigrant petitions that the Petitioner had filed on the Beneficiary’s behalf, when the Beneficiary occupied a lower-level position. Each petition constitutes a separate record of proceeding. In the denial notice, the Director did not claim to have reviewed the prior approvals of the nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same evidence contained in the current record, the approvals would have been 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.⁵

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

B. Foreign Employment in a Managerial or Executive Capacity

The Beneficiary is already in the United States working for an affiliate of the foreign employer. Therefore, the Petitioner must submit a statement from an authorized official of the petitioning

⁵ *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r 1988).

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United States employer which demonstrates 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.⁶

1. Evidence of Record

Before he traveled to [REDACTED] to work for the Petitioner in 2008, the Beneficiary worked as a restaurant manager for [REDACTED] in the [REDACTED]. The Petitioner submitted a two-page job description from the [REDACTED] Operations Manual, indicating that the restaurant manager reports to the F&B director and supervises "All F&B Department." The "Job Summary" reads: "To assist the F&B Director in planning, organizing and directing the overall F&B operation in every aspect and to prepare himself for his future role as Food and Beverage Director." The rest of the description consisted of a list of 29 "Key Responsibilities." Some of these responsibilities took the form of general goals and expectations, such as "achieve and maintain set standards of quality Food and Beverage service." Other list items identified specific duties or levels of responsibility, such as the following examples:

- Training of F&B Supervisors and rank and file staff.
- Performance appraisals of department heads.
- Evaluates possible internal promotions and transfers as well as terminations and special awards.
- Approves staff schedules, vacations, attendance records and payroll time sheet.
- Is fully responsible for the F&B department during F&B Director absence.
- Is fully responsible for the day-to-day operation in all outlets.

A list submitted with the petition indicated that the Beneficiary supervised 27 named employees:

- 1 outlet supervisor
- 1 head waiter
- 13 waiters/waitresses
- 1 bartender
- 3 musicians/entertainers
- 1 chief steward
- 2 kitchen helpers
- 2 dishwashers
- 3 commercial cleaners

⁶ See 8 C.F.R. § 204.5(j)(3)(i)(B).

⁷ The [REDACTED] is a U.S. possession, but employment there before November 28, 2009 is considered employment abroad. See generally, Memorandum of Donald Neufeld, Acting Assoc. Dir., USCIS, *Effect of the CNRA, Title VII of Public Law 110-229, Classification of Aliens under Section 101(a)(15)(L) and 203(b)(1)(C)* (November 23, 2009).

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In the RFE, the Director requested a more detailed description of the Beneficiary's employment. In response, the Petitioner submitted a new percentage breakdown of the Beneficiary's duties abroad:

- 20% Managing the restaurant day-to-day operations. . . . Responsible for development, implementation, and review of the policies, procedures, practices and standards and control to ensure they are consistently applied.
- 20% Responsible for developing and implementing objectives for the team. . . . Participate in the interview and selection process for associates. Have the authority to recommend hire and fire of employees. Train, develop, coach and manage the performance of direct and indirect reporting associates to ensure the efficient running of the restaurant. . . .
- 20% Managing the marketing of the restaurant by directing advertisements, inviting food editors and the local media to review the restaurant and promoting to local businesses to hold social events at the restaurant.
- 20% Responsible for the inspection of the dining room and kitchen areas. . . . Ensure that all health and food safety regulations are adhered to, by verifying temperatures, observing presentation, tasting products and checking preparation methods to determine quality. Provide guidance toward improvement and make necessary adjustments for consistency.
- 10% Responsible for budgetary responsibilities including forecasting of covers and revenues, while controlling payroll and other relevant costs, minimizing loss and misuse. . . . Evaluate cost effectiveness of all aspects of operation. Develop and implement cost saving and profit enhancing measures. Manage and control stock ensuring par levels are maintained.
- 10% Leading management meetings, writing reports and performing other managerial functions related to the role.

The Petitioner submitted an organizational chart, which indicated that the Beneficiary was responsible for two outlets, called [REDACTED] with others in charge of all other food and beverage workers, including kitchen staff, stewards, and bar workers, under other supervisors. A new list of subordinates indicated that the Beneficiary had two direct reports, both outlet supervisors, and six indirect reports, all wait staff, for a total of eight subordinates rather than the 27 previously claimed. Five of the six names did not appear on the earlier list of the Beneficiary's claimed subordinates.

In the denial notice, the Director stated that none of the positions subordinate to the Beneficiary qualify as professional. The Director also found that "[i]t appears that the beneficiary devoted a majority of his time performing non-qualifying administrative, operational, and first-line supervisory tasks."

On appeal, the Petitioner does not address the Director's finding regarding the Beneficiary's past employment abroad.

2. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that the Beneficiary was employed abroad in a managerial capacity.

On appeal, the Petitioner states that “[t]he Decision focuses on Beneficiary’s current and future position,” but the Director devoted more than two pages of the decision to the Beneficiary’s earlier work abroad. The Director quoted the percentage breakdown in full, and discussed the subordinate positions identified in the Petitioner’s RFE response.

The record is not consistent regarding the degree of the Beneficiary’s authority during his employment abroad. The Petitioner first submitted a “Listing of Employees to be Supervised,” with the Beneficiary’s name at the top followed by 27 other names, but in response to the RFE, the Petitioner identified only eight subordinates, most of them not on the first list.

The two job descriptions submitted for the Beneficiary are also inconsistent. The version submitted in response to the RFE indicated that the Beneficiary wrote reports and devoted 20% of his time to managing marketing and promotion, but the original list of 29 “Key Responsibilities” did not include either of those functions. The earlier list indicated that the Beneficiary “[a]ttends . . . internal departmental meetings,” while the later version stated that he led those meetings. The earlier list indicated that the Beneficiary “[p]articipates in preparing annual F&B budget,” but not include the “budgetary responsibilities” in the later list, such as: “Evaluate cost effectiveness of all aspects of operation. Develop and implement cost saving and profit enhancing measures. Manage and control stock ensuring par levels are maintained.”

Both versions of the job description include the elements of the definition of managerial capacity, such as hiring authority and authority over day-to-day operations, but the two descriptions are so different from one another that their accuracy is doubtful. A description of the Beneficiary’s claimed managerial duties is a core requirement for eligibility. The Petitioner cannot meet that requirement by submitting conflicting descriptions. 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.⁸

For the above reasons, the Petitioner has not established that the Beneficiary worked abroad in a qualifying managerial capacity.

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

⁸ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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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 P-H-&R-(G), Inc.*, ID# 17442 (AAO July 26, 2016)