Will The Petitioner Employ The Beneficiary In A Qualifying Managerial Or Executive Capacity?

By Joseph P. Whalen (Sunday, March 27, 2016)

In general, when examining the executive or managerial capacity of a given position, USCIS reviews the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity. (I am not certain that it is the best approach; more on that later.) 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). USCIS then considers 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 INA §101(a)(44); 8 U.S.C. § 1101(a)(44).

It is essential that the job duties presented are accurate and true to the position to be filled by the beneficiary. This step is critical and is also wherein lie most of the difficulties experienced by petitioners. Inadequate descriptions of the job duties performed abroad and to be performed in the U.S. are at the root of the vast majority of requests for evidence (RFEs). I hate to sound prejudiced or xenophobic in any way (I am neither) but these common problems often arise due to less than sufficient English language skills necessary to the task at hand. The task is the production of two position descriptions that list actual job duties that fall into categories that track either of the two available statutory definitions.

As noted above, INA § 101(a)(44); 8 U.S.C. § 1101 (a)(44) provides us with definitions of managerial or executive duties for purposes of either the immigrant or nonimmigrant visa categories under consideration. The same definitions are used for the intracompany transferee (L-1A) or multinational manager or executive (EB-1C or E13).
### INA §101(a)(44) [8 U.S.C. § 1101 (a)(44)]

<table>
<thead>
<tr>
<th>(44)(A)</th>
<th>The term &quot;managerial capacity&quot; means an assignment within an organization in which the employee primarily-</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>manages the organization, or a department, subdivision, function, or component of the organization;</td>
</tr>
<tr>
<td>(ii)</td>
<td>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;</td>
</tr>
<tr>
<td>(iii)</td>
<td>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</td>
</tr>
<tr>
<td>(iv)</td>
<td>exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.</td>
</tr>
</tbody>
</table>

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.

<table>
<thead>
<tr>
<th>(44)(B)</th>
<th>The term &quot;executive capacity&quot; means an assignment within an organization in which the employee primarily-</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>directs the management of the organization or a major component or function of the organization;</td>
</tr>
<tr>
<td>(ii)</td>
<td>establishes the goals and policies of the organization, component, or function;</td>
</tr>
<tr>
<td>(iii)</td>
<td>exercises wide latitude in discretionary decision-making; and</td>
</tr>
<tr>
<td>(iv)</td>
<td>receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.</td>
</tr>
</tbody>
</table>
(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General [Secretary] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

Many individuals begin their visa journey (an odyssey for some) as a nonimmigrant worker and eventually transition into an employment-based immigrant. For those individuals who have an employer that has a large footprint across borders, the transition might be more clear-cut than for many other foreign national workers who must follow different paths to lawful permanent resident (LPR) status and a “green-card”.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See INA § 101(a)(44)(A)(i) and (ii); 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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." See INA §101(a)(44)(A)(iv); 8 C.F.R. § 204.5(j)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 204.5(j)(2).

The following may help in the selection of the appropriate statutory definition to pursue. IF one directly manages something THEN use INA § 101(a)(44)(A); 8 U.S.C. § 1101(a)(44)(A) "managerial capacity". IF one manages the direction of something THEN use INA § 101(a)(44)(B); 8 U.S.C. § 1101(a)(44)(B) "executive capacity". Regardless of the definition pursued, it is essential to write an adequate support letter. See below.
(j) Certain multinational executives and managers.

(1) A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager.

(2) Definitions. As used in this section:

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; or

(C) In the case of a partnership that is organized in the United States to provide accounting services, along with managerial and/or consulting services, and markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

*Doing business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

*Executive capacity* means an assignment within an organization in which the employee primarily:

(A) Directs the management of the organization or a major component or function of the organization;

(B) Establishes the goals and policies of the organization, component, or function;

(C) Exercises wide latitude in discretionary decisionmaking; and

(D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

*Managerial capacity* means an assignment within an organization in which the employee primarily:
(A) Manages the organization, or a department, subdivision, function, or component of the organization;

(B) 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;

(C) 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

(D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

**Multinational** means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

**Subsidiary** means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(3) **Initial evidence**—

(i) **Required evidence.** A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.
(ii) **Appropriate additional evidence.** In appropriate cases, the director may request additional evidence.

(4) **Determining managerial or executive capacities**—(i) **Supervisors as managers.** A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional.

(ii) **Staffing levels.** If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the reasonable needs of the organization, component, or function, in light of the overall purpose and stage of development of the organization, component, or function, shall be taken into account. An individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(5) **Offer of employment.** No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

---

**A Statement in the Form of A Letter from Each Employer**

Both the foreign employer and the U.S. employer (the petitioner) must submit a letter in support of the petition describing the duties of the qualifying positions, abroad and domestically. These vital and critical pieces of evidence often prove to be the biggest point of confusion in these visa petition packets. Far too often the person putting together the petition packet is flustered or overwhelmed. I believe that it sometimes happens that the wrong approach is taken towards the task of writing support letters. I suggest that one first concentrate on gathering information as to the actual duties performed abroad or to be performed domestically in each position by itself. The next step is to attempt to sort the duties and match them to a statutory definition. It might be necessary to try to compare the duties to each statutory definition before deciding which one is more appropriate for the particular position. Also be mindful of the fact that the position abroad and the position in the U.S. do not have to meet the same statutory definition. A manager abroad might be entering the U.S. to fill an executive position and vice versa. In other words the employee can flip-flop between statutory definitions and remain in the same
It is best to avoid trying to fit a position into a statutory definition based on the job title. Merely because a position is labeled in a certain way does not mean that it meets a certain statutory definition because of that label. Labels as to job descriptions are like labels as to people; i.e. stereotypes, they are rarely true and correct.

Unlike the general approach taken by USCIS, or at least by AAO, in examining a position within a petition filed on behalf of a multinational manager or executive, I would start by examining the duties of the position held abroad as a necessary prerequisite to examining the duties of the proffered position in the U.S. An even earlier prerequisite is ensuring the required relationship between the foreign and domestic employers. If the petitioning employer is not even eligible to file on behalf of the beneficiary nothing else matters. Once clearing those first two hurdles, it will be the duties of the proffered position that allows one to determine its nature as either managerial, executive, or non-qualifying. As eluded to in the first paragraph, when examining the executive or managerial capacity of a given position, USCIS reviews the totality of the record, starting first with the description of the beneficiary's proposed job duties with the petitioning entity, as per 8 C.F.R. § 204.5(j)(5). As a reminder (j)(5) is the final regulatory provision specifically directed at the multinational manager or executive visa classification. As a further reminder, that provision calls for the submission of a job offer in the form of a letter clearly stating the duties of the proffered position. I would not start with an analysis of the final item listed in the regulations. Legacy INS actually put some thought into the formulation of these regulations. It starts with information about the relationship between the petitioner and the foreign employer. Then there is information about the U.S. employer having to have been “doing business” for a minimum period of time. Following definitions of the managerial and executive capacities intended for this visa classification, the first piece of evidence relates to the beneficiary’s qualifying work experience abroad. Finally, the regulations get around to the U.S. employment offer, but in evaluating that aspect, it again boils down to the actual job duties. That’s all, folks.

---

1 This essay is devoted to the immigrant version of this visa. The similar nonimmigrant visa allows flip-flopping among three types of job capacities (managerial, executive, or specialized knowledge) one of which is not qualifying in the immigrant version of the visa (specialized knowledge). Not all qualified nonimmigrants will qualify for immigrant classification, even when they obtain L1-A intracompany transferee visas as managers or executives because specialized knowledge still qualifies them for it.