



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

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

MATTER OF C-P-R- CORP

DATE: SEPT. 25, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an activated carbon producer and seller, seeks to permanently employ the Beneficiary as its general 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 a managerial or executive capacity.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that it has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner asserts that the same two people own a majority of each company, and that the number of shares issued to these two individuals is sufficient to control each of the two companies.

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 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. The petition must include a statement from an 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).

II. QUALIFYING RELATIONSHIP

The issue to be discussed is whether the Petitioner has established that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See section 203(b)(1)(C) of the Act; see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The Petitioner's California Articles of Incorporation show that it is authorized to issue 200,000 shares. The record includes stock certificate No. 1 showing [REDACTED] holds 80,000 shares and stock certificate No. 2 showing that [REDACTED] holds 60,000 shares. Accordingly, [REDACTED] owns and controls the Petitioner with his majority ownership interest.

The record also includes the ownership and distribution of the Beneficiary's foreign employer's shares in the following proportion:

[REDACTED] - 42.20 percent
[REDACTED] - 24.46 percent
[REDACTED] - 15.17 percent
[REDACTED] - 7.34 percent
[REDACTED] - 7.34 percent
[REDACTED] - 3.49 percent

Based on the ownership interests set out above, [REDACTED] does not own a controlling interest in the foreign entity because he does not own a majority interest.

The Petitioner asserts on appeal that because the Petitioner's two shareholders, together own a majority interest in the foreign entity, it has established an affiliate relationship under the regulations.

The term "affiliate" means (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or; (2) one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 204.5(j)(2).

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities. See, e.g., *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct

the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

Here, however, the record does not include evidence that the Petitioner's two shareholders have entered into a voting agreement to vote their shares of the foreign entity as a single unit. U.S. Citizenship and Immigration Services has never accepted a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. The Petitioner is not one of two subsidiaries both of which are owned and controlled by the same individual. As noted above, the Petitioner's majority interest owner does not own a majority interest in the foreign entity. The Petitioner is not one of two legal entities owned and controlled by the same group of individuals. Rather, two shareholders own the Petitioner and six shareholders own the foreign entity, and the six shareholders do not own and control approximately the same share or proportion. The Petitioner's majority interest owner does not control the foreign entity because several of the foreign entity's shareholders together control a majority interest and may vote against his 42.20 percent interest. Based on the evidence submitted, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer.

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

Although the Director did not enter a finding on this issue, in our *de novo* review we find that the record is insufficient to establish that the Beneficiary will be employed in a managerial or executive capacity for the Petitioner. The Petitioner states on the Form I-140, that it is a ten-employee company.

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.

The Act defines the term "executive capacity" as an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function thereof; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act.

We will briefly address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's staffing to determine whether the Petitioner has established this eligibility

requirement. 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 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 executive or managerial 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 submitted a broad overview of the Beneficiary's intended duties for the Petitioner. In a request for evidence (RFE), the Director specifically noted that the job description submitted was vague and did not include sufficient detail regarding the Beneficiary's daily duties. In response to the RFE, the Petitioner submitted the same job description and added that the Beneficiary would also make orders with sufficient information so that the foreign entity could manufacture products to meet clients' requirements. This task, along with several of the other tasks outlined, suggest that the Beneficiary will perform the necessary non-qualifying operational tasks to maintain the Petitioner's business operations. The Petitioner also emphasized that its reason for transferring the Beneficiary to the United States is the need for marketing its products in the United States. If the Beneficiary is being transferred to perform the Petitioner's marketing tasks, this is also a non-qualifying duty.

The duties as described are insufficiently detailed to establish that the Beneficiary's proposed duties satisfy all four elements of the definition of managerial capacity or all four elements of the definition of executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. The Petitioner does not clearly establish whether the Beneficiary will primarily establish the policies of the company, will primarily supervise or direct other employees, or will primarily perform operational tasks such as marketing services and products, resolving problems, identifying trends, recommending selling prices or discount rates, improving product packaging, coordinating new product development, and other tasks necessary to sustain the Petitioner's daily operations. The Petitioner's descriptions of the Beneficiary's duties do not establish the Beneficiary's primary daily duties. Without additional detailed information on the Beneficiary's proposed position, we cannot ascertain the Beneficiary's actual role within the U.S. company. The Petitioner has not established that the position described is a managerial position or an executive position.

B. Staffing

The Petitioner does not provide an organizational chart describing the company's structure and hierarchy. Although the Petitioner claims that it employed ten people when the petition was filed in August 2015, the record includes a payroll summary for only seven employees for wages paid through April 30, 2015. The record does not include job descriptions for the Petitioner's other employees and does not identify where the employees fall within the organizational hierarchy.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act. 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. The record does not include sufficient probative evidence demonstrating that the Petitioner employs staff that will perform the operational and administrative tasks of the company and relieve the Beneficiary from performing primarily non-qualifying duties.

The Petitioner also has not established that the Beneficiary will primarily perform executive duties. 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. Section 101(a)(44)(B) of the Act. 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 they 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 the 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." *Id.* Without evidence of the Beneficiary's subordinates' duties and their placement in the Petitioner's organizational structure, the Petitioner has not established that the Beneficiary will primarily direct a subordinate level of managerial employees and that those employees will relieve him from performing primarily non-qualifying duties.

The record does not include sufficient probative evidence that the Beneficiary will perform primarily managerial or executive duties for the Petitioner. For this additional reason, the petition may not be approved.

IV. CONCLUSION

The appeal is dismissed because the Petitioner has not established a qualifying relationship with the Beneficiary's foreign employer. We also find that the Beneficiary's proposed position does not qualify as a manager or an executive position as defined in the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of C-P-R- Corp*, ID# 669776 (AAO Sept. 25, 2017)