



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

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

MATTER OF A&SC-, LLC

DATE: APR. 1, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a beauty salon and spa, seeks to permanently employ the Beneficiary as its chief operating officer under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) § 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, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by disregarding evidence in the record and by making unsupported assumptions.

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

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

....

(C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

## II. EMPLOYMENT IN AN EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a qualifying managerial or executive capacity. On appeal, the Petitioner emphasizes that the Beneficiary will be employed in an executive capacity.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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.

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.

### A. Facts

The Petitioner filed Form I-140 on March 13, 2014, and claimed that it employed 19 employees. Throughout the proceeding, the Petitioner has stated that it seeks to employ the Beneficiary in an executive capacity. When the Director, in the denial notice, referred to managerial capacity, the Petitioner responded that it is “a gross misstatement of fact” to state that the Beneficiary is, or seeks classification as, a manager.

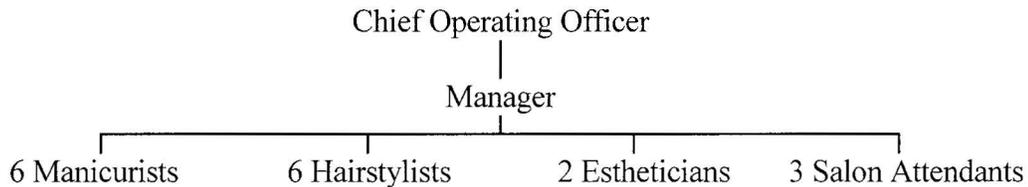
The Petitioner submitted an introductory letter dated March 3, 2014, from [REDACTED], the Petitioner’s co-owner and general manager of administration. [REDACTED] asserted that the Beneficiary’s “position [with the petitioning entity] is clearly executive in nature.” He divided the Beneficiary’s duties into categories, with the approximate percentage of time spent on each duty:

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- General Management, 35%, consisting of:
  - Establishing goals and policies, 15%
  - Staffing, 10%
  - Developing and implementing structural changes, 10%
- Strategic Management, 10%
- Budgetary Concerns, 25%
- Marketing, 10%
- Overseeing Staff, 20%

The Petitioner submitted an organizational chart showing the following structure:



The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, and IRS Forms 1099-MISC, Miscellaneous Income, showing payments to eight employees and 24 contractors in 2013. One of the hairstylists was an employee for part of the year and a contractor for another part, and therefore received both types of IRS form.

The Director issued a request for evidence (RFE) on December 16, 2014, asking for additional details regarding the Beneficiary's duties at the petitioning company. In response, the Petitioner submitted a letter, dated March 5, 2015, from [REDACTED] who provided more details about the Beneficiary's duties:

- **General Management:** As the Chief Operating Officer, [the Beneficiary] spends approximately **35%** of her time running the general management of the company. . . .

[The Beneficiary] spends 15% of her time establishing company goals and policies. . . . These policies include employee guidelines as well as the company's expectations for the different positions in the company. For example, she determines the company's policies regarding tardiness and attendance, dress code, and eating areas. [The Beneficiary] establishes procedures for the appropriate sanitation of all tools and areas, disposal of chemicals, and how frequently these procedures must be conducted. She also sets out procedures on how to bill clients, schedule appointments, handle customer complaints or dissatisfaction as well as procedures to promote communication and adequate flow of information.

In addition, she spends another 10% of her time staffing the company. The salon directly employs some employees, while others work as independent contractors. . . .

[The Beneficiary] reviews the applicants' resume, verifies their references, and administers tests to ensure that they are qualified to work [for the Petitioner]. . . .

10% of her time . . . is spent developing and implementing any structural changes she deems necessary. . . . These structural changes include adding departments or components to the organization as well as shifting the level of authority or discretion given to each position in the company. . . . She meets with the Salon Manager to receive reports on each employee's job performance. . . .

- **Strategic Management:** Another **10%** of [the Beneficiary's] time is spent developing strategic management initiatives . . . [which] include analyzing the feasibility of expanding . . . , by researching the cost of expansion, likelihood of increased profitability as well as researching possible locations in which to open up other salons. To achieve these goals, [the Beneficiary] reviews market studies to determine whether the company should expand. . . . She also evaluates reports regarding competitors and additional factors affecting expansion . . . [and] creates and implements improvement projects, such as remodeling the salon. Other strategic decisions include increasing staff or downsizing. . . . [The Beneficiary] also develops training programs for the company's staff. . . . [W]e plan to hire a market research analyst who will be responsible for assisting [the Beneficiary] in the mentioned tasks. . . .
- **Budgetary Concerns:** [The Beneficiary] spends approximately **25%** of her time . . . setting up the company's budget and price structure. . . .

[S]he conducts studies of the beauty market to determine pricing points for their services. This requires her to research the beauty market in South Florida . . . [and] keep informed of emerging trends in the beauty market. . . . [S]he consults with various vendors as to the price and quality of the products. She then negotiates for the best possible price, and . . . enters into a contract with the supplier. . . . Using the price structure, [the Beneficiary] determines how much will be invested in equipment for the salon as well as beauty products and supplies for both retail and use in the salon.

[The Beneficiary] develops and implements a company-wide budget by monitoring the banking activities of the company, making cash flow projections and ensuring that the budget meets both current and future business models. . . . She must also review and evaluate the company's financial reports. . . . She also creates annual operating plans. . . .

In addition, she decides how much to charge independent contractors for renting space at our salon, as well as salaries for all of our staff. . . .

- **Marketing:** [The Beneficiary] is also responsible for overseeing the company's marketing campaigns by reviewing and approving marketing plans submitted to her.

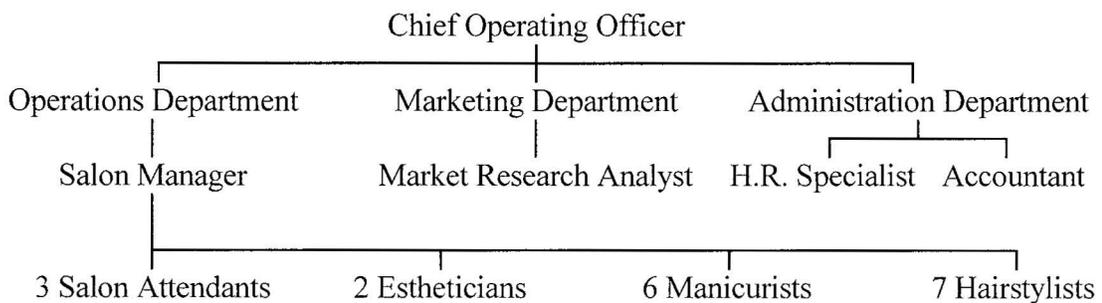
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Approximately **10%** of her time is spent on this task. To achieve this, [the Beneficiary] will oversee the content, production and distribution of all marketing and publicity materials. . . . Marketing the company also requires her to review and approve the construction of the company’s website. . . .

In addition to the above, the remaining **20%** of [the Beneficiary’s] time is spent overseeing the company’s staff which consists of three departments containing eight components . . . [and] a staff of nineteen people, consisting of two full-time employees and seventeen independent contractors. She has the discretion to make hiring and firing decisions for all the staff employed at our company. . . . [The Beneficiary’s] position . . . is clearly executive in nature.

(Emphasis in original.) The Petitioner submitted a revised organizational chart, as follows:



█ stated that the salon manager, salon attendants, and hairstylists all worked full-time. The chart does not include █ position as general manager of administration. The chart provides names to go with most of the titles, but there are no names listed under market research analyst or human resources specialist. The Petitioner stated: “The Marketing Department is currently outsourced, but will be staffed with a Market Research Analyst in the near future,” and that both positions in the Administration Department were also outsourced.

The Director denied the petition on September 2, 2015, concluding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial or executive capacity. Noting that the Petitioner had not yet hired a market research analyst, the Director concluded that the Beneficiary performed the duties of that position herself. The Director also noted that the second organizational chart did not identify the human resources specialist, and that the evidence of record does not support the Petitioner’s claim to have a staff of 19. The Director concluded that the Petitioner’s staffing is not sufficient to relieve the Beneficiary from performing non-qualifying duties, and that the “broad and vague” job description did not adequately show the nature of the Beneficiary’s day-to-day duties.

On appeal, the Petitioner asserts that the Beneficiary’s duties with the Petitioner meet all the requirements of an executive position, and that “she performs no non-qualifying tasks.” The Petitioner

states that the Director “focused on the number of employees the company has” and “did not consider the various independent contractors and third party service providers that worked for the company.”

## B. Analysis

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that it will employ the Beneficiary in a qualifying executive capacity.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary’s proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary’s 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). We then consider the beneficiary’s job description in the context of the petitioner’s organizational structure, the duties of the beneficiary’s subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary’s actual duties and role within the petitioning entity.

In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary’s duties, the petitioner still has the burden of establishing that the beneficiary is “primarily” performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

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.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary’s duties and his or her subordinate employees, the nature of the petitioner’s business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary’s actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization’s structural hierarchy.

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 actual duties themselves reveal the true nature of the employment. *Id.* Therefore, reciting a 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.

On appeal, the Petitioner does not address the Director's finding that the job description lacked detail. Instead, the Petitioner repeats elements of that description, and asserts that the duties described are clearly executive in nature, and that therefore the Director erred in denying the petition. Review of the job description, however, supports the Director's conclusions about the lack of detail.

The Petitioner asserts that the Beneficiary "spends 15% of her time establishing company goals and policies." The Petitioner has not established that developing goals and policies for a small business, operating from a single location, places significant ongoing demands on the Beneficiary's time. The Petitioner has not shown that its billing procedures, for instance, require frequent and time-consuming changes and adjustments.

Similar objections apply to several other asserted duties. For example, the Petitioner states that the Beneficiary spends "10% of her time . . . developing and implementing any structural changes she deems necessary," but the Petitioner has submitted no evidence to show that the structural changes of a single salon place continuing demands on the Beneficiary's time. Also, the Petitioner has not shown the existence of a continuing series of "market studies" for the Beneficiary to review while "developing strategic management initiatives."

The Petitioner states that the Beneficiary spends approximately 10% of her time "reviewing and approving marketing plans submitted to her." The record does not contain any of these marketing plans, nor does it identify who prepared them. The Petitioner states that the Director assumed that the Beneficiary performed the Petitioner's marketing functions herself, "disregard[ing] the fact that these duties were outsourced to third party service providers." The Petitioner had previously made similar assertions about outsourcing, but the record contains no evidence to identify the outsourced market analyst or confirm that the Petitioner used and paid for the person's services. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The position description, while lengthy, also includes repetition and overlapping duties. Under "General Management," the Petitioner stated that the Beneficiary "spends . . . 10% of her time staffing the company," reviewing applicants' qualifications "to ensure that they are qualified to work" for the Petitioner. Decisions regarding staff size appear under "Strategic Management." At a third place in the job description, the Petitioner stated that "the remaining **20%** of [the Beneficiary's] time is spent overseeing the company's staff" (emphasis in original), a responsibility that includes "the discretion to make hiring and firing decisions for all the staff." In this way, the Petitioner has counted hiring decisions twice. The same repetition appears in the following passage of the appellate brief: "[The Beneficiary] spends approximately 10% of her time finding and vetting potential staff. . . . The remaining 20% of her time is spent . . . determining who will work for the company." The Petitioner

does not explain how “finding and vetting potential staff” differs from “determining who will work for the company.”

Furthermore, the Petitioner has repeatedly asserted that the Beneficiary’s responsibilities are exclusively executive, and dismissed as erroneous any suggestion that her duties are managerial or those of a first-line supervisor. The Petitioner, however, does not explain how recruitment, hiring, and “develop[ing] training programs for the company’s staff” constitute high-level executive functions. Similarly, the position descriptions provided for the salon’s personnel indicates that all independent contractors report directly to the Beneficiary and that she “reviews” the hair, nail, and skin treatments they provide.

The fact that the Beneficiary manages or directs a 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, 8 U.S.C. § 1101(a)(44). 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 position description alone is insufficient to establish that her actual duties, as of the date of filing, would be primarily executive in nature.

We also consider the proposed position in light of 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.” *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)). 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, 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., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the record does not support some of the Petitioner’s claims regarding the company’s staffing. The Petitioner has stated that all of its employees work full-time, while the contractors’ hours are set “by appointment.” In 2013, most of the Petitioner’s employees and contractors earned less than a full year’s pay, even at minimum wage. According to the IRS Forms W-2 and 1099-MISC in the record, only one employee and four contractors received more than \$10,000 in wages or other compensation in 2013. In the first quarter of 2014, when the petition was filed, the Petitioner paid \$800 per month to the salon manager, \$400 per month to a salon attendant, and full-time wages to a second salon attendant. The Petitioner did not document wages paid to a third attendant, despite stating that it employs a full-time manager and three full-time attendants. It is unclear whether the part-time staff the Petitioner actually employs is able to relieve the Beneficiary from performing the various non-executive functions attributed to these positions. For example, the salon manager is responsible for attending to customer

needs, inquiries and complaints, and purchasing supplies and inventory, while the attendants work in the reception area, schedule appointments, keep client records, handle payment transactions, and advise clients of the salon's products and services. The Petitioner's evidence does not support its claims that it has four full-time workers to perform these functions.

It is evident from the record that the Petitioner frequently replaces departing workers, but this does not entirely explain the low salary figures on the IRS forms. The Petitioner's response to the RFE included biweekly payroll statements from December 2014 to February 2015. The statements showed that between 12 and 14 workers received payment during each two-week pay period. The payments ranged from \$61 to \$1,969, with the average payment (not counting the Beneficiary's \$3,000 year-end bonus) being \$637.32 and the median payment being \$495.00. In each pay period, the Beneficiary was one of two or three individuals who received more than \$1,000. The individual identified as the salon manager earned an average of \$245 per week during the ten documented weeks. These figures are not consistent with the Petitioner's claim that most of its staff works full-time.

If the record conflicts with the Petitioner's claims regarding staffing, then we are not required to presume the accuracy or credibility of the Petitioner's other assertions. Doubt cast on any aspect of the petitioner's proof may 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

The Petitioner has not established that the Beneficiary will be employed in a qualifying executive capacity. For this reason, the appeal will be dismissed.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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 A&SC-, LLC*, ID# 16227 (AAO Apr. 1, 2016)