



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

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

MATTER OF ETCC-USA INC.

DATE: SEPT. 13, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a supplier of imported automobile mufflers and related exhaust parts, seeks to permanently employ the Beneficiary as its franchise manager for North America 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, concluding that the evidence of record did not establish that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits copies of previously submitted evidence and asserts that the Director erred by disregarding evidence of the Beneficiary's role in managing franchises.

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

The Director denied the petition based on a finding that the Petitioner did not establish that it will employ the Beneficiary in a 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 the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.¹

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.

¹ See section 101(a)(44)(C) of the Act.

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A. Evidence of Record

The Petitioner filed Form I-140 on March 20, 2015, and stated on the form that it had three current employees. The record shows that these employees include a chief executive officer (CEO), a franchise manager (the Beneficiary), and a warehouse assistant.

██████████ the Petitioner's CEO, stated that the Petitioner's parent company supplies parts to ██████████ a franchisor for several businesses in New England. ██████████ stated: "Our roster of U.S. franchises . . . are all operated under exclusive licensing agreements which are managed by the Franchise Manager." He further stated that the Beneficiary "manages all ongoing relationships with our U.S. franchises at ██████████ including all matters pertaining to licensing, marketing, contract enforcement, and product development. [The Beneficiary] is responsible for 27 ██████████ outlet locations."

██████████ stated that the company's warehouse assistant "reports directly to [the Beneficiary] and relieves him from performing non-managerial tasks. . . . [The Beneficiary] will not be involved whatsoever in producing a product or providing a non-managerial service." When larger shipments require additional labor, an ██████████ franchise in ██████████ Massachusetts, has agreed to provide "all labor required to assist with the off-loading of containers arriving from [the Petitioner's] factory in South Africa."

██████████ provided the following breakdown of the Beneficiary's time with the petitioning company:

Oversee Franchise Agreements & Monitor Franchise Finances (30%)

- [The Beneficiary] monitors all . . . contracts in place with ██████████ . . . Should any of the franchisees at any time violate the conditions of the agreement, [the Beneficiary] is authorized to act in the best interests of [the Petitioner] in any manner he sees fit.
- . . . [T]he Franchise Manager balances over 25 locations . . . ensuring our agreements are maintained and addresses any issues the franchisee may encounter given their location or client base.
- [The Beneficiary] and the CEO . . . review the franchisees monthly balances. . . . [The Beneficiary] will work with struggling franchises and . . . will advise and implement the appropriate strategy for the underperforming franchise.

Licensing Management (25%)

- . . . [The Beneficiary] manages the licensing [of authorized dealers], leads training of franchisees and addresses license violations unilaterally.
- . . . [The Beneficiary] visits each franchisee at least once every two months.
- [The Beneficiary] continually re-educates the . . . franchisees regarding the values of being part of a universally recognized group. . . .

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Modify and Determine Product Lineup (15%)

- [The Beneficiary] serves as the primary liaison between all the franchises and production in South Africa. . . .
- Changes and additions to the existing range of products supplied by [the Petitioner] can be made by [the Beneficiary] at his discretion. . . .
- [The Beneficiary] works with each franchise to determine[] what products perform best at their location and what products are in demand from South Africa. . . .
- In 2009, he assisted in shifting the product focus to replacement items. . . .

Manage Marketing (15%)

- . . . [The Beneficiary] will lead the delivery of the marketing program. . . .
- [The Beneficiary] developed an effective marketing plan. . . .

Product Development (15%)

- [The Beneficiary] . . . coordinates with the Planning and Logistics Manager, Dispatch Clerk and the Warehouse Manager in South Africa on the development of new products based on his ideas, franchise requests, and customer demands.

██████████ added that the Beneficiary “will carry out the duties of the Chief Executive Officer” in the CEO’s absence. The record does not show how often this would be the case.

The Director issued a request for evidence (RFE), instructing the Petitioner to submit evidence that the Beneficiary will be employed in a managerial or executive capacity in the United States. In response, ██████████ provided a slightly expanded and revised description of the Beneficiary’s duties which stated that the Beneficiary is “a Functional Manager” who “manages the essential function of Franchising for the company.” ██████████ referred to both a “warehouse manager” and a “warehouse assistant,” but a newly submitted organizational chart showed only the warehouse assistant.

As an example of the Beneficiary’s work, the Petitioner submitted what it called “Beneficiary’s U.S. Month by Month Sales Analysis for All Customers.” The analysis consists of a series of spreadsheets, listing the items sold to each customer and the total income from those sales.

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 acknowledged the Petitioner’s submission of a job description, but determined that it was vague and general, that “the petitioner has not shown what specific tasks actually fall within these broad categories,” and that “[t]he job description also includes several non-qualifying duties.” The Director further concluded that the warehouse assistant’s job description limits his responsibilities and does not show that he relieves the Beneficiary from performing non-qualifying duties.

Regarding the assertion that the Beneficiary is a function manager, the Director stated that “[t]he petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner provided a vague job description that did not discuss how the beneficiary is managing an

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essential function.” The Director concluded that the Beneficiary’s “managerial job title and general oversight authority over the business [are] insufficient to elevate his position to that of a ‘function manager.’”

On appeal, the Petitioner states that the Director’s “conclusion disregards the evidence . . . demonstrating the beneficiary’s role managing the [petitioner’s] different franchises. The day-to-day job functions and duties are managed through these franchises and not carried out by the Beneficiary himself.” The Petitioner submits no new evidence, instead asserting that the RFE response (duplicated on appeal) contains the necessary information.

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 it will employ the Beneficiary in a managerial or executive capacity.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner’s description of the job duties.² 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.³

The Director found the Petitioner’s description of the Beneficiary’s job duties to lack detail, and to include non-qualifying activities. The Petitioner does not address this finding on appeal.

Several of the Beneficiary’s duties are described so vaguely that we cannot tell what specific activities they entail. Among these vaguely-described duties are “monitoring contracts” and “work[ing] with each franchise to determine[] what products perform best at their location.”

The Beneficiary reviews sales reports, but the Petitioner has not said who performs the non-qualifying administrative work of compiling those sales reports. Similarly, the Petitioner stated that the Beneficiary “developed an effective marketing plan . . . using a range of tools (direct mail/email, events, PR, webcalls, web, conferences, phone follow up etc.” Developing a marketing plan and using the listed tools appear to be the work of a marketing employee rather than a manager. The Petitioner did not identify who, other than the Beneficiary himself, would perform these non-qualifying marketing tasks.

The Petitioner has submitted marketing materials for [REDACTED] and asserted that these materials were “created under direction of Beneficiary,” but the record does not support this claim.⁴ The licensing

² See 8 C.F.R. § 204.5(j)(5).

³ *Id.*

⁴ 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*

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agreement between [REDACTED] and the Petitioner does not state that the Petitioner will prepare [REDACTED] marketing materials or oversee that preparation. The agreements with individual franchisees state that the Petitioner must approve “signs, displays, advertising and promotional material,” but it does not necessarily follow that the Beneficiary, or anyone else at the petitioning company, actively oversaw the creation of those materials.

The Petitioner has submitted copies of agreements executed between the Petitioner and [REDACTED] and between the Petitioner and individual authorized dealers (including [REDACTED] franchisees). The agreement between the Petitioner and [REDACTED] indicates (on page 2) that the Petitioner “has, in conjunction with [REDACTED] designed a muffler for its exclusive use.” Page 9 of the agreement indicates that the Petitioner “shall provide initial training,” and possible future training, to the dealers. Conducting training sessions and designing mufflers are neither managerial nor executive functions, and the Petitioner has not specified which of its three employees is responsible for performing those non-qualifying tasks.

Finally, the Beneficiary’s duties would include such tasks as addressing customer complaints as needed, providing advice to franchisees on products and demographics, representing the company in an effort to acquire new clients, liaising with the foreign entity on product lineup and development issues, and managing “the dispatch, receiving and ordering of goods of any nature that our franchisees require.” While all of these tasks are undoubtedly necessary for the smooth operation of the company’s business model, the record does not show how they are managerial in nature. Overall, while the record shows that the Beneficiary exercises discretionary authority to oversee the Petitioner’s relations with [REDACTED] franchisees under the terms of authorized dealership agreements, his role also includes operational, administrative, sales, marketing, and technical functions, rather than primarily managerial 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.

The statutory definition of “managerial capacity” allows for both “personnel managers” and “function managers.”⁵ Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The Petitioner does not claim that the Beneficiary is a personnel manager. Some materials refer to the Beneficiary’s only subordinate, the warehouse assistant, as the “warehouse manager,” but the Petitioner has presented no evidence that this subordinate’s duties are those of a manager or professional. The warehouse assistant has no subordinates and therefore cannot be a supervisor.

California, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

⁵ See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii).

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The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a “function manager.” The term “function manager” applies generally when a beneficiary’s managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an “essential function” within the organization.⁶ The statute and regulations do not define the term “essential function.” If a petitioner claims that a beneficiary will manage an essential function, that petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary’s daily duties dedicated to managing the essential function.⁷ In addition, a petitioner’s description of a beneficiary’s daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

Here, the essential function in question appears to be handling the licensing of the Petitioner’s products to dealers who hold [REDACTED] franchises. The Petitioner, however, has not provided enough information to show that the Beneficiary’s efforts in this area would be primarily managerial rather than administrative or operational. Stating that he would manage licensing, for example, does not specify what identifiable tasks that work would entail, apart from the non-qualifying act of personally providing training to franchisees. As discussed, the record indicates that the Beneficiary would perform a wide range of duties with respect to the [REDACTED] franchise operations as his only subordinate performs limited duties and there are no employees or other staff available to assist him with day-to-day monitoring, training, administrative, marketing, product ordering, and other non-managerial functions.

The Petitioner has, at times, referred to the Beneficiary’s position as “executive-managerial.” 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.⁸ 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 a beneficiary to direct and a 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 an owner or sole managerial employee. A beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.”⁹

The Petitioner has not shown that the Beneficiary would have the required level of control over the organization to qualify as an executive. Rather, his responsibility would lie in overseeing adherence

⁶ See section 101(a)(44)(A)(ii) of the Act.

⁷ See 8 C.F.R. § 204.5(j)(5).

⁸ Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

⁹ *Id.*

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to licensing agreements. The Petitioner has sometimes used the word “executive” (hyphenated with “managerial”) but has not explained how the Beneficiary’s position conforms to the statutory and regulatory definition of the term. In the RFE response, the Petitioner emphasized the claim that the Beneficiary is a function manager. In this way, the Petitioner essentially retreated from the claim that the Beneficiary is an executive, and the Petitioner does not return to it on appeal. Instead, it appears that the Petitioner has used both the words “executive” and “manager” because the underlying statute also uses both words.

Beyond the level of the Beneficiary’s authority within the petitioning entity, 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.”¹⁰ 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.¹¹

The Director noted that the only specified duties for the warehouse assistant are that he “is responsible for ensuring products that arrive to the U.S. warehouse from South Africa are inventoried, organized and prepared for delivery.” The Director found that this narrow set of duties appeared to leave the Beneficiary responsible for many other administrative and operational tasks that do not fall within the statutory definition managerial or executive capacity.

The Petitioner maintains that the franchisees perform the non-qualifying operational work, leaving the Beneficiary free to perform entirely managerial duties. The Petitioner’s organizational chart included [redacted] franchises, [redacted] referred to “our U.S. franchises,” and the statement submitted on appeal refers to [redacted] different franchises.” Misstatement of the Petitioner’s name aside, the record does not show that the Petitioner has franchises in the United States. The Petitioner has not established any ownership interest in [redacted] or any of [redacted] franchises. The Petitioner is a supplier of automobile parts; while the independently owned dealers ultimately sell the Petitioner’s products to consumers, they do not perform the day-to-day tasks necessary to operate the Petitioner’s business. The franchises are not contractors whom the Petitioner has hired to perform specific functions. Rather, the Petitioner is a supplier to the franchises; a licensor rather than a franchisor. They are separate entities on the supply chain, each with their own distinct and self-contained functions. We will not consider the franchises and other retailers to be extensions of the Petitioner’s business, and we cannot find that the

¹⁰ *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).

¹¹ *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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franchises and their supplier are, collectively, a single business organization over which the Beneficiary exercises managerial control. The Beneficiary's authority is restricted to the petitioning U.S. entity.

The Director addressed the above issue in the denial notice, stating that "the petitioner claimed that the beneficiary works with and monitors the managers at [REDACTED]. However, the record only contained the Licensing Agreement, which is not sufficient to support the petitioner's claim." The agreements between the Petitioner and various retailers indicate that, as [REDACTED] authorized licensor, the Petitioner has the authority to determine whether a given dealer qualifies for an [REDACTED] franchise; to approve the dealer's "signs, displays, advertising and promotional material," and to review and copy each dealer's records. These clauses, however, do not grant any of the Petitioner's employees managerial or executive authority over the franchisees or their employees. The agreements specify that "[t]he AUTHORIZED DEALER is not an agent or employee of" the Petitioner.

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

III. DOING BUSINESS

Beyond the Director's decision, additional information has recently surfaced which may be relevant to the Petitioner's eligibility to seek employment-based immigration benefits on the Beneficiary's behalf.

Public records indicate that the Commonwealth of Massachusetts involuntarily dissolved the petitioning corporation on June 30, 2016.¹² Therefore, it is not evident that the Petitioner still exists, or has the right to conduct business in Massachusetts. As a result, the continued existence of a valid job offer is in doubt.

We do not dismiss the appeal on the basis of this new information, but the Petitioner must address this information in any future action relating to this proceeding or any future petition.

IV. 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 with the petitioner.¹³ Here, that burden has not been met.

¹² Source: http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?SEARCH_TYPE=1 (printout added to record August 10, 2016).

¹³ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).

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ORDER: The appeal is dismissed.

Cite as *Matter of ETCC-USA Inc.*, ID# 9264 (AAO Sept. 13, 2016)