



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

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

MATTER OF S-A-, INC.

DATE: OCT. 31, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an education business, seeks to permanently employ the Beneficiary as its “Director for Asian Market for Recruitment” 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 of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary had been employed in a managerial or executive capacity for the foreign entity.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary’s previous L-1A approval, based on the same facts regarding the Beneficiary’s foreign employment, should have resulted in a favorable approval of this Form I-140, Immigrant Petition for Alien Worker. The Petitioner contends that the Beneficiary directed an essential function for the foreign entity and thus qualifies as a manager.¹

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

I. LEGAL FRAMEWORK

Section 203(b)(1)(C) of the Act makes an immigrant visa available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate.

A United States employer may file a Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The petition must include a statement from an

¹ The Petitioner does not claim that the Beneficiary worked in an executive capacity. Accordingly, we restrict our analysis to eligibility under the statutory definition of managerial capacity.

authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

The Act defines the term “managerial capacity” as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

II. EMPLOYMENT IN A MANAGERIAL CAPACITY ABROAD

The Director denied the petition determining that the record did not include a sufficiently detailed description of the Beneficiary’s duties for the foreign entity and that the record did not include sufficient evidence to establish that the Beneficiary managed an essential function, as the Petitioner claimed.

The Petitioner states that it provides academic enrichment programs for international students to successfully matriculate in the U.S. system and that its business develops and recruits international students for these programs in Asia. The Petitioner asserts that it depends on international recruitment abroad to bring in business and that the Beneficiary oversees this critical component both “domestically in the U.S. in the past year and a half and during his 6-year service at [the foreign entity].” The Petitioner claims that the Beneficiary directed and organized a marketing campaign for the Petitioner’s products through agents, partner organizations, and individually to the entire region, and that his position did not involve actual recruitment. The Petitioner avers that marketing and recruitment are an essential function and that the Beneficiary is the manager of this essential function.

The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term “essential function” is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a petitioner must clearly describe the duties to be performed in managing the essential function, or more specifically, identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary’s daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, a petitioner’s description of a beneficiary’s daily duties must demonstrate that the beneficiary will manage the function rather than

Matter of S-A-, Inc.

perform duties related to the function. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02 (AAO Apr. 14, 2016).

We will address both the foreign entity's description of the Beneficiary's duties as well as the foreign entity's staffing to determine whether the Petitioner established that the Beneficiary was a function manager abroad. We note that when reviewing staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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. Duties

When examining the executive or managerial capacity of a beneficiary, we will look first to a petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the petitioner must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the petitioner's other employees. See, e.g., *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner initially stated that the Beneficiary "directed a major function of the Subsidiary [the Beneficiary's foreign employer] which includes creating and managing agencies in order to target new markets and potential leads in Asian regions," and that he "supervised independent contractors and subcontractors for two Agents and three Educational Agencies" "while holding a senior position to carry out the activities of the managed function." The Petitioner asserted that the Beneficiary "also managed an essential function within the Subsidiary, which is new business creation and recruitment in the Asian markets," without which the Petitioner "would not have a pipeline to recruit new students." The Petitioner noted that the Beneficiary had full discretion to initiate talks and finalize agency agreements and memorandums of understanding and also interacted with senior-level managers of independent contractors and educational agencies.

In response to the Director's request for evidence for a more detailed description of the Beneficiary's duties for the foreign entity, including "actual specific day-to-day tasks," the Petitioner essentially re-stated the initial description as follows:

- [The Beneficiary] directed a major function of the Subsidiary which includes creating and managing agencies with a purpose of targeting new markets and potential leads in Asian regions. (20%)
- [The Beneficiary] managed the Independent Agent, [REDACTED] in China who controls three Subcontractors. . . . Other Independent Contractors [the Beneficiary] manage[d] are [REDACTED] and [REDACTED] in Korea who operate

- more than 15 agencies. [The Beneficiary] further managed three main Educational Agencies in China, Korea, and Japan. . . . (50%).
- [The Beneficiary] also managed an essential function within the Subsidiary, which is new business creation and recruitment in the Asian markets. This is an essential function of the Subsidiary because [the Beneficiary] created 90% of the Company's business through the leads that he created from partnerships and strategic Agency Agreements. Without [the Beneficiary's] performance as Director of Asian Market for Recruitment, the Company would not have a pipeline to recruit new students[.] (30%)

In the repetitive descriptions of the Beneficiary's duties for the foreign entity, the Petitioner emphasizes that the Beneficiary is a function manager and that the function managed is essential. However, the Petitioner does not provide a detailed description of the Beneficiary's actual day-to-day duties as those duties relate to the claimed essential function. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Moreover, the statements regarding the Beneficiary's employment capacity in essence repeat the language of the statute or regulations and do not satisfy the Petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Assocs., Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the descriptions provided, it appears that the foreign entity targets new markets and potential leads in Asian regions, and creates new business and recruits students in the Asian markets. The Petitioner, however, does not identify the Beneficiary's particular duties as they relate to marketing and recruiting potential students for the petitioning organization's business. The Petitioner also asserts that the Beneficiary supervised or managed independent contractors and subcontractors "while holding a senior position to carry out the activities of the managed function." However, the fact that the Beneficiary will manage or direct a business, or a portion of the 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" managerial in nature. Sections 101(A)(44)(A) of the Act.

Here, the record does not include sufficient detail regarding the specifics of the Beneficiary's routine activities to analyze. The record does not include evidence of who negotiates and writes the contracts, who prepares each contract amendment with registration and processing information, and who prepares the advertisements used to market the Petitioner's program and which are provided to the agencies and contractors. The record does not identify the Beneficiary's day-to-day duties involved in managing the contractors, agencies, and education agencies. The Petitioner does not delineate the tasks the Beneficiary performs and the tasks he delegates. The record does not include descriptions of duties demonstrating that the Beneficiary's duties are managerial and not administrative in nature. While the Beneficiary may have exercised discretion over the foreign entity's operations, including entering into new agency contracts, and may have possessed the requisite level of authority with respect to discretionary decision-making, the position descriptions

here are insufficient to establish that his actual duties would be primarily managerial in nature. Without additional detailed information on the Beneficiary's day-to-day duties and actual position at the foreign entity, the Petitioner has not established that the Beneficiary performed primarily as a manager.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial 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 foreign entity's organizational chart depicts the Beneficiary as the "Director of Asian Market for Recruitment" and lists two individual agents and three educational agencies (China, Korea, and Japan) as reporting to the Beneficiary. The record includes a second chart noting: that one of the individual agents is involved with three other entities; that the second individual agent is involved with 15 agencies; and, the names of the three educational agencies. The record includes a few agency agreements and several memorandums of understanding with other businesses, some of which appear on the second organizational chart. These agreements, however, do not include sufficient detail to establish that the agents, agencies, and businesses involved perform the operational, supervisory, and administrative tasks of the foreign entity's business, and thereby relieve the Beneficiary from performing non-qualifying duties. The record does not clearly set out the interaction, obligation, and responsibilities of the Beneficiary and the agents, agencies, and contracts he claims to supervise or manage.

The Petitioner asserts that recruiting and creating new business "is an essential function of the Subsidiary because the Beneficiary created 90% of the Company's business through the leads that he created from partnerships and strategic Agency Agreements." This statement indicates the Petitioner's belief that the Beneficiary is an essential employee, not that the recruitment and creation of new business is an essential function. Even if considering that the Petitioner meant to identify recruiting and creating new business as a specific function and that such overseas recruitment of potential students is essential to the Petitioner's business, the Petitioner attributed only 30 percent of the Beneficiary's time to managing this function. As noted above, the Petitioner provides minimal information regarding the actual tasks that are involved in managing this function. The agreements do not include sufficient detail to ascertain and analyze the Beneficiary's responsibilities and obligations and to determine whether his duties in relation to the agreements were managerial or administrative in nature.

The Petitioner also identifies a "major function of the Subsidiary" as "creating and managing agencies with a purpose of targeting new markets and potential leads in Asian regions." The Petitioner does not detail what is involved in "creating agencies" and the evidence of record does not

shed further light on the nature of this function. The record also does not include evidence of the Beneficiary's actual duties in relation to "directing" this function.

The Petitioner indicates that the Beneficiary spent 50 percent of his time managing the independent agents and agencies. The Petitioner does not expound upon the duties involved in managing the agents and agencies, and the agreements and memorandums of understanding do not identify the Beneficiary's specific role. The Petitioner has not articulated a specific function that included the majority of the Beneficiary's time, has not adequately described the essential nature of a specific function, and significantly has not corroborated its assertions that the Beneficiary will manage the function rather than perform the duties relating to the function.

The record also does not include sufficient evidence to demonstrate 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. Contrary to the common understanding of the word "manager," 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." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, or outside resources, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2). The Petitioner has not established that the Beneficiary had subordinate employees at the foreign entity to supervise and to carry out the operational and administrative tasks associated with the foreign entity's responsibility to promote the Petitioner and provide students for the Petitioner's programs. The record does not establish that the Beneficiary will primarily supervise managers, supervisors, or professional employees.

The Petitioner has not established that the Beneficiary's position for the foreign entity is a managerial position.

III. PRIOR APPROVAL

On appeal, the Petitioner asserts that the evidence used to document that the position abroad qualified as a managerial position resulted in the approval of the Beneficiary's L-1A nonimmigrant visa, and thus, should also be sufficient for the approval of the immigrant visa petition at hand. Because the record of proceedings of the approved petition is not before us, the Petitioner has not shown that the evidence is essentially the same in each petition. In any event, the other approval is not binding on us in the adjudication of the present appeal. Further, if the previous nonimmigrant petition was approved based on the same evidence contained in the current record, the approval would constitute an error on the part of the Director.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that the Beneficiary was employed in a managerial capacity for the foreign entity.

Matter of S-A-, Inc.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A-, Inc.*, ID# 749766 (AAO Oct. 31, 2017)