



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

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

MATTER OF B-S-&L-, INC.

DATE: JUNE 27, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a “project management and development” company, 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 Petitioner did not establish, as required, that it will employ the Beneficiary in a managerial or executive capacity in the United States.

On appeal, the Petitioner submits additional evidence and asserts that the Director did not take into account the organization’s reasonable needs, the Beneficiary’s responsibility for directing the “management, professional employees of the company,” and the fact that he is the sole employee entrusted with “purely executive” duties.

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

I. LEGAL FRAMEWORK

An immigrant visa is 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. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, 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. U.S. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The sole issue to be addressed is whether the Petitioner established that it will employ the Beneficiary in an executive capacity in the United States. The Petitioner does not claim that the Beneficiary will be employed in a managerial capacity. Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

“Executive capacity” is defined as 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, 8 U.S.C. § 1101(a)(44)(B).

The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which clearly describes the duties to be performed by the Beneficiary. Beyond the required description of the job duties, we review the totality of the evidence when examining a beneficiary’s claimed executive capacity, 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.

Accordingly, our analysis of this issue will focus on the Beneficiary’s duties as well as the Petitioner’s staffing levels and reporting structure.

A. Duties

The Petitioner must show that the Beneficiary will perform certain high-level responsibilities consistent with the statutory definition of executive capacity. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). In addition, the Petitioner must prove that the Beneficiary will be *primarily* engaged in executive duties, as opposed to ordinary operational activities alongside the Petitioner’s other employees. See *Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533.

In a supporting letter, the Petitioner described the Beneficiary’s activities as “exclusively executive” and divided them into four areas of responsibility as follows:

Direct the Management and Discretionary Functions (40%):

- Establish strategies and policies for the Company to achieve its financial short and long term goals, and supervise productivity in order to maximize returns for the Company; (25%)
- Establish goals and policies in order to expand operations and client base in the United States, the Caribbean, and Latin America; (30%)

- Analyze the operations of the Company to evaluate the performance of the Company and its staff; (30%)
- Confer with General Manager on daily issues and pending matters; (15%)

Direct the Development Functions (30%):

- Establish commercial relationships with companies in the United States and abroad to develop our company's operations; (40%)
- Identify and filter into new markets for the Company's expansion throughout the Caribbean and Latin America; (30%)
- Direct the negotiations with corporate and individual clients and oversee the development of our entire business operations. (30%)

Direct the Financial Functions (15%):

- Direct the preparation of financial statements and confer with the Board of Directors and the Financial Director to ensure that the Company's financial objectives are achieved; (40%);
- Oversee accounts receivable and payable; (35%)
- Obtain and arrange for funds for a variety of uses for the company with Board of Directors. (25%)

Direct the Marketing Functions (15%):

- Continue to identify value added services to be offered to our customers . . . and transmit those ideas to the General Manager who then meets with the project management team in order to implement such services; (15%)
- Direct, supervise and approve the execution of promotional and advertising materials based on his experience with customers' needs; (40%)
- Direct marketing strategies to continue to expand the Company's reach in Curacao, Panama, and throughout the Caribbean and Latin America. (25%)

In a request for evidence (RFE), the Director requested that the Petitioner provide a definitive statement describing the Beneficiary's position, including a more detailed list of his specific daily duties and the percentage of time he spends on each duty. In response, the Petitioner resubmitted the same position description provided in its initial support letter.

Upon review, we find that the Petitioner described the Beneficiary's position in overly broad terms that did not convey what the Beneficiary would do on a day-to-day basis as its president. For example, the Petitioner listed three separate duties related to developing goals, policies, and strategies for expansion in Caribbean and Latin American markets without distinguishing between them, elaborating on the specific tasks involved, or identifying any policies and strategies he would implement. The Petitioner also included several general duties associated with overseeing the company's overall operations, but such duties, without additional explanation, merely paraphrase the definition of executive capacity. 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. *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).

The Beneficiary's responsibility for directing the "development functions" of the company is also lacking sufficient detail to establish that he performs executive-level duties in this area. The Petitioner indicates that the Beneficiary establishes commercial relationships with other companies but did not explain how he accomplishes this task or what specific executive duties are involved. As discussed further below, his subordinates' job descriptions include little mention of their interactions with clients, suppliers, or other companies. The Petitioner indicates that the general manager "oversees contractual negotiations with suppliers and providers," and that the Beneficiary "directs" negotiations, but no one is claimed to actually perform the company's day-to-day business transactions with clients, suppliers, and service providers. Similarly, the Petitioner states that the Beneficiary identifies new markets, but does not claim that anyone else on its staff performs market research functions. As a result, we cannot determine what proportion of the Beneficiary's responsibility for business development functions would require to him to perform executive duties, and what proportion would involve non-qualifying duties related to the company's day-to-day marketing, sales, and procurement activities.

In addition, although the Petitioner indicates that the Beneficiary will spend 15% of his time directing the company's financial functions, there is an overlap between his duties and those attributed to the subordinate financial director, who is charged with supervising the preparation of financial statements and reports, ensuring the availability of funds, and monitoring expenses. Given that the Petitioner does not claim to have any lower-level subordinates in its financial department, it is unclear how the financial function's day-to-day operational and administrative tasks would be divided between the Beneficiary and his claimed managerial subordinate.

In sum, the Petitioner has not provided sufficient detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The fact that the Beneficiary will direct a business as its senior employee does not necessarily establish eligibility for classification as a multinational executive.

Even though the Beneficiary exercises discretion over the Petitioner's operations and possesses authority with respect to discretionary decision-making, the position description alone is insufficient to establish his employment will be in an executive capacity. Rather, the Petitioner must also establish that he would have sufficient subordinate staff to supervise and perform the day-to-day company activities he is claimed to oversee or direct. As discussed further below, the Petitioner has not shown its ability to relieve the Beneficiary from significant involvement in the operational tasks required to operate its business.

B. Staffing and Organizational Structure

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. Section 101(a)(44)(C) of the Act.

The Petitioner states that it procures construction materials for its foreign affiliate's medium- to large-scale construction projects in Panama and Curacao, and that it is responsible for delivery of those materials abroad. In addition, the Petitioner stated that it is involved in a residential real estate development project in Florida known as "[REDACTED]"

The Petitioner's organizational chart at the time of filing depicted the Beneficiary as president with four direct subordinates – general manager, operations manager, financial director, and administrative manager. The chart also depicts a project manager who reports to the general manager and an administrative assistant who reports to the administrative manager.¹ The Petitioner submitted evidence showing that it paid all seven employees in September 2017, the month prior to the filing of the petition.

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 he "directs" the enterprise as the owner or sole managerial employee.

Here, although the Petitioner's organizational chart shows a tier of employees with managerial job titles reporting to the Beneficiary, the Petitioner has not shown that he would be primarily directing the management of the company or that the subordinate staff relieves him from significant involvement in its day-to-day operations.

The job descriptions for the subordinate employees are similar in some respects to the Beneficiary's own broad duties and do not provide meaningful insight into what they actually do within the scope of the Petitioner's business. For example, the Petitioner states that the general manager supervises the day-to-day operations of the company, supervises legal and administrative operations for each project, implements administrative and operational policies and procedures, and exercises discretion over subordinate employees and "those subcontracted who perform the day-to-day work." The general manager's only claimed subordinate is a part-time project manager whose duties are not described and who has no apparent subordinates. The Petitioner has not provided evidence of its

¹ The initial organizational chart indicated the operations manager supervises a project manager in Curacao and a Panama-based administrative manager with four subordinates. The Petitioner provided evidence that its claimed affiliates in Curacao and Panama employ the individuals named in the chart. However, it did not include the foreign staff when it provided an updated organizational chart in response to the Director's RFE, and it has not provided job descriptions for the foreign employees. Also, we note that the Curacao-based "project manager" is identified as an "administrative assistant" in the foreign entity's payroll statements.

regular use of subcontractors “who perform the day-to-day work,” nor has it submitted evidence related to its only claimed U.S. project (“[REDACTED]”). Given that the Beneficiary himself is also claimed to be responsible for oversight of the Petitioner and implementing its policies, we are left with little understanding of the general manager’s actual role and responsibilities in the company.

The responsibilities attributed to the operations manager are similarly unclear. The Petitioner states that she, like the Beneficiary and the general manager, establishes and implements, goals and objectives, but her other duties related to sales promotions, product marketing strategies, advertising campaigns, and recommending new facilities; locations or overseeing renovations of current facilities. It is unclear what products the Petitioner is currently promoting, marketing or advertising in the United States, or to what extent it is involved in the development or renovation of facilities. Although the Petitioner initially indicated that this employee oversees foreign-based personnel, her duty description does not include supervisory responsibilities, and the Petitioner later removed those foreign personnel from its organizational chart.

As noted, the financial director’s duties overlap with the Beneficiary’s own stated responsibilities for directing the financial function and it did not establish how they share the day-to-day duties of this function. Finally, the Petitioner provided a broad position description for the administrative manager, indicating that she reviews operational reports, coordinates administrative procedures and systems, assesses the performance of “staff,” ensures the smooth flow of information within the company, and monitors and purchases office supplies.

Overall, the descriptions provided for the four “manager” positions are too general to support the Petitioner’s claim that the Beneficiary would be directing the performance of managerial staff who supervise the day-to-day operations of the company and “relieve the Beneficiary from dedicating his time to the supervision of lower level employees.” Furthermore, the Petitioner’s statements regarding the nature of duties performed by the Beneficiary’s subordinates are inconsistent. Despite the broad, higher-level duties attributed to the employees, the Petitioner has also stated that the Beneficiary’s subordinates relieve him from “performing the services of the corporation and non-qualifying functions such as bookkeeping, delivery, placing orders, shipping among others. All of these duties are being performed by subordinate employees.” This statement implies that the Beneficiary’s subordinates are not managers as claimed, but rather the persons performing the routine day-to-day activities necessary to operate the business. For these reasons, we find that broad job descriptions for the subordinate managers have limited probative value.

The Petitioner also stated that the Beneficiary’s subordinates are “professional managers.” Although the Director analyzed whether the subordinate employees are professionals, the definition of “executive capacity” does not require the supervision of professionals, nor does a beneficiary’s supervision of professionals establish eligibility a Beneficiary’s eligibility as an L-1A executive. Nevertheless, although several of the employees hold bachelor’s degrees, we cannot classify them as

professionals based on the submitted job descriptions, which are lacking in probative value for the reasons discussed above.²

The Petitioner correctly emphasizes that a company's size alone may not be the only factor in determining whether the Beneficiary is or would be employed in a managerial or executive capacity, and that we must take into account the reasonable needs of the organization and acknowledge that *See* section 101(a)(44)(C) of the Act. However, it is appropriate to consider the size of the petitioning company in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner indicates that its primary purpose is to source "green" building materials in the United States for its projects in the Caribbean and Latin American, to take responsibility for the logistics of shipping and delivery of those materials abroad, and to manage a U.S.-based real estate construction project. However, it does not consistently claim that any of its employees are responsible for sourcing and purchasing materials, performing duties related to shipping and delivery of those products overseas, or performing duties associated with the U.S.-based project. Therefore, our determination is not based on the size of the staff, but rather the lack of evidence that the staff in place at the time of filing relieved the Beneficiary from significant involvement in the company's day-to-day activities.

Accordingly, the Petitioner has not met its burden to establish that the Beneficiary would perform primarily executive duties.

III. QUALIFYING RELATIONSHIP

The Director found that the Petitioner's response to the RFE included "evidence to establish the relationship between the parent company and the petitioner." However, we disagree with this finding after a *de novo* review of the evidence.

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

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

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity.

office) or related as a “parent and subsidiary” or as “affiliates.” See § 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 claims to be an affiliate of the Beneficiary’s last foreign employer, a company registered in Curacao. The Petitioner indicates that the Beneficiary and his spouse each own 50 percent of both entities. Although the Petitioner has submitted evidence to corroborate its ownership, the record does not contain sufficient evidence of the foreign entity’s ownership. The Petitioner submitted an excerpt from the Curacao Commercial Register, dated in 2011, indicating that the foreign entity was established in 2003, that it has authorized capital of 50,000 Netherlands Antillean guilders (ANG), that its issued capital is 10,000 ANG, and that “there are holders of non-paid-up shares.” This document identifies three company directors – the Beneficiary, his spouse, and another individual – but does not identify who owns the company’s shares.

The Petitioner will need to address this evidentiary deficiency in any future filing where its qualifying relationship with the claimed foreign affiliate is an element of eligibility.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner has not established that the Beneficiary would be employed in the United States in an executive capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of B-S-&L-, Inc.*, ID# 1237710 (AAO June 27, 2018)