



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

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

MATTER OF C-T-, INC.

DATE: DEC. 23, 2015

CERTIFICATION OF CALIFORNIA SERVICE CENTER DECISION

APPLICATION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The treaty enterprise (referred to herein as "the Employer"), an international telecommunications service provider, seeks to employ the Applicant as an operations manager based on a treaty of friendship, commerce, and navigation. *See* 101(a)(15)(E)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(E)(ii); 8 C.F.R. § 214.2(e)(3). The Director, California Service Center, denied the application. The matter is now before us on certification.¹ The application will be denied.

The Director denied the application, finding the record lacks evidence that the alien Applicant would carry out the duties and assume a placement within the Employer's organizational hierarchy such that the Applicant would be employed in a position that is principally and primarily executive or supervisory in nature.

Recognizing that the application involved a complex or novel issue of law, the director certified the decision to us for review. 8 C.F.R. § 103.4(a).

I. The Law

Section 101(a)(15)(E)(ii) of the Act defines a treaty investor as:

an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; . . . (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital

¹ We note that the Employer filed a motion to reconsider [REDACTED] on June 15, 2012, which was denied by the Director on August 12, 2012 because it did not meet the requirements for a motion. *See* 8 C.F.R. § 103.5(a)(3), (4). The Employer filed a second motion to reconsider [REDACTED] on September 17, 2012, which was denied as late by the Director on October 5, 2012. *See* 8 C.F.R. § 103.5(a)(1)(i), (4). The Employer then filed an appeal [REDACTED] on November 2, 2012, which we rejected for lack of jurisdiction. *See* 8 C.F.R. § 214.1(c)(5).

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The regulation at 8 C.F.R. § 214.2(e)(3) states the following, in pertinent part, with regard to the employee of a treaty investor:

. . . an alien employee of a treaty investor, if otherwise admissible, may be classified as E-2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the alien's services essential to the efficient operation of the enterprise. . . .

Additionally, the regulation at 8 C.F.R. § 214.2(e)(17) states that in order for a position to be deemed as that of an executive or supervisory character, that position "must be principally and primarily, as opposed to incidentally or collaterally, executive or supervisory in nature" such that the duties of the position are those that "provide the employee ultimate control and responsibility for the enterprise's overall operation or a major component thereof." The regulation further states that in order to determine whether the applicant has established possession of the requisite control and responsibility, a Service officer must consider the following factors, where applicable:

- (i) That an executive position is one which provides the employee with great authority to determine the policy of, and the direction for, the enterprise;
- (ii) That a position primarily of supervisory character provides the employee supervisory responsibility for a significant proportion of an enterprise's operations and does not generally involve the direct supervision of low-level employees, and;
- (iii) Whether the applicant possesses executive and supervisory skills and experience; a salary and position title commensurate with executive or supervisory employment; recognition or indicia of the position as one of authority and responsibility in the overall organizational structure; responsibility for making discretionary decisions, setting policies, directing and managing business operations, supervising other professional and supervisory personnel; and that, if the position requires some routine work usually performed by a staff employee, such functions may only be of an incidental nature.

II. Facts and Procedural History

The Employer is a Florida corporation that seeks to employ the Applicant as its operations manager with a salary of \$45,000 per year. Section 2, No. 7(c) of the Form I-129 Supplement E indicates that the Employer employed a total of ten employees in executive or managerial positions at the time of filing. Additionally, CEO [REDACTED] submitted a supporting statement dated February 6, 2012 on behalf of the Employer. With regard to the Applicant's proposed position, [REDACTED] stated the following:

"[The Applicant] will be responsible for analyzing and establishing operational strategies that would be suitable for our corporation's management requirements. She will direct and coordinate investment activities to establish short and long range strategic

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management and financial operations. [The Applicant] will direct and coordinate our corporation and subsidiary's operational management activities to ensure compliance with our internal and external corporate standards. She will also establish management control systems for operational procedures. [She] will formulate and administer company policies to develop long range goals and objectives for operational developments.

In support of the application, the Applicant also submitted the Employer's organizational chart in which she was depicted in a position that is subordinate to that of the chief operations officer (COO), who was listed as one of five subordinate positions to the company's CEO. The chart does not show any employees subordinate to the Applicant and indicates that there were two positions – those of international relations director and carrier relations director – that assumed similar placement as direct subordinates of the COO within the Employer's organizational hierarchy.

After initial review, the Director determined that the record lacked sufficient evidence demonstrating that the Applicant was eligible for classification as an E-2 nonimmigrant employee of an E-2 treaty investor. Accordingly, the Director issued a request for evidence (RFE) dated February 14, 2012. Among the issues addressed in the RFE was that of the Applicant's proposed position with the Employer. The Director asked for the following information: (1) a supplemental job description listing the Applicant's assigned job duties, including the percentage of time the Applicant would allocate to each duty; (2) a list of the total number of employees located at the Employer's location where the Applicant is to be employed; (3) a list of all employees the Applicant supervises or oversees along with the job titles and position descriptions of the Applicant's subordinates; (4) an organizational chart of the Employer; and (5) wage and tax documents identifying the Employer's employees and their respective wages.

The record shows that counsel for the Employer assisted with the RFE response, which included a May 1, 2012 statement from counsel reiterating the job description that was provided initially in the Form I-129 supporting statement from [REDACTED]. In a separate statement, also dated May 1, 2012, [REDACTED] provided a discussion of the services that the Employer and its affiliates provide, pointing out that the Applicant previously held the position of operations manager at one of the Employer's subsidiaries. [REDACTED] claimed that the Applicant's proposed position is that of an essential executive who will direct operational activities "at the highest level of all organizations [REDACTED]." [REDACTED] repeated the general information that he provided in his initial supporting statement and added that the Applicant has an in-depth knowledge of supply and demand and would be able to coordinate the company's resources with customers' demands, while ensuring that customers receive proper delivery of the top quality telecommunication services. [REDACTED] clarified that the Applicant would not have any subordinates, claiming that the proposed position is "hands[-]on executive in nature" and would require the Applicant to make decisions that would be implemented throughout the Employer and its various subsidiaries and affiliates.

[REDACTED] did not provide a list of the Applicant's specific job duties and their respective time constraints, even though the Director expressly requested this information in the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. 8 C.F.R. § 103.2(b)(14).

III. Analysis

The primary issue to be addressed in this proceeding is whether the Employer that seeks to hire the Applicant provided sufficient evidence to establish that the Applicant would be principally and primarily employed in a position of executive or supervisory character pursuant to the provisions of 8 C.F.R. § 214.2(e)(17)(iii). In making this determination, we will first examine the description of the job duties to be performed by the Applicant. A detailed description of actual daily job duties is crucial, as the 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).

Upon review of the two job descriptions provided by the CEO of the Employer, we find that neither contains sufficient information to convey a meaningful understanding of the Applicant's actual daily tasks, without which we are unable to make a determination as to the nature of the proposed employment. Looking more closely at [REDACTED] statement from May 1, 2012, which was submitted in response to the RFE, we note that considerable focus was placed on the Applicant's position title and level of essentiality, neither of which establishes what specific tasks the Applicant would carry out on a day-to-day basis or the proportion of executive or supervisory tasks versus tasks that are non-executive and non-supervisory. While [REDACTED] also stated that the Applicant would analyze and establish operational objectives and strategies within the context of a telecommunications enterprise, this claim reveals no specific information that would explain the tasks the Applicant would perform in order to meet this broad job responsibility. In other words, there is no information as to how the Applicant would obtain the information that is to be analyzed and what sorts of data she would consider in determining the operational strategies and objectives.

In addition, [REDACTED] indicated that the Applicant would serve as the coordinator in matching customers' demand for the Employer's services. However, the record similarly lacks specific information clarifying the actual process and the tasks the Applicant would assume in her efforts to ensure proper coordination. While [REDACTED] indicated that the Applicant would approve scheduling for proper delivery of services, it is unclear who would actually do the scheduling, which in itself is not indicative of an executive or supervisory task. Despite [REDACTED] use of the terms "direct and coordinate" in an apparent effort to establish that the Applicant's position would involve a heightened degree of discretionary authority with respect to her role in capital investment activities, these terms are vague and do not demonstrate the Applicant's actual underlying day-to-day duties.

Furthermore, turning to the Applicant's salary and placement within the Employer's organizational chart, we find that neither is effective in establishing that the proposed position would be of an executive or supervisory character. The chart does not establish that the Applicant would hold an executive or supervisory position, despite what her position title may indicate. The chart, which reflects 11 employees total, indicates that there are two supervisory levels above the applicant's position—the Employer's COO and CEO. The chart contains no indication that anyone other than the Applicant herself would be charged with operations-related tasks. Absent evidence that other employees of the Employer will relieve the Applicant of performing non-qualifying duties, it appears

she would perform and carry out the very tasks she would be charged with overseeing. As previously noted, the record does not establish that the non-executive or non-supervisory tasks would only be incidental to the Applicant's proposed position. Moreover, when considering the Applicant's proffered wage, it is unclear why, if the Applicant is to occupy a key executive position, her salary is significantly lower than any other employee depicted in a parallel tier within the organizational hierarchy.²

In summary, the record, particularly the evidence pertaining to the Applicant's job duties, salary, and her specific placement within the Employer's organizational hierarchy, fails to establish that the proposed position would be principally and primarily comprised of executive or supervisory tasks. Therefore, we cannot conclude that the Applicant would be employed in a position of executive or supervisory character.

IV. Conclusion

In visa proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the application must be denied.

ORDER: The initial decision of the Director, California Service Center is affirmed, and the application is denied.

Cite as *Matter of C-T-, Inc.*, ID# 16351 (AAO Dec. 23, 2015)

² We note that counsel, in her letter in support of the Employer's second motion to reconsider, stated that the Applicant, as a member of the family structure that owns the Employer, "will receive reasonable compensation which is eventually supplemented by either corporate distributions or corporate remunerations received by members of the family unit." The record does not demonstrate that the Applicant has received or will receive additional compensation as a member of the family unit. Further, simply receiving remuneration for being a relative of the owners of the Employer is not necessarily compensation for services rendered; it also does not establish that the Applicant will be acting principally or primarily in a managerial or supervisory capacity.