



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

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

MATTER OF J-E- INC

DATE: SEPT. 27, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an automobile parts and service business, seeks to permanently employ the Beneficiary as its president 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 Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner will employ the Beneficiary in the United States in a managerial or executive capacity. We summarily dismissed the Petitioner's appeal from the Director's decision, but subsequently reopened the proceeding in order to adjudicate the appeal on its merits. The Petitioner has since supplemented the record with a brief, which we have taken into consideration.

On appeal, the Petitioner asserts that the Beneficiary qualifies as both a manager and an executive. The Petitioner also asks that we take into account the Beneficiary's experience, the contributions the Petitioner makes to its community, and facts that meet various eligibility criteria such as the company's continued business operations.

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, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. This classification does not require a labor certification.

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. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director found that the Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity.

A managerial capacity is an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization, 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, 8 U.S.C. § 1101(a)(44)(A). A personnel manager supervises and controls the work of other supervisory, professional, or managerial employees; the duties of a first-line supervisor are not considered managerial unless the employees supervised are professional. *Id.* A personnel manager must also have the authority to execute or recommend personnel actions such as hiring, firing, and promotions. A function manager need not directly supervise other employees, but must manage an essential function within the organization, or a department or subdivision of the organization, and function at a senior level within the organizational hierarchy or with respect to the function managed. *Id.*

An executive capacity is an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function of the organization; 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.

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. Duties

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.

The Petitioner stated that the Beneficiary “has the sole discretion over the day to day operations of the company” and “is responsible for the management of [the petitioning company] including the essential functions of the organization listed below,” with the approximate percentage of time devoted to each responsibility:

- Manage department managers of Sales & Administration and Technical Operations: assign their managerial responsibilities; confer with them regarding operational status and recommendations; coordinate managerial activities, resolve operational problems. (35%)
- Direct and coordinate financial and annual budget activities to fund operations, maximize investments. (10%)
- Analyze operations to evaluate performance of a company or its staff in meeting objectives or to determine areas of potential cost reduction, program improvement, or policy changes including directing customer relationship. (20%)
- Direct, plan, or implement policies, objectives, or activities of organizational [*sic*] or businesses to ensure continuing operations, to maximize returns on investments, or to increase sales of motors and motor parts. (10%)
- Negotiate or approve contracts or agreements with suppliers, distributors, and customers including international contracts for engine components in South Africa and abroad for the purpose of procuring foreign engines and parts (20%)
- Direct human resources activities. (5%)

The Director denied the petition, stating that the Beneficiary’s job description is overly broad and lacks details. On appeal, the Petitioner states: “there was a breakdown in duties to include percentage of time spent on each detail: how that can remotely be considered ‘broad’ is indeed puzzling.”

Detail, in a job description, goes beyond time percentages in the job description. Words and phrases such as “a company or its staff” and “organization[s] or businesses” are general references rather than a description of one particular position at a known company. Most of the language in the submitted job description paraphrased or directly quoted tasks listed for “Chief Executives” in O*NET, a database of job information sponsored by the U.S. Department of Labor.¹ For example, O*NET states that chief executives “[d]irect, plan, or implement policies, objectives, or activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, or to increase productivity.” The Petitioner changed “productivity” to “sales of motors and motor parts,” but left the broad reference to “organizations or businesses.”

The Petitioner must provide specific information about the particular position, rather than restate the basic requirements in the statute and regulations. See *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). For the same reason, the requirement to provide a detailed job description would be meaningless if a petitioner could meet

¹ See <http://www.onetonline.org/link/summary/11-1011.00> (printout added to record September 6, 2017).

that requirement simply by quoting, with slight modifications, a generic definition from a government-sponsored publication.

The Petitioner has not provided enough information about the Beneficiary's duties to establish that those duties are primarily those of a manager or executive.

B. Staffing

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.

A beneficiary's control over the business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive 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" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. 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 Petitioner has not established that the Beneficiary's 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."² 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 and the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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 must primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a "first line supervisor is not considered to be acting in a

² *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)).

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; 8 C.F.R. § 204.5(j)(4)(i).

At the time of filing in February 2014, the Beneficiary had three subordinates. Their job descriptions and tax documents included the following information:

Workshop & Warehouse Manager (also called Mechanic Manager & Lead Mechanic)

Earned \$23,140 in 2014

- Supervise Mechanic duties
- Diagnostics
- Repairs on vehicles
- Mechanical work
- Reports sales to Functional Manager
- Operates Forklift

Mechanic

Earned \$20,902 in 2014

- Diagnostics
- Mechanical work

Part-time mechanic

Earned \$8940 in 2014, all during the first quarter

- Mechanic work on heavy work load days

The above job descriptions indicate that the Beneficiary's subordinates relieve him from performing operational tasks relating to automobile repair and servicing, but not other tasks relating to running the business, such as purchasing, marketing, and facility maintenance. The Petitioner has not shown who acts as a cashier, accepting payment for services rendered.

The Petitioner's organizational chart also showed the Beneficiary's spouse as the "Administration, Sales & Marketing Manager," but her name is not on payroll documents from 2014, indicating that she left the company before the filing date. The Petitioner did not specify the former duties of that position or identify who performed them after the Beneficiary's spouse left the company. None of the job descriptions submitted for the Beneficiary or his subordinates include marketing or administrative duties. The Petitioner stated that the workshop and warehouse manager "reports sales," but it is not clear what this entails or how much of his time the task occupies.

To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor.³ The Director found that the Beneficiary performs "the duties of a first-line supervisor

³ Cf. 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the

over non-professional employees,” which do not qualify as managerial. On appeal, the Petitioner asserts that its mechanics “were hired for their experience, knowledge and abilities” rather than for their academic credentials. The Petitioner asks “for consideration that hands on and real world experience can, and should, be valued,” and cites case law which, according to the Petitioner, shows that “persons may be recognized as members of a professional class without the normally required academic degree – specifically whether no such degree program may exist.” None of the cited case law recognizes automobile repair or any related field as a profession.⁴ We note that the statute distinguishes between “professionals” and “skilled workers.” See section 203(b)(3) of the Act. The distinction exists not to denigrate skilled work, but to recognize that there are significant differences in the ways one prepares for employment in the two types of occupation.

The Petitioner has not shown that any of his subordinates are supervisory or managerial employees. One employee has a managerial title and is nominally a supervisor, but from the duties described, that employee appears to be primarily a mechanic, with at least one non-supervisory duty (operating a forklift) not shared with any other employee. It is not evident that he spends most, or even much, of his time supervising one or two subordinates.

The Petitioner asserts that the Beneficiary is a function manager because he manages “an essential function – namely the procurement of merchandise, the negotiation of contracts and services and the supervision of provision of services from the team.” A function manager’s managerial role arises not from supervising or controlling the work of managerial, supervisory, or professional staff but instead from responsibility for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act. 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. 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 perform the duties related to the function.

With respect to “the procurement of merchandise,” the Petitioner has listed its suppliers, but the record does not show who handles the actual purchasing of supplies and inventory; it does not

Act states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

⁴ Specifically, the Petitioner cites: *Matter of Yaakov*, 13 I&N Dec. 203 (Reg’l Comm’r 1969); *Matter of Arjani*, 12 I&N Dec. 649 (Reg’l Comm’r 1966); *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1996); and *Matter of Devnani*, 11 I&N Dec. 800 (Acting D.D. 1966). The beneficiary in *Yaakov* was a librarian with 3½ years of college education; *Arjani* concerned an accountant with a bachelor’s degree and postgraduate education; *Bienkowski* related to an economist with “extensive employment experience”; and the beneficiary in *Devnani* was an organic chemist with “extensive specialized experience.” The cited cases show that, in some unusual instances, a person can work in a profession without first earning the normally required degree; but none of the cited cases expanded the definition of “profession” to encompass occupations such as automobile repair that normally do not require a bachelor’s degree.

appear in any employee's job description. The Petitioner does not address this gap in the record or establish that the Beneficiary does not need to perform this task himself.

The Petitioner has documented its employment of a small number of subordinate employees who work as automobile mechanics, but with the exception of an accountant who prepares the company's tax returns, the Petitioner has not shown who relieves the Beneficiary from having to perform routine administrative functions that are neither managerial nor executive.

The job description, as submitted, includes references to "department managers of Sales & Administration and Technical Operations." The Director noted that no such departments appear to exist in the petitioning organization; the employee tasked with sales and administration left the company before the petition's filing date. The Petitioner does not address this finding on appeal.

The Petitioner asserts that "ALL managers" sometimes perform non-managerial tasks. The statute takes this into account, requiring that a beneficiary's duties be *primarily* rather than *exclusively* managerial. Even so, the burden is on the Petitioner to demonstrate that the Beneficiary spends the majority of his time on managerial tasks. The Petitioner has not provided enough information to meet that burden, and the Petitioner has not shown who performs routine business functions other than automobile service and repair.

Because the Petitioner has not established that the Beneficiary primarily manages (rather than performs) a specified essential function of the company, the Petitioner has not shown that the Beneficiary is a function manager.

In the initial appellate brief, the Petitioner stated: "We are extremely disturbed at the reference to [the Beneficiary] not qualifying as an 'executive' – specifically as no mention of an executive position has been made in the record of filings. Perhaps the officer has gotten the petition confused." In a supplementary brief, however, the Petitioner states: "we are persistent on this petition primarily because [the Beneficiary] also would meet the [definition] of Executive Capacity." The Petitioner does not elaborate on this assertion, except to paraphrase the definition by stating that the Beneficiary directs the company, establishes its goals and policies, and exercises wide latitude in discretionary decision making.

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. 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 is not deemed an executive under the statute simply by virtue of an executive title or by "directing" the enterprise as an owner or sole managerial employee.

The Beneficiary's control over the entity which he wholly owns is undisputed. But the Petitioner has not provided sufficiently detailed, reliable information to show that the Beneficiary's work consists *primarily* of managerial or executive duties.

The Petitioner asserts that USCIS previously approved petitions granting the Beneficiary L-1A nonimmigrant status as an intercompany transferee. Each petition filing is a separate proceeding with a separate record; the nonimmigrant petitions are not part of the record now before us. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). That said, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are in the current record, the approvals would constitute material error on the part of the Director. 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. *See Matter of Church Scientology Int'l*, 19 I&N Dec. at 597. USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Eng'g Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

We further note that when the beneficiary of an L-1A nonimmigrant petition is an owner or major stockholder of the company, the petition must include evidence that the beneficiary's U.S. services will be temporary, after which the organization will transfer the Beneficiary abroad. *See* 8 C.F.R. § 214.2(l)(3)(vii). The Beneficiary is the sole owner of the petitioning U.S. company, and claims to be the sole owner of the foreign entity. The L-1A classification is not intended to be a means for the owners of businesses to permanently transfer themselves to the United States. If the Beneficiary had intended to immigrate all along, then the earlier approvals were contrary to the regulations and therefore erroneous.

III. QUALIFYING RELATIONSHIP

The above discussion of the ownership of the U.S. and foreign companies leads us to an issue which the Petitioner must address if it seeks to file a new petition.

Each petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C). This qualifying relationship must exist at the time of filing the petition, and throughout the adjudication of the proceeding. *See* 8 C.F.R. § 103.2(b)(1). Also, by regulation, "doing business" means the regular, systematic, and continuous provision of goods, services, or both, and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2). Therefore, evidence of a company's existence as a legal entity is not on its own sufficient to show that the company is doing business.

To show that the foreign company remains in business, the Petitioner submitted copies of invoices, payroll documents, and bank statements, but the most recent of these materials date from September 2012. The record, therefore, does not show that the company was still doing business when the petition was filed in February 2014.

Furthermore, South Africa's Companies and Intellectual Property Commission lists the foreign company as "deregistered."⁵ This information indicates that the foreign company is no longer in business, and therefore, the Petitioner is no longer part of a multinational organization. Without a resolution of this issue, USCIS cannot properly approve any petition requiring an ongoing qualifying relationship between the two companies.

IV. CONCLUSION

The Petitioner did not establish that it will employ the Beneficiary in a managerial or executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of J-E- Inc*, ID# 530011 (AAO Sept. 27, 2017)

⁵ Publication No. [REDACTED] Notice No. 48-B, available at [http://www.cipc.co.za/files/\[REDACTED\]Crystal_Reports_-_GGderegistrations_PubNo_\[REDACTED\]NoticeNo_48-B_PubDate_16-12-2016_Part1_Close_Corporations.pdf](http://www.cipc.co.za/files/[REDACTED]Crystal_Reports_-_GGderegistrations_PubNo_[REDACTED]NoticeNo_48-B_PubDate_16-12-2016_Part1_Close_Corporations.pdf) (excerpts added to record September 6, 2017).