



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

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

MATTER OF A-T-R-, INC.

DATE: AUG. 4, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a Texas corporation that provides IT engineering consulting services, seeks to employ the Beneficiary in the position of vice president of operations 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 Petitioner appealed the Director's decision and the matter was remanded for further action. The Director has since issued a second denial, concluding that the Petitioner has not established that: (1) it has a qualifying relationship with the Beneficiary's employer abroad; (2) the Beneficiary was employed abroad in a managerial or executive capacity; (3) the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (4) it has the ability to pay the Beneficiary's proffered wage. The Director also made a finding of fraud based on anomalies and inconsistencies in the record.

The matter is now before us on certification. The record contains no further statements or evidence from the Petitioner with regard to the Director's findings in the certified decision.

Upon *de novo* review, we will affirm the Director's decision.

I. LEGAL FRAMEWORK

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.

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.

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. EVIDENTIARY STANDARD

As a preliminary matter, and in light of the Petitioner's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

....

The “preponderance of the evidence” of “truth” is made based on the factual circumstances of each individual case.

....

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the Petitioner’s contentions that the evidence of record establishes eligibility for the benefit sought.

III. 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.

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).

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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 Petitioner filed the Form I-140 on January 20, 2011. In support of the petition, the Petitioner provided a cover letter along with 44 supporting exhibits.¹ The Petitioner identified the Beneficiary’s last foreign employer as ██████ claiming to be ██████ parent based on its claimed ownership of 60%, or a majority interest, of that entity. The Petitioner claimed that its control of the foreign entity is derived from a joint venture between the Petitioner and the foreign entity.

The Director issued a request for evidence (RFE) on June 27, 2011, advising the Petitioner that the evidence in the record did not establish the existence of a qualifying relationship between the Beneficiary’s foreign employer and the U.S. petitioning company.

In response, the Petitioner provided a statement accompanied by 36 supporting exhibits. After reviewing the Petitioner’s submissions, the Director issued a denial, dated March 11, 2013, concluding, in part that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary’s foreign employer. The Director found that the Petitioner’s submissions did not support a finding of eligibility. Namely, the Director noted that certain foreign language documents were submitted without corresponding certified English translations and further pointed to various

¹ While reviewing the decision that the Director certified to our office for review along with all prior submissions, we observed that a number of the exhibits that were intended as part of the Petitioner’s originally submitted supporting evidence, i.e., ██████ were missing from the record of proceeding. Accordingly, we issued a letter, dated August 21, 2015, informing the Petitioner of the missing evidence. We allowed the Petitioner the opportunity to supplement the record. On September 21, 2015, the Petitioner responded to our letter and submitted the missing evidence, which consisted of the missing exhibits ██████ We have reviewed and incorporated the exhibits into the record.

documentary anomalies and inconsistencies that gave rise to doubt as to the credibility of the Petitioner's claim.

The Petitioner filed an appeal on April 12, 2013, contending that all foreign documents were accompanied by the required translations. The Petitioner generally disputed the Director's findings.

On January 24, 2014, following our review of the entire record, we issued a decision remanding the matter back to the service center based upon the Director's introduction of derogatory evidence of which the Petitioner was not notified prior to the issuance of the denial and which served as a basis for several of the Director's adverse findings. We instructed the Director to issue a notice of intent to deny (NOID) in order to notify the Petitioner of any and all derogatory information that would serve as a basis for denying the petition, and to allow the Petitioner an opportunity to rebut the derogatory information and/or evidence.

The Director complied with our instructions and issued a NOID on April 30, 2014. The Director included the adverse findings that were issued in the original denial notice and added an additional finding.

The record indicates that the Petitioner did not respond to the NOID. Accordingly, the Director issued a decision, dated September 10, 2014, denying the petition, in part, based on the conclusion that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's employer abroad.

B. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has 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.

In the present matter, the Petitioner's claim of having a qualifying relationship rests on its understanding that by virtue of participating in a joint venture with the Beneficiary's foreign employer, a qualifying relationship was created between the two joint venture participants, i.e., the Petitioner and the Beneficiary's employer abroad. Contrary to the Petitioner's assertion, the question of whether the requisite qualifying relationship exists must be addressed by focusing on the key elements of common ownership and control between the Petitioner and the Beneficiary's employer abroad. Here, the Petitioner submitted the foreign entity's October 13, 2007 "Ordinary

Meeting of Shareholders,” which shows that the Petitioner acquired 30,000 out of 50,000 shares issued by the foreign entity, thereby resulting in the Petitioner’s acquisition of a 60% ownership interest in that entity, as discussed in the initial supporting statement.

As such, the Petitioner’s qualifying relationship with the foreign entity resulted from its purchase of 60% of the foreign entity’s shares, rather than the formation of a joint venture between the Petitioner and the foreign entity. While acquiring ownership of an entity by participating in a 50-50 joint venture may be one way of establishing a parent-subsidiary relationship between the purchasing and subsidiary entities, the evidence presented in the matter at hand indicates that the Petitioner’s majority ownership of the foreign entity is the key indicator that a parent-subsidiary relationship was created, regardless of any joint venture, which may or may not have been created. Therefore, the Director’s determination that the Petitioner did not provide sufficient evidence to show that the Petitioner and the Beneficiary’s foreign employer “have exercised a 50/50 joint venture and that both entities have equal control and veto power over the foreign company and the U.S. petitioner,” is irrelevant in determining whether a qualifying relationship exists between the two entities in question.

As previously explained in this discussion, in order to determine whether the Beneficiary’s U.S. and foreign employers have a qualifying relationship, we must consider the elements of common ownership and control shared between the two entities. In the instant matter, by virtue of having submitted evidence to show that the Petitioner acquired a majority of the foreign entity’s stock, the Petitioner met its burden in establishing that a qualifying relationship was established. While the terms of the joint venture agreement between the Petitioner and the Beneficiary’s foreign employer indicate that both entities would make capital contributions to the venture, the true basis for the qualifying relationship is the Petitioner’s ownership and control of the foreign entity, rather than its 60% capital contribution to the joint venture.

In light of the above, we hereby withdraw the Director’s finding, as it is not consistent with the above analysis.

IV. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The next two issues to be addressed in this discussion pertain to the Beneficiary’s 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 was 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.

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 eight employees in the United States at the time of filing and a gross annual income of \$825,124. In its supporting statement, the Petitioner

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claimed that the Beneficiary “has supervised a major function of the company and has been responsible for executive duties, in addition to being responsible for its operations and hiring of additional personnel.” In a separate statement, the Petitioner provided a list of 11 job duties, which were restated in the Petitioner’s RFE response statement, which included the following corresponding percentage breakdown:

- Designs the short, medium and long[-]term engineering consulting services plans of our engineering consulting firm based out of [REDACTED] Texas; 20%
- Coordinates, organizes, supervises and controls the integration operations and the staff reporting to him, including presentation analysis, presentation to clients, job accuracy, and staff accountability; 15%
- Oversees all activities in support role to the [p]resident, including service pricing, financial reports, budget for both services, studies, consultation and engineering analysis; 15%
- Meets frequently with subordinate engineers to ensure job accountability and accuracy in the parameters of our services which include services related to foundation and structural systems analysis, hydrology and water penetration analysis, accident reconstruction; general causal analysis; construction materials failure, statistical analysis; accident investigation analysis, and fire/wind/water damage analysis; 15%
- Directs, and evaluates the reports received from his subordinate engineers on topics based [*sic*] related to our engineering consulting services[.]; 10%
- Supervises the results of the subordinate staff to improve the long[-]term competitiveness of the services offered by the company, and develops new presentation strategies and analysis which targets specific areas, with initiatives focused on the areas under his supervision . . . ; 10%
- Directs subordinates in their particular recommendations given to clients, including studies and opinions in diverse engineering fields; 10%
- Participates in the initial contracts with potential target accounts and suppliers, including insurance companies, legal firms, and state and government offices[.] 5%

In the same RFE statement, the Petitioner stated that the Beneficiary also assumes a managerial role in which he is responsible for overseeing the work of three full-time employees and an unspecified number of “our part[-]time personnel.”

As indicated previously, the Director originally denied the Petition on March 11, 2013. The Director restated the above list of job duties and the corresponding percentage breakdown and affirmatively concluded that the Beneficiary would allocate 85% of his time to non-qualifying job duties. In the April 12, 2013 appeal, the Petitioner submitted a statement disputing the Director’s findings.

As indicated above, we issued a decision on January 24, 2014, remanding the matter back to the Director for a new decision. Following our remand, the Director issued a NOID on April 30, 2014

in which he again determined that the Beneficiary would not be employed in a managerial or executive capacity.

The Petitioner did not respond to the NOID, resulting in the Director's issuing a second denial, dated September 10, 2014, which he certified to us for review. The record does not indicate that additional evidence or information has been submitted subsequent to the certification.

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.

While we have conducted a *de novo* review of the record, and find that the Petitioner has not provided sufficient evidence to establish that the Petitioner would employ the Beneficiary in a qualifying managerial or executive capacity, we conclude that the Beneficiary's job description, which formed the basis of the Director's determination, does not support the finding that "the beneficiary will be spending more than 85% of his time in [sic] non-managerial activities such as consulting, client presentations, budgeting, quality assurance and customer care." A review of the supporting job description shows that the Petitioner claimed that the Beneficiary would coordinate, organize, supervise, and control client presentations and oversee consultation and engineering analysis. The Petitioner did not claim that the Beneficiary would actually carry out these tasks himself. Further, contrary to the Director's analysis of the evidence, the job description made no mention of the Beneficiary's role, if any, with respect to budgeting, quality assurance, or customer care. Thus, while we find the Beneficiary ineligible for the immigration benefit sought herein, we cannot base our finding on the flawed analysis contained in the Director's decision.

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 job duties with the U.S. entity. 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, its staffing and operational needs, as well as the job duties performed by support personnel. The sum of these factors contributes to our ability to gain a comprehensive understanding of the Beneficiary's placement and role within the Petitioner's organizational hierarchy.

As indicated above, we find that a comprehensive review of the record indicates that the evidence of record is insufficient and does not adequately support the Petitioner's claim that the Beneficiary's proposed employment would be comprised of tasks that are primarily within a qualifying managerial or executive capacity. Although the Beneficiary's proposed percentage breakdown of job duties indicates that the Beneficiary would spend approximately 60% of his time in a supervisory role where he would oversee others in their performance of various operational tasks, the record lacks evidence to support these assertions. Namely, despite the claim made in the Form I-140, indicating

that the Petitioner had eight employees at the time of filing, the Petitioner's RFE response contained a statement, dated July 26, 2011, in which the Petitioner listed a total of six employees, including one part-time administrative assistant and one new employee, who was hired approximately six months after the petition was filed. This additional information indicates that the U.S. entity may have been staffed with only one part-time and four full-time employees at the time of filing, which is not consistent with the Petitioner's original claim stating that it had a total of eight employees. 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).

Although the Director did not expressly find that the Petitioner's original claim and the information provided in response to the previously issued RFE are inconsistent, both the NOID and the Director's final decision summarized the Petitioner's submissions and reiterated the Petitioner's claims, thus adequately informing the Petitioner of its submission of inconsistent evidence with regard to its staffing composition at the time of filing. The record shows that, while given the opportunity, the Petitioner did not respond either to the NOID or to the findings issued in the Director's certified decision. Thus, while the Beneficiary's list of job duties includes numerous references to subordinates, including "subordinate engineers" and a "subordinate staff" in general, the record does not contain evidence resolving the inconsistency regarding the number of employees the Petitioner had at the time the Form I-140 was filed; nor does the Petitioner provide supporting evidence establishing that it employed multiple subordinate engineers who could conduct the necessary types of analyses for the Petitioner's clients and who could provide reports for the Beneficiary to review with regard to the consulting services the Petitioner offers to its clients.

As previously noted, the Petitioner's July 26, 2011 RFE response statement indicates that the Petitioner hired a second engineering employee on July 8, 2011, which is approximately six months after the Petition was filed. The evidence of record indicates that the Petitioner had, at most, one engineering employee at the time of filing, thus indicating that the Petitioner's references to "subordinate engineers" do not reflect the staffing hierarchy the Petitioner had in place during the time period in question. While it is possible that an entity's staffing composition can change after the date of filing as a result of new employees being hired or existing employees leaving or being let go, a determination of the Petitioner's eligibility must be made on the basis of facts and circumstances that existed at the time the petition was filed; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the matter at hand, a review of the job description that the Petitioner originally provided at the time of filing shows that the Petitioner made no references at all to "subordinate engineers" and made only general references to the Beneficiary's "subordinates," who were purportedly assigned the same analysis-based tasks – foundation and structural systems analysis, hydrology and water penetration analysis, general causal analysis, statistical analysis, accident investigation analysis, and fire, wind, and water damage analysis – that were expressly assigned to the Beneficiary's engineering subordinates in the subsequent job description that was provided in the Petitioner's RFE response. Given that the Petitioner did not have multiple engineering subordinates for the Beneficiary to oversee at the time of filing, it is unclear whether the types of analyses that had to be

performed by the Beneficiary's subordinates required the knowledge and educational credentials of a professional engineering staff. 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. Comm'r 1972)).

Further, while the updated job description that the Petitioner provided in the RFE response statement indicated that all analysis would be performed by the Beneficiary's subordinate engineering staff, the original job description indicated that the Beneficiary himself would actually conduct the various analyses. This comparison of job descriptions indicates that at the time of filing, the Beneficiary was assigned various non-qualifying operational tasks, which the Petitioner assigned to the Beneficiary's subordinates in a subsequent job description. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying 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). Here, the original job description expressly indicates that the Beneficiary would be assigned certain non-qualifying operational tasks as part of his proposed position. However, based on the job descriptions provided, we are unable to determine what portion of time the Beneficiary would allocate to qualifying versus non-qualifying tasks. As such we cannot conclude that the Petitioner's operational tasks would truly be only incidental to the proposed position.

After considering the differences between the two job descriptions, the inconsistent claims regarding the number of employees the Petitioner had at the time of filing, and the overall lack of evidence to establish the level of the Petitioner's organizational complexity at the time of filing, we cannot conclude that the Petitioner's organization was adequately staffed with the support personnel necessary to carry out the Petitioner's operational tasks, thereby relieving the Beneficiary from having to allocate his time primarily to non-managerial and non-executive job duties. In sum, the Petitioner has not provided sufficient reliable supporting evidence to establish by the preponderance of the evidence that the Beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

B. Beneficiary's Employment Abroad

The third issue we will address in this decision is the Beneficiary's employment abroad and whether it was primarily comprised of tasks within a managerial or executive capacity.

1. Evidence of Record

In the original supporting statement, the Petitioner stated that during his employment abroad the Beneficiary "managed the operation of the company's operations, contract negotiations, project oversight, business plans, and financial procurement." The Petitioner added that the Beneficiary

forecasted profits and losses and “was also responsible for negotiating and signing contracts with clients worldwide, vendors, and purchasers, and was responsible for the expansion of [REDACTED] into the U.S. . . .”

In response to the RFE, the Petitioner offered additional evidence in the form of a statement from the Beneficiary’s foreign employer. Namely, the foreign entity stated that during his employment abroad the Beneficiary allocated 20% of his time to directing and formulating a strategy “to consolidate [the foreign entity’s] operational sites . . . and affiliate offices”; 20% to developing and managing the foreign entity’s “commercial strategies and plans to optimize business performance in areas such as, [sic] supplier relationships, employee and manager efficiency, and operational performance”; 10% to directing and managing “external relationships” with product suppliers, clients, government officials, and IT providers; and 10% to directing company strategies for implementing “corrective action, [sic] and develop[ing] indicators, targets and initiatives focused on company growth and long[-]term stability plans.” The Petitioner also provided the foreign entity’s organizational chart, which indicates that the Beneficiary’s direct subordinates included accounting, operations, sales, and human resources with the four remaining positions – development, design, information architecture, and technical support – depicted as the direct subordinates of the operations position.

In the March 11, 2013 denial of the petition, the director offered an analysis of the Beneficiary’s employment abroad, which was similar to his analysis of the proposed position. Namely, the Director’s discussion of the Beneficiary’s employment abroad also erroneously referred to marketing, market research, and quality assurance as elements that comprised 85% of the Beneficiary’s former position abroad, despite the fact that none of these elements was actually cited in any of the seven statements used to describe the Beneficiary’s position abroad.

As previously indicated, we withdrew the Director’s and instructed that a NOID be issued. As the Petitioner did not response to the April 30, 2014 NOID, the Director issued a second denial, which was based, in part on his conclusion that the Petitioner did not provide sufficient evidence to establish that the Beneficiary was employed abroad in a managerial or executive capacity.

2. Analysis

Similar to the analysis regarding the Beneficiary’s proposed employment, when considering the Beneficiary’s employment abroad, we once again commence with a review of the Beneficiary’s job description, followed by an assessment of the foreign entity’s organizational structure, its staffing and operational needs, as well as the job duties performed by support personnel to determine the company’s capacity for relieving the Beneficiary from having to allocate his time primarily to its operational tasks. As previously noted, we conduct a *de novo* review of the record pertaining to all grounds for denial. Having done so in the present matter, we find that while the Director’s analysis is flawed, the Petitioner has not provided sufficient evidence to establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity. However, to the extent that the record does not support the Director’s analysis that the Beneficiary “spent 85% of his time performing duties such as: [sic] marketing, market research, quality assurance and acquisition of new customers” this analysis must be withdrawn.

Notwithstanding the Director's flawed analysis, we agree with the ultimate conclusion that the record does not establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity. First, after reviewing the job duties and percentage breakdown offered in response to the RFE, we find the job description lacks sufficient detail and as a result precludes us from gaining a meaningful understanding of the actual tasks the Beneficiary carried out during his employment as the foreign entity's president and CEO. In its supporting statement, the foreign entity indicated that the Beneficiary allocated 20% of his time to directing and formulating a strategy "to consolidate [the foreign entity's] operational sites . . . and affiliate offices"; 20% to developing and managing the foreign entity's "commercial strategies and plans to optimize business performance in areas such as, [sic] supplier relationships, employee and manager efficiency, and operational performance"; 10% to directing and managing "external relationships" with product suppliers, clients, government officials, and IT providers; and 10% to directing company strategies for implementing "corrective action, [sic] and develop[ing] indicators, targets and initiatives focused on company growth and long[-]term stability plans."

The statement did not include a discussion of the specific strategies the Beneficiary created or the Beneficiary's actual underlying tasks that led to the creation of the various strategies. The job description was equally vague in its lack of information disclosing the specific tasks involved in directing and managing the foreign entity's various "external relationships." Further, while the statement indicated that the Beneficiary spent 15% of his time assuming a leadership role with respect to various managers and "other personnel," the statement does not clarify which of the Beneficiary's assigned tasks reflected his leadership role or explain how those tasks are different from the Beneficiary's role in evaluating reports created by his subordinates or overseeing site acquisition, sales, and operational management, which constitute tasks performed by potential subordinates.

In addition to the deficiencies discussed above, we find that the foreign entity's organizational chart is inconsistent with the list of employees that was provided in tandem with the Beneficiary's list of job duties. As indicated above, the foreign entity's organizational chart indicates that the Beneficiary's direct subordinates included accounting, operations, sales, and human resources with the four remaining positions – development, design, information architecture, and technical support – depicted as the direct subordinates of the operations position. However, the foreign entity's job description letter indicates that the Beneficiary's subordinates included an operations director, design director, computer/architectural design, technical manager, human resources manager, sales director, and accounting director, thus excluding only one of the positions from the organizational chart – that of development – from the list of subordinates. We also note that despite the foreign entity's inclusion of the word "director" as part of the design position title and the term "manager" as part of the technical position title, the organizational chart does not indicate that either position's placement within the foreign entity's hierarchy is consistent with its directorial or managerial position title.

We further point to additional inconsistencies between the information provided in the foreign entity's RFE response statement and its organizational chart. First, while the statement indicates that the operations director had five subordinates, the organizational chart indicates that he had only four, three of whom the statement claimed as direct subordinates of the Beneficiary. Second, while the

statement indicates that the design director supervised three computer graphics designers, the organizational chart does not depict any positions subordinate to the designer. Similarly, while the statement indicates that the computer/architectural designer supervised four subordinates, the organizational chart showed no subordinates for this position. Next, while the information systems/technical manager was described as reporting directly to the Beneficiary, the organizational chart depicts the technical position as being directly subordinate to the operations position, thus adding to the mounting list of inconsistencies. As previously noted, the Petitioner has the burden of resolving any inconsistencies in the record through the submission of independent objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. 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. *Id.* at 591. The numerous anomalies and inconsistencies described herein give rise to doubt as to the assertions made with regard to the Beneficiary's employment abroad and the qualifying nature of such employment.

Lastly, while the Petitioner claimed that its RFE response included the foreign entity's roster of 30 employees, a separate department breakdown, personnel documents, a payroll roster spreadsheet, and filing reports for the foreign entity's employees during the 2010 calendar year, all documents in supporting exhibits 3-9, were in Spanish and were not accompanied by certified English translations. Despite the fact that the Director cited this deficiency, both in the NOID and in the most recently issued denial, the Petitioner did not respond to either notice or provide evidence to cure the cited deficiency. Given the lack of certified translations of these documents, we cannot determine whether the evidence supports the Petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Therefore, the foreign documents will be accorded minimal evidentiary weight in this proceeding.

Accordingly, in light of the numerous evidentiary deficiencies cited above with regard to the Beneficiary's former employment abroad, we find that the record lacks sufficient reliable evidence to determine that the Beneficiary's position with the foreign entity was in a qualifying managerial or executive capacity and on the basis of this second adverse finding, this petition cannot be approved.

V. ABILITY TO PAY

The fourth issue to be addressed in this proceeding is whether the Petitioner submitted sufficient evidence to establish that it had the ability to pay the Beneficiary's proffered wage commencing with the date the petition was filed.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

A. Evidence of Record

The Form I-140 in this matter was filed on January 20, 2011. The Petitioner's initial supporting evidence included the following: Quarterly and annual tax returns for 2008 and 2009, quarterly tax returns and employers reports for the first three quarters of 2010, employee earnings statements for January 31 through September 30, 2010, copies of bank statements for 2009 and 2010, a balance sheet and profit and loss statement accounting for transactions as of June 28, 2009, a profit and loss statement for 2008, and a balance sheet and profit and loss statement for 2010.

In the June 27, 2011 RFE, the Director asked the Petitioner to provide the IRS Form W-2 and 1099-MISC statements it issued to each employee and contractor for work performed in 2010. In response, the Petitioner provided four Forms W-2, Wage and Tax Statements.

In the NOID that was issued on April 30, 2014, the Director informed the Petitioner that additional evidence would be necessary to establish its continuing ability to pay. Namely, the Director instructed the Petitioner to provide its tax returns for 2010-2013, which would account for the time period immediately prior to and following the date the petition was filed. The record shows that the Petitioner did not respond to the NOID. The Director pointed to the Petitioner's failure to respond to the NOID and cited the lack of ability to pay evidence in his most recent decision, which has been certified to us.

B. Analysis

As a preliminary matter, we note that 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). We further note that the Petitioner has not responded to the Director's certified decision.

We find that the evidence previously submitted to support the Petitioner's ability to pay is insufficient to meet the regulatory requirements. While the Petitioner provided its 2008 and 2009 tax returns, neither document accounts for the time period during which the petition was filed. Further, while the Petitioner provided additional documentation in the form of bank statements, balance sheets and profit and loss statements, W-2 statements, and quarterly tax returns and employee wage reports, none of these documents are expressly permitted by 8 C.F.R. § 204.5(g)(2) as an acceptable means of establishing the ability to pay. The Petitioner did not establish that it was unable to provide the requested evidence that is expressly cited at 8 C.F.R. § 204.5(g)(2). Therefore, in light of these evidentiary deficiencies, we find that the Petitioner has not established its ability to pay commencing with the date the petition was filed and on the basis of this third ground of ineligibility the instant petition must be denied.

VI. FINDING OF FRAUD

The last issue to be addressed in this decision is the Director's finding of fraud. Although the Director noted a number of evidentiary anomalies and inconsistencies, the Director's finding of

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fraud was wholly unsupported.² In fact, the Director did not define what constitutes fraud or explain which facts in the present matter support a finding a fraud. Instead, the Director provided the statutory ground for finding willful misrepresentation of a material fact, but similarly neglected to explain its applicability to the evidentiary deficiencies that were cited in the Director's discussion of the Petitioner's eligibility to classify the Beneficiary as a multinational manager or executive under section 203(b)(1)(C) of the Act. In other words, despite his reference to willful misrepresentation of a material fact and ultimate finding of fraud, the Director did not articulate a basis for his finding by listing the elements of fraud and willful misrepresentation of a material fact, distinguishing between these two terms,³ and applying the element of either definition to the facts presented in the record.

Here, the inconsistencies described above do not warrant a finding of fraud or willful misrepresentation of a material fact. That said, anytime a petition includes numerous errors and discrepancies, and the petitioner does not to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the Petitioner's assertions. As previously indicated, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. While the discrepancies and errors catalogued above do not rise to the level of fraud or willful misrepresentation of a material fact, they lead us to conclude that the evidence of the Beneficiary's eligibility is not credible. Notwithstanding our finding regarding the Petitioner's eligibility and the quality of the evidence submitted in support thereof, the Director's finding of fraud is not substantiated by the evidence of record and is hereby withdrawn.

V. CONCLUSION

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

ORDER: The director's June 29, 2015 decision is affirmed. The petition is denied.

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² While the Director also pointed out that the Petitioner's president, [REDACTED] has been associated with two other organizations and further noted that [REDACTED] signed the Petitioner's lease as both the tenant and the landlord, we do not find that these observations adversely affect the Petitioner's credibility.

³ The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. See *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).