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

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

MATTER OF P-E-, INC.

DATE: NOV. 24, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a wholesale and retail gasoline products business, seeks to continue to employ the beneficiary as an intercompany transferee under the L-1A classification. *See* section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner is a New Jersey corporation that claims to be a subsidiary of [REDACTED]. The Petitioner seeks to continue to employ the Beneficiary as Chief Executive Officer (CEO) for a period three years.

The director denied the petition concluding that the Petitioner did not establish that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity. On appeal, the Petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the Petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term “managerial capacity” as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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.

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.

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II. ISSUE ON APPEAL

The main issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

A. Managerial or Executive Capacity in the United States

1. Facts

The Petitioner filed the Form I-129 on November 20, 2014. The Petitioner stated on the petition that it is a wholesale and retail gasoline products business, has 5 employees and a net annual income of approximately \$50,000. According to the documents submitted, the Petitioner wishes to continue to employ the Beneficiary in the position of CEO with an annual salary of \$45,000.

In the Form I-129 support letter, the Petitioner stated that, “[i]n addition to being ultimately responsible for all management decisions and planning and implementing our company’s goals, [the Beneficiary]:

1. Leads and oversees the development and implementation of our company’s long and short-term plans, according to his strategies;
2. Ensures our company is appropriately organized and staffed;
3. Exercises final authority over hiring and firing;
4. Ensures that expenditures are within the annual budget;
5. Ensures effective internal controls and managements information systems are in place;
6. Acts as liaison with government authorities, ensuring the integrity of our company’s public discourses.

The Petitioner also stated that the Beneficiary’s duties include “supervision of two (2) managers who oversee two (2) staff.”

The Petitioner provided an organizational chart of its current employees in the United States, showing four employees in addition to the Beneficiary, which include the President,¹ Assistant Manager, Book Keeper/Junior Clerk, and Cashier/Gas Attendant.

After reviewing the submitted documentation, the Director issued an RFE, advising the Petitioner that the initial evidence did not establish that the beneficiary had been or would continue to be employed in a qualifying managerial or executive capacity. The Director requested additional

¹ The position of “President” on the organizational chart is filled by [REDACTED] who is also referred to as the Vice President/Manager throughout the petition. According to the corporate tax documents submitted, [REDACTED] owns 49% of the Petitioner.

information regarding the Beneficiary's duties, such as a letter from the Petitioner describing his expected managerial or executive duties and the percentage of time he would allocate to each duty.

In response, the Petitioner submitted a letter reiterating the previously described duties, adding the following percentages of time spent on each enumerated duty:

1. Lead and oversee the development and implementation of our company's long and short-term plans, according to strategies which he develops: 50% (20 hours per week);
2. Ensure appropriate organization and staffing: 5% (2 hours per week);
3. Ensure appropriate systems to lawfully and ethically function, and exercise final authority over hiring and firing: 5% (2 hours per week);
4. Assess expenditures to budget and the principal risks of the company, ensuring that the risks are being monitored and managed: 25% (10 hours per week);
5. Ensure effective internal controls and managements information systems are in place, and evaluate the success of the organization: 5% (2 hours per week);
6. Lead, guide, direct and evaluate the work of the vice-president, and act as liaison with government authorities, ensuring the company's integrity public disclosures: 10% (4 hours per week).

The Director denied the petition, concluding that the Petitioner did not establish that the beneficiary will be employed in a qualifying managerial or executive capacity.

2. Analysis

Upon review, and for the reasons discussed herein, the Petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity. The Petitioner has not indicated or asserted that the position of CEO is a managerial position rather than an executive one; therefore, we will restrict our analysis of the proffered position to whether or not it qualifies as employment in an executive capacity.

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, 8 U.S.C. § 1101(a)(44)(B). 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 the beneficiary to direct and the 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 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. The 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.*

When examining the executive or managerial capacity of the beneficiary, we will look first to the 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 performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

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 Petitioner's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the Petitioner's business, and any other factors that will contribute to understanding of a Beneficiary's actual proposed duties and role in a business. Here, the totality of the evidence does not support the Petitioner's claims that the Beneficiary will be employed in a qualifying executive or managerial capacity.

In this case, the Petitioner initially provided a list of the Beneficiary's duties described in overly broad and non-specific terms. In the RFE the Director requested that the Petitioner provide additional specificity regarding the Beneficiary's responsibilities and discuss how the broad objectives described translated into daily tasks related to the Petitioner's business. In response, the Petitioner assigned a percentage breakdown to each of the generalized duties, indicating that the Beneficiary spends 50% of his time to "[l]ead and oversee the development and implementation of our company's long and short-term plans," and 25% of his time to "[a]ssess expenditures to budget and the principal risks of the company, ensuring that the risks are being monitored and managed." However, the Petitioner does not provide any information on how these duties translate into the Beneficiary's actual daily job duties or how the assigned responsibilities interact with the specific business of running a gas station. The Petitioner's description of the proposed duties does not provide any detail or explanation of the beneficiary's claimed executive activities in the course of his daily routine. The actual duties themselves will 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 (2nd Cir. 1990). Absent a clear and credible description of the Beneficiary's actual daily duties, we cannot determine what proportion of those duties would be managerial or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties.

The Petitioner contends that the Beneficiary has been employed since September 2012 in an executive position and will continue to be employed as such. However, the evidence submitted in

support of this petition raises doubts as to the credibility of this claim.² Specifically, the Petitioner submitted IRS Form 941 Quarterly Wage Reports showing that from the time of approval of the initial petition through June 2014, the Petitioner employed between one and two additional employees and paid between \$5,220 and \$18,790 (total) in wages each quarter. The wage reports further show that the Petitioner's staff increased to five individuals during the third quarter of 2014, but lacks evidence that the Petitioner employed five individuals at the time of filing in November 2014.

The Petitioner further asserts that the organizational chart provided is evidence of the Beneficiary's executive position, in that it shows the "beneficiary's management of a manager who manages employees." The evidence must substantiate that the duties of the Beneficiary and his subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While it appears that the Beneficiary has some level of authority and control over the Petitioning entity, the Petitioner has not provided evidence of an organizational structure sufficient to elevate the Beneficiary to an executive position with the necessary subordinate managerial employees. Specifically, the organizational chart provided shows the Book Keeper/Clerk and Gas Attendant/Cashier report to the Assistant Manager, who reports to the Vice President/Manager who reports to the Beneficiary as CEO. Regarding the company's structure, the Petitioner writes "Our manager oversees hires, fires and disciplines employees. The manager reports to [the Vice President], and [the Vice President] reports to [the Beneficiary] who has final say on every action the company takes." However, copies of payroll records submitted by the Petitioner raise some doubt as to the credibility of the Petitioner's claims. The payroll records show wages paid in 2014 to four employees, including the Beneficiary, and the President/Vice President/Manager, Assistant Manager, and Book keeper/junior clerk, Gas Attendant/Cashier. The Beneficiary was paid a salary, while the remaining three employees (Vice President, Assistant Manager, Book keeper/junior clerk, and Gas Attendant/Cashier) were each paid \$8.25 per hour, raising some question as to the claimed structure of the organization and differentiation in the duties of these positions. The Petitioner did not submit position descriptions to indicate the nature and responsibilities of the claimed subordinate positions; nor did the Petitioner provide an explanation as to why the Assistant Manager earns the same minimum wage salary as his two claimed subordinates. The Petitioner has also not explained why the President/Vice President/Manager, who is also the 49% owner of the Petitioner, reports to the Beneficiary and earns the same \$8.25 minimum wage.

The Petitioner has not credibly explained how the non-qualifying duties associated with running the business has been performed by the Petitioner's other employees. Given the nature of the Petitioner's business, it is unclear how the Beneficiary would have been relieved of non-qualifying duties while operating a gas station serving the public. Even with the claimed increase of staff to five, including the Beneficiary, the evidence in the record does not suggest that the Petitioner has

² Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

sufficient staff to relieve the Beneficiary from primarily performing operational and administrative duties required in the daily operation of the business, duties such as providing customer service, running the cash register or operating the gas pumps.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa petition for classification as a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS 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, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *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 size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15. Here, our finding is based on the conclusion that the beneficiary will not be primarily performing managerial or executive duties; our decision does not rest on the size of the petitioning entity.

On appeal, the Petitioner states that on March 5, 2015 it purchased an additional gas station location and acquired five additional employees. The Petitioner asserts that this acquisition is an indication of its continuing growth and need for the Beneficiary's services. Additionally, on September 24, 2015, the Petitioner submitted an addendum to the pending appeal, which included evidence of the Petitioner's lease to operate another gas station location. However, the statute and regulations do not provide the petitioner with additional time to grow to the point where it can support a qualifying managerial or executive position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

For the foregoing reasons, the Petitioner has not established that the beneficiary will be employed in a qualifying managerial capacity. Accordingly, for this reason alone the appeal will be dismissed.

III. BEYOND THE DIRECTOR'S DECISION

Beyond the Director's decision, the Petitioner has not established that the Beneficiary was employed in a qualifying managerial or executive position abroad for one year prior to his admission to the United States.

In the RFE, the Director requested additional evidence to demonstrate that the Beneficiary's position abroad was managerial or executive. In response, the Petitioner submitted pay records as evidence of the Beneficiary's employment abroad, but did not submit the requested description of the position or any information regarding the nature of the position abroad. Instead, the Petitioner referenced an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed

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explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

We acknowledge that USCIS previously approved a nonimmigrant petition filed on behalf of the beneficiary. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

For this additional reason, the petition cannot be approved. We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1037 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a de novo basis).

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of P-E-, INC.*, ID# 14671 (AAO Nov. 24, 2015)