



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

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

MATTER OF GLNT-, INC.

DATE: AUG. 1, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of motor carrier transportation services, seeks to permanently employ the Beneficiary as a financial manager 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, Texas Service Center, denied the petition. The Director concluded that the Petitioner did not establish that: (1) it has a qualifying relationship with the Beneficiary's former employer abroad; (2) the Beneficiary was employed abroad in a qualifying managerial or executive capacity; and (3) the Petitioner would employ the Beneficiary in a qualifying managerial or executive capacity. The Petitioner subsequently filed a combined motion to reopen and reconsider seeking withdrawal of the Director's decision. The Director denied the motion, affirming the underlying decision denying the petition.

The matter is now before us on appeal. In its appeal, the Petitioner disputes the Director's original findings, asserting that the Director erred by disregarding previously submitted evidence and refers to the submission of documents in support of a previously filed Form I-129 petition.

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

I. LEGAL FRAMEWORK

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.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(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. QUALIFYING RELATIONSHIP

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

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To establish a “qualifying relationship” under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a “parent and subsidiary” or as “affiliates.” See generally section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

The pertinent regulations at 8 C.F.R. § 204.5(j)(2) define the relevant terms. Generally, the term “affiliate” means:

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

The same regulation defines a “subsidiary” as:

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.

A. Evidence of Record

The record shows that the Petitioner filed the Form I-140 on November 15, 2012. It indicates that the Beneficiary’s last foreign employer was [REDACTED] a Hungarian entity. The Petitioner did not provide a statement or evidence in support of the Form I-140 specifying its ownership breakdown or the nature of its relationship, if any, with the Beneficiary’s former employer abroad. However, the record includes a Form I-485, Application to Register Permanent Residence or Adjust Status, in support of which the Beneficiary provided a self-prepared 2010 Form 1120, U.S. Corporation Income Tax Return, including Schedule G, which lists the [REDACTED] and [REDACTED] as 50/50 owners of the Petitioner’s voting stock.

On February 27, 2013, the Director issued a request for evidence (RFE), advising the Petitioner that the evidence in the record did not establish a qualifying relationship between the Beneficiary’s foreign employer and the U.S. Petitioner. The Director instructed the Petitioner to submit evidence demonstrating common ownership and control of both entities in order to establish a qualifying relationship.

In response to the RFE, the Petitioner submitted a partially translated foreign document titled “Social Contract of the limited liability corporation by paragraph 105 of Commercial code,” which lists [REDACTED] and the Beneficiary as capital contributors. The Petitioner also provided its 2012

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federal tax return, complete with Schedule E, which identifies the Beneficiary and [REDACTED] as joint owners of the petitioning entity, with each individual owning 50% of the Petitioner's stock.

The Director denied the petition concluding, in part, that the Petitioner did not provide sufficient relevant evidence to establish that it had a qualifying relationship with the Beneficiary's foreign employer.

On motion, the Petitioner claimed that it provided evidence of a qualifying relationship in support of previously filed immigrant and nonimmigrant petitions. The Petitioner indicated that the Director erred in not considering the previously submitted evidence. In an effort to establish that it has a qualifying relationship with the Beneficiary's foreign employer, the Petitioner provided additional evidence including the following: (1) an October 23, 2014 statement, signed by the Petitioner's president, claiming that the Petitioner is a wholly-owned subsidiary of [REDACTED] whose foreign address was provided in the statement; (2) a statement, signed by the president of [REDACTED] and also dated October 23, 2014, explaining that the foreign entity is jointly owned by the Beneficiary and [REDACTED] with each owning 50% of the entity; and (3) an undated statement signed by [REDACTED] claiming that the Beneficiary is the Petitioner's general manager and that the Petitioner is jointly owned by himself and the Beneficiary with each owning 50%.

On January 26, 2016, the Director issued a notice denying the Petitioner's motion without considering the submissions pertaining to the issue of a qualifying relationship between the Petitioner and the Beneficiary's foreign employer.

On appeal, the Petitioner submits a statement again claiming that the Director did not consider "the initial and previous evidence" and reiterates the prior claim that the Petitioner and the Beneficiary's foreign employer are affiliates by virtue of being jointly and equally owned by the same two individuals – the Beneficiary and [REDACTED]

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that determine whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Med. Syss., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

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In the present matter, the evidence submitted to establish a qualifying relationship between the Petitioner and the Beneficiary's employer abroad is deficient and inconsistent. While the Petitioner did address the issue of a qualifying relationship by submitting the above-described statements signed by one of the Petitioner's claimed owners, all three statements offer no documentary proof of ownership and merely reiterate the Petitioner's original claim. In fact, two of the statements did not exist prior to the Director's decision and appear to have been created for the sole purpose of addressing the Director's adverse findings. However, 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) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

We further note that while the "Social Contract" that was earlier submitted with regard to the foreign entity does name the Beneficiary and [REDACTED] the translation does not meet the provisions of 8 C.F.R. § 103.2(b)(3), which requires that any document containing foreign language must be accompanied by a *full* English language translation. In the matter at hand, while the original foreign document is comprised by 21 articles, the translation only includes the article name and number for articles 6-21, but does not include a translation of the content in those articles, despite the fact that Articles 6, 9, 15, and 18, which discuss the rights and obligations of shareholders, managers, share distribution, and end of shareholder participation in the corporation, respectively, are all directly relevant to the issues of ownership and control of the entity. Accordingly, the evidence is minimally probative and will be accorded limited evidentiary weight in this proceeding.

In addition, we find that Schedule G of the Petitioner's 2010 tax return, which states that [REDACTED] and [REDACTED] are equal and joint owners of the Petitioner's voting stock, is entirely inconsistent with the Petitioner's claims and with subsequently submitted tax returns, which identify the Beneficiary and [REDACTED] as the Petitioner's two owners. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

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.

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.

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.

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A. U.S. Employment in a Managerial or Executive Capacity

1. Evidence of Record

On the Form I-140, the Petitioner indicated that it had six current employees in the United States and a gross annual income of \$169,514.

The record shows that the Petitioner did not provide any evidence in support of the Form I-140. The only information that pertains to the Beneficiary's proposed employment is at Part 6, No. 3 of the Form I-140, which instructs the Petitioner to provide a nontechnical description of the position. In response, the Petitioner stated that the Beneficiary will be the general manager of the property brokerage division and that "[h]is duty [sic] will be to establish the division, obtaining [sic] property broker authority, bond from [redacted] hire additional property br [sic]."

In the RFE, the Director advised the Petitioner that the evidence in the record did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States and instructed the Petitioner to submit additional evidence. Specifically, the Petitioner was asked to provide the following: (1) a list of Beneficiary's proposed job duties with time constraints assigned to each duty; (2) an organizational chart depicting the Petitioner's staffing and management structure; (3) job descriptions for the individuals listed in the organizational chart and state whether they are full- or part-time employees; and (4) IRS Form W-2, Wage and Tax Statement, for each employee and evidence that contractors were paid if the Petitioner uses contract labor.

In response to the RFE, the Petitioner submitted the following description of the Beneficiary's proposed employment:

Loads:

Time spent on duties: 2-4 hours a day on a weekly basis

Decision on Loads to be brokered or carried based on the quality of the load and the position of the transportation equipment

Purchasing and Spending:

Time spent on duties: 1-2 hours on a weekly basis

Decision on purchasing and spending on funds of [the Petitioner] based upon amount of available monetary resources including the purchase of: tractors, trailers, heavy duty refrigeration equipment, parts, tires, operational inspections, safety instruction and DOT compliance courses, drug and alcohol testing, electrical equipment and office supplies

Negotiations:

Time spent on duties: variable throughout the week

Manage negotiations between clients (customer[s]) and [B]eneficiary (manager) about customers['] transportation of goods through resources that require

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customers['] satisfaction and needs such as flatbed, refrigeration or van service through communication by computer, telephone or in-person

Hiring of outside companies:

Time spent on duties: variable depending on needs of company['] weekly logistics
Beneficiary will communicate with outside logistical companies in order to receive loads that will cover the capacity of available transportation equipment and equipment operators throughout the establishment of appointments set forth by logistical company employees

The Petitioner also provided the following tax documents: (1) a 2012 Form W-2 for [REDACTED] showing gross earnings of \$7500, 2012 Form W-2 for [REDACTED] showing gross earnings of \$5000, 2012 IRS Form W-2 for the Beneficiary showing gross earnings of \$5000; (2) 2012 Form W-3, Transmittal of Wage and Tax Statements, showing that the Petitioner paid a total of \$17,500 in wages; (3) a Form W-2c, Corrected Wage and Tax Statement, showing that the Beneficiary's correct total wages for 2012 was \$24,000, not \$5000; ; (4) a Form W-3c, Transmittal of Corrected Wage and Tax Statements, dated March 18, 2013, changing the prior total of \$5000 to the corrected total of \$24,000; (5) the Beneficiary's personal tax return for 2012 showing gross earnings totaling \$24,000; (6) state quarterly report for the first three quarters of 2012, all three naming [REDACTED] as the only employee who received wages, specifically \$3000 in wages during the first quarter and \$1500 in wages during each of the next two quarters; (7) correction to the Petitioner's state Employer's Quarterly or Annual Domestic Report, dated February 27, 2013, indicating that the Beneficiary and [REDACTED] each earned \$5000 and that [REDACTED] earned \$1500 in gross earnings for the reporting period ending December 31, 2012; (8) a second Correction to the Petitioner's state Employer's Quarterly or Annual Domestic Report, dated March 18, 2013, indicating that the correct gross earnings for the Beneficiary were \$24,000 rather than \$5000 for the reporting period ending December 31, 2012; (9) the Petitioner's first quarter federal tax return for 2012 showing that one employee received wages or compensation during that quarter and that the Petitioner paid a total \$3000 in wages; (10) the Petitioner's third quarter federal tax return for 2012 showing that no employees received wages or compensation during that quarter, but that it paid \$1500 in wages; (11) a correction to the Petitioner's fourth quarter federal tax return for 2012 showing \$11,500 as the total corrected amount for all employee earnings; (12) a second correction to Petitioner's fourth quarter federal tax return for 2012 showing \$30,500 as the total corrected amount for all employee earnings; and (13) the Petitioner's 2012 federal tax return showing that the Petitioner had total gross earnings totaling \$476,397 and that it paid \$29,000 in officer compensation and \$7500 in salaries and wages.

The Director denied the petition on September 24, 2014, and affirmed the denial on January 26, 2016, in a follow-up decision denying the Petitioner's motion. In the original decision, the Director concluded that the Petitioner offered an overly vague job description that did not establish that the Beneficiary would be employed in a managerial capacity. The Director reflected on the information provided in the Petitioner's 2012 quarterly tax returns and determined that the Petitioner had no employees during the course of two quarters, thus leaving no one for the Beneficiary to hire, fire, or train, thus indicating that the Beneficiary would carry out the Petitioner's nonqualifying tasks. The

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Director also considered the Petitioner's tax documents, finding that the Petitioner offered inconsistent information regarding the number of employees it had and the amount of wages it paid in 2012 and that the Petitioner offered no evidence to establish that it actually filed the amended tax documents.

In response to the original denial, the Petitioner filed a motion supported by new submissions pertaining to the Beneficiary's proposed position. The submissions included an undated employment authorization letter stating that the Beneficiary has been working for the Petitioner since 2011 in the position of general manager, earning a salary of \$2000 per month. The Petitioner claimed that the Beneficiary manages the business, performs logistics and human resources services, and manages the truck transportation. The Petitioner also provided an organizational chart depicting the Beneficiary as general manager and [REDACTED] as president, both shown at the top-most level of the organizational hierarchy. Both individuals are shown as overseeing [REDACTED] in her dual position as secretary and dispatcher with [REDACTED] in the position of "accounting" as [REDACTED] direct subordinate. [REDACTED] is shown as overseeing four truck drivers, all depicted at the bottom tier of the Petitioner's hierarchy.

In his latest decision, the Director questioned the validity of the documents amending the Beneficiary's salary and reiterated his reservations as to whether the Petitioner actually filed the amended documents. The Director also noted that the Petitioner's motion did not address previously submitted evidence showing zero employees to carry out the daily tasks.

On appeal, the Petitioner refers to an "initial application" and claims that it previously provided sufficient information about the Beneficiary's position as well as supporting evidence, including tax returns and Forms W-2 and 1099. The Petitioner also claims to have submitted supporting evidence when it filed prior L-1A nonimmigrant petition. The Petitioner provided supporting evidence in the Form of a 2012 W-3 statement indicating that it paid \$36,500 in wages, resubmitted 2012 Form W-2 statements for three employees, and provided 2012 Form 1099-MISC statements for three people.

2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

In the present matter, we note as a threshold matter that the Petitioner has not provided consistent information about the Beneficiary's job title or job descriptions. While Part 6, No. 1 of the Form I-140 indicates that the Beneficiary would assume the position of financial manager, the job

description the Petitioner provided in response to the RFE as well as the Petitioner's organizational chart both identify the Beneficiary's proposed position as that of general manager. We further note that the claim at Part 6, No. 3 of the Form I-140, where the Petitioner referred to the Beneficiary's management of a brokerage division, is inconsistent with the information provided in the Beneficiary's job description and in the Petitioner's organizational chart, which makes no reference to a brokerage division. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See, Matter of Ho*, 19 I&N Dec. at 591-92.

Further, we find that the job description that the Petitioner submitted in response to the RFE offered an incomplete account of the Beneficiary's specific job duties and the time he plans to allocate to managerial versus nonmanagerial tasks. As previously stated, the record does not include corroborating evidence to establish that the Beneficiary hired or fired anyone in 2012, as claimed in the job description; nor does the Petitioner's organizational chart corroborate the job description's claim that the Beneficiary would oversee "subordinate supervisors" to ensure compliance with company evaluations. We further note that the Petitioner has not established that the Beneficiary's role in training subordinate employees in areas concerning safety and compliance with the Department of Transportation is one that would involve the performance of managerial job duties, as there is no evidence to suggest that the training would involve working with supervisory, professional, or managerial employees.

In addition, the Petitioner indicated that the Beneficiary's job duties would include making decisions on purchasing and fund allocation. However, there is no evidence to indicate that the Petitioner has the staff to relieve the Beneficiary from having to actually make the purchases required for the business; nor is there any indication that engaging in such tasks qualifies as time spent in a managerial capacity. Similarly, while the Petitioner claims that the Beneficiary would "manage negotiations" with clients, it appears that the Beneficiary would be directly involved in actually conducting such negotiations, which the Petitioner has not established as a managerial task. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the nonqualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, the Petitioner offered a deficient job description that does not support the finding that the Beneficiary would allocate his time primarily to tasks of a managerial or executive nature.

Further, 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 a 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. Here, the Petitioner has provided an inconsistent accounting of who it employed at the time of filing. Specifically, the Petitioner provided conflicting tax documents, which preclude a

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comprehensive understanding of precisely whom the Petitioner employed at the time of filing and whether the Petitioner had the ability to relieve the Beneficiary from having to carry out the Petitioner's operational and administrative tasks. While the documentation seemingly indicates that the Petitioner employed [REDACTED] sometime in 2012, we cannot conclude that she was employed in November 2012 when the Petition was filed based on the deficient evidence that the Petitioner submitted. Despite the Director's expression of doubt as to whether the Petitioner actually filed the tax documents that were included in the record, the Petitioner has not addressed this concern and continues to rely on the previously submitted documents, whose validity is directly in question. Further, while the Petitioner identified a total of four truck drivers in its organizational chart, it provided only three Form 1099-MISCs and has not provided corroborating evidence to establish whether any of the three truck drivers actually provided the Petitioner with services at the time the instant Form I-140 was filed. Without an accurate depiction of the Petitioner's other employees, we cannot conclude that the Petitioner has the staff to support the Beneficiary in a managerial or executive position, such that the Beneficiary would be relieved from performing the operational and administrative duties associated with its trucking business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 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. 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." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i). 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. 8 C.F.R. § 204.5(j)(2). The evidence presented 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 a managerial position.

The Petitioner in the present matter provides an organizational chart, which attempts to illustrate a complex organizational hierarchy comprised of multiple managerial tiers. However, the record lacks sufficient information justifying the secretary/dispatcher's oversight of an accounting employee or the accounting employee's oversight of four truck drivers. While the chart depicts [REDACTED] directly overseeing an accounting position, the Petitioner did not provide a job description for [REDACTED] to establish that she actually has supervisory job duties as her organizational chart placement indicates. Further, the Petitioner provides no supporting evidence to explain how an employee who performs the duties of a secretary and dispatcher is qualified to oversee the work of an accountant; nor does the Petitioner explain why an accountant would be tasked with overseeing four truck drivers, as indicated in the Petitioner's organizational chart. 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) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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We further question why both the Beneficiary and the Petitioner's president are depicted as jointly overseeing the secretary/dispatcher. As the Petitioner did not provide information depicting his specific managerial tasks with respect to the employee who is identified as his direct subordinate, we are unable to determine how the Beneficiary and the company's president split their time overseeing a single employee whom the Petitioner has not established as being either managerial or supervisory, despite what the organizational chart seemingly indicates. [REDACTED] and [REDACTED] respective placements within the Petitioner's organizational hierarchy lead us to believe that the organizational chart is not an accurate depiction of the Petitioner's staffing structure. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, Section 204(b) of the Act, 8 U.S.C. § 1154(b); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The Petitioner also does not provide a description of the claimed subordinates' jobs to indicate that they are professional positions. To determine whether the 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 United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), 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." As such, the Petitioner does not provide any information about the Beneficiary's subordinates to establish that he manages supervisory, professional, or managerial employees, such that he could be considered a personnel manager.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary's managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The statute and regulations do not define the term "essential function." If a petitioner claims that a beneficiary will manage an essential function, that petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

In the present matter, the Petitioner does not claim or provide evidence to establish that the Beneficiary's primary role is to manage an essential function; nor is there sufficient evidence to establish that the Petitioner has the support staff to carry out the underlying job duties of an essential function. As such, we find no basis upon which to conclude that the Beneficiary would assume the role of a function manager.

We also find that the Petitioner did not specifically claim nor provide evidence to establish that the Beneficiary would be employed 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 a beneficiary to direct and a 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 an owner or sole managerial employee. A 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.*

As discussed above, the Petitioner has not provided a detailed job description or a reliable organizational chart that accurately depicts a sufficiently complex organizational hierarchy that would support the Beneficiary in an executive position. 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, these factors are not sufficient to establish that the Beneficiary’s actual duties, as of the date of filing, would be primarily managerial or executive in nature. As indicated above, the Petitioner provided a deficient job description and equally deficient supporting evidence, neither of which is sufficient to establish that the Beneficiary’s proposed employment would be primarily comprised of tasks in an executive capacity.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

B. Foreign Employment in a Managerial or Executive Capacity

If the Beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the Petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the Beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

1. Evidence of Record

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As stated above, the Petitioner identified the Beneficiary's foreign employer as [REDACTED]. However, the Petitioner did not provide a description of the Beneficiary's foreign duties at the time of filing. We further note that despite issuing an RFE to elicit highly critical information regarding the Beneficiary's job duties and the foreign entity's organizational hierarchy, the Petitioner's response did not include the requested information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Accordingly, given that the Petitioner did not provide the requested information pertaining to the Beneficiary's employment abroad, the Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary was employed abroad in a managerial or executive capacity.

In support of the motion, the Petitioner provided the foreign entity's organizational chart depicting the Beneficiary as president at the top of the hierarchy. The Beneficiary was depicted as overseeing an office manager and an accounting position and these positions were depicted as jointly overseeing a garage manager, who was shown as overseeing six truck drivers. The only information about the Beneficiary's position abroad was included in an undated statement indicating that the Beneficiary was employed by the foreign entity since 2004. The statement further claimed that the Beneficiary was "the manager for business, logistics, human resources and managing [*sic*] international and national truck transportation."

The Director denied the Petitioner's motion without addressing the specific evidentiary deficiencies pertaining to the Beneficiary's employment abroad.

On appeal, the Petitioner submits a statement claiming that the Beneficiary assumed the position of "general manager of the property broker division." The Petitioner indicated that the Beneficiary's duties were to "establish the division, obtain property broker authority, bond from mcsa [*sic*], hire additional property brokers, supervise the division to match truckers with empty space to manufacturers."

2. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary was employed abroad in a managerial or executive capacity.

As noted above, 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. § 204.5(j)(5). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.*

In the present matter, the Petitioner provided a deficient job description that does not list the Beneficiary's actual job duties or discuss what managerial tasks he performed. While the Petitioner attempts to supplement the record on appeal with an employment authorization letter, the job description contained therein is overly broad and does not explain what tasks were involved in establishing a property brokerage division, obtaining property broker authority, or supervising the division. These vague references do not convey a meaningful understanding of the Beneficiary's actual daily tasks. As previously stated, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See also*, sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *Matter of Church Scientology International*, 19 I&N Dec. at 604. Without providing critical information about the Beneficiary's job duties, which the Petitioner was expressly instructed to submit in response to the RFE, we cannot affirmatively conclude that the Beneficiary was employed abroad in a managerial or executive capacity. As stated previously, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, while the above described employment verification letter attested to the Beneficiary's period of employment and included a brief job description, the signature of the person who made these attestations is illegible and the signatory was not otherwise identified such that would establish his or her authority or personal knowledge to provide information pertaining to the Beneficiary's employment.

Further, in reviewing the totality of the record, including the foreign entity's organizational structure, the duties of the Beneficiary's subordinate employees, and the presence of other employees to relieve the Beneficiary from performing operational duties, we find that the Petitioner provided little information to support the claims put forth in the foreign entity's organizational chart.

As noted, a Beneficiary may qualify as a personnel manager or function manager. However, in this case the Petitioner did not provide evidence that the Beneficiary was employed as either. Specifically, the Petitioner did not provide job descriptions for the Beneficiary's subordinates or submit evidence to substantiate the assertion that the Beneficiary's direct subordinates – an office manager and accounting position – are supervisory as the organizational chart indicates. The Petitioner did not provide job description or educational credentials to establish that either subordinate performed supervisory functions or attained a level of education commensurate with a professional employee.

The Petitioner also did not claim or provide evidence to suggest that the Beneficiary's role in his position abroad was that of a function manager. As stated above, in order to establish that the Beneficiary was employed abroad as a function manager, the Petitioner would have to furnish a position description describing the duties performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of a beneficiary's daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary managed the function rather than performed the duties related to the function.

The record likewise does not support the assertion that the Beneficiary was employed as an executive. As noted, the job description provided does not indicate that the Beneficiary primarily performed qualifying tasks, and the absence of information concerning the foreign entity's staff and their duties precludes us from concluding that the foreign entity had sufficient organizational complexity to support the Beneficiary in an executive role.

In light of the evidentiary deficiencies described herein, we also find that the Petitioner has not established that the Beneficiary was employed in a managerial or executive capacity abroad.

IV. DOING BUSINESS

Beyond the Director's decision, we find that the Petitioner did not establish that it has been doing business for at least one year prior to the date of filing the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). Specifically, the regulation at 8 C.F.R. § 204.5(j)(2) defines that term as:

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.

In the present matter, while the Petitioner provided evidence of truck purchases that took place in November 2011 and May and August 2012, these documents do not account for the entire one-year time period that preceded the November 2012 filing of the petition. We note that the Petitioner's invoices for April and May 2013 pertain to transactions that took place after the petition was filed and are therefore irrelevant for the purpose of determining whether the Petitioner had been doing business for at least one year prior to the date of filing the petition. Therefore, given the lack of evidence, we find that the Petitioner has not established that it has been doing business for at least one year prior to the date of filing the petition.

V. ABILITY TO PAY

Next, also beyond the Director's decision, we find that the Petitioner did not establish its ability to pay the Beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) reads as follows:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes

the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Petitioner has the ability to pay the Beneficiary's proffered wage.

In order to establish the ability to pay, the Petitioner must provide copies of its annual reports, federal tax returns, or audited financial statements for the relevant time period in question. In the present matter, while the Petitioner provided a copy of its 2012 tax return showing that the Beneficiary was compensated \$24,000 as an officer of the corporation, there is no evidence to establish that this tax return was actually filed with the IRS. We further question the reliability of this tax return given the numerous anomalies pertaining to the Petitioner's 2012 quarterly tax returns and wage reports, which were inconsistent in disclosing the number of employees the Petitioner had during and the precise amount of wages it paid during any given quarter. As the Director pointed out in his decision, the Petitioner did not provide evidence to show that it actually filed its documents, including the amendments to the Form 941 and Forms W-2 and W-3.

Moreover, the Petitioner indicated at Part 6, No. 9 of the petition that the Beneficiary would be paid a monthly salary of \$3200, which is equivalent to an annual salary of \$38,400. As the petition's priority date falls on November 15, 2012, we must examine the Petitioner's tax return for 2012. The Petitioner's tax return for calendar year 2012 presents a net taxable income of \$0, thus indicating that the Petitioner could not pay a proffered wage of \$38,400 per year out of this income.

If the petitioner does not have sufficient net income to pay the proffered salary, we will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as we are satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash, or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Here, when we add the Petitioner's net current assets during the year in question, \$12,075, to the Beneficiary's purported officer compensation of \$24,000, the total of \$36,075 is more than \$2000 below the proffered wage of \$38,400. Therefore, even if Petitioner's 2012 tax return were proven

accurate and were to have been filed with the IRS, it would not establish that the Petitioner had the ability to pay the Beneficiary's proffered yearly salary at the time the petition was filed.

VI. PRIOR APPROVALS

Finally, the Petitioner asserts that USCIS previously granted the requested status, thereby recognizing that the Petitioner is eligible for the immigration benefit sought herein. However, it must be emphasized that each petition filing is a separate proceeding with a separate record. 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). That said, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. at 597. USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

VII. 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of GLNT-, Inc.*, ID# 18032 (AAO Aug. 1, 2016)