



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

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

MATTER OF D-I-, INC.

DATE: JULY 7, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, which describes itself as a holding company, seeks to permanently employ the Beneficiary as its director and president under the first preference immigrant classification for multinational executives or managers. See Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Texas Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity; (2) the Beneficiary has been employed abroad in a managerial or executive capacity; (3) the Petitioner has been doing business for at least one year prior to the petition's filing date; and (4) the Petitioner has the ability to pay the Beneficiary's proffered wage.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by disregarding relevant evidence and by drawing unwarranted conclusions.

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

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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 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager.

II. DOING BUSINESS

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it has been doing business for at least one year prior to the filing date, as required by the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D).

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. 8 C.F.R. § 204.5(j)(2).

A. Evidence of Record

We will address this issue first, because our conclusions on this subject will affect our findings regarding other stated grounds for denial.

The Petitioner filed the petition on December 19, 2014. With the petition, the Petitioner submitted a letter from [REDACTED] director of the petitioning company, who stated:

Our company is a wholly-owned subsidiary of [REDACTED] of [REDACTED] Pakistan. Our parent company established [REDACTED] in 2012. It has now elected to acquire [REDACTED] and to consolidate the two companies under this [petitioning] company as an “umbrella” or “holding” company.

We have converted several assumed names formerly held by [REDACTED] to our name. We have also established [REDACTED] Texas as our headquarters location.

The Petitioner submitted copies of assumed name certificates, filed with the State of Texas on July 21, 2014, indicating that the Petitioner would do business under the names [REDACTED] and [REDACTED]. The record establishes that [REDACTED] is a convenience store located at the address that the Petitioner identifies as its headquarters.

The Petitioner also submitted a copy of its certificate of formation, filed with the State of Texas on July 8, 2014, five months and 11 days before the petition’s filing date.

The Petitioner also submitted copies of Franchise Tax Account Status printouts, showing that all three named companies were in active status as of December 11, 2014. The printouts for the Petitioner and for [REDACTED] showed the same [REDACTED] Texas, mailing address for both companies,

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and both named the Beneficiary as the registered agent for the respective entities. The printout for [REDACTED] showed an address in [REDACTED] Texas, and identified [REDACTED] as the registered agent. [REDACTED] status printout showed a registration date of August 16, 1989.

The Petitioner submitted copies of share certificates, indicating that [REDACTED] (the Petitioner's foreign parent company) owns 10,000 shares of [REDACTED] and 140,000 shares of the petitioning entity. The Petitioner did not submit share certificates for [REDACTED]

The Director issued a request for evidence (RFE), observing that "the US petitioner was created on July 8, 2014," and therefore "it does not appear that the [Petitioner] . . . has been doing business for at least 1 year prior to the filing of the I-140" on December 19, 2014. The Director also asked for additional evidence to corroborate the Petitioner's claimed ownership of [REDACTED] and [REDACTED]

In response, [REDACTED] repeated his earlier assertion that the foreign parent company "established [REDACTED] in 2012 . . . [and] has now elected to acquire [REDACTED] and to consolidate the two companies under [the petitioning] company." He added: "There was no exchange of money involved in the transactions since our parent company already owned [REDACTED] [a]nd acquired [REDACTED] [i]n exchange for the support and expansion of opportunities that it would receive from including it under the umbrella of [the petitioning company]."

The Petitioner's then-attorney of record, [REDACTED] stated:

As of [the petition's filing] date, the petitioner had been fully incorporated, organized, and had absorbed all of the assets and liabilities of [REDACTED] and [REDACTED] including their "goodwill" and prior business dealings. Thus, it had become the "successor in interest" of those two entities. Both of those entities had been "doing business" for many years. . . . Thus, as successor in interest, the petitioner . . . has been "doing business" for over a year through its components at the time of the filing of the petition.

The Director denied the petition, based, in part, on the finding that the Petitioner had not been doing business for at least one year as of the petition's filing date. The Director acknowledged the claim that the Petitioner is the successor in interest of both [REDACTED] and [REDACTED] but the Director concluded that the Petitioner had not shown that it had absorbed the companies and assumed their operations. Rather, the Director determined, "it appears that these companies are still viable entities" in their own right, in which case there can be no successor in interest.

On appeal, the Petitioner states that it documented the ownership structure through stock certificates.

¹ The State Bar of Texas lists [REDACTED] as deceased. (https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm& [REDACTED] printout added to record April 27, 2016.)

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B. Analysis

The Petitioner does not contest the evidence showing that the petitioning entity came into existence less than six months before the filing date. Instead, the Petitioner maintains that it meets the “doing business” requirement through its ownership interest in [REDACTED] and [REDACTED]

Responding to the Director’s finding that [REDACTED] and [REDACTED] “are still viable,” the Petitioner states: “Yes, they are still viable. They did not disappear into oblivion simply because their ownership changed.” This response misses the point. Because [REDACTED] and [REDACTED] still exist as distinct corporations that continue to do business in their own right, we cannot view the Petitioner as their successor in interest. Successorship in interest occurs when one company ceases to exist, and another entity assumes its assets and obligations, effectively operating in place of the earlier entity. If the original entities still exist and do business, then no other entity can claim to be their successor in interest.

The Petitioner has submitted documentation relating to the past business activity of [REDACTED] and [REDACTED]. The petitioning U.S. employer itself, rather than any affiliate or subsidiary, must have been doing business for at least one year. 8 C.F.R. § 204.5(j)(3)(i)(D). The record shows that [REDACTED] has existed since 2012, and [REDACTED] since 1989, but neither of those entities is the petitioning employer. Therefore, evidence relating to those companies does not and cannot show that the petitioning entity has been doing business for a year or more prior to the petition’s filing date.

Furthermore, the record does not support the Petitioner’s claim to have acquired the other businesses. Counsel, on appeal, states: “The Petitioner has shown that it became the owner of [REDACTED] and [REDACTED] [b]y virtue of stock certificates from both companies transferring all the outstanding shares of each to [REDACTED].² The record does not contain those documents, and no official of the petitioning entity has directly claimed to have submitted them. The unsupported assertions of counsel do not constitute evidence. *See, e.g., Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner previously submitted copies of share certificates showing that [REDACTED] in Pakistan, owns the Petitioner and [REDACTED]. This common ownership makes the Petitioner an affiliate of [REDACTED] but it does not grant the Petitioner ownership of [REDACTED] and it does not, by itself, make the Petitioner a holding company that owns or controls [REDACTED]. Counsel states that “this was an ‘in-house’ transfer so no money was exchanged,” but the record contains no documentary evidence to corroborate this statement. [REDACTED] letter, in response to the RFE, includes this claim but is not, itself, evidence to support the claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

² It is not clear whether counsel means the Petitioner or the parent company, both named [REDACTED]

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While [REDACTED] appears at least to be affiliated with the Petitioner, there is no evidence of any ownership connection between [REDACTED] and either the Petitioner or its parent entity in Pakistan. The Petitioner had initially submitted a 2013 Summary of Stock Ownership (a supplement to its IRS Form 1120S, U.S. Income Tax Return for an S Corporation), which identified [REDACTED] as [REDACTED] sole owner.

The Petitioner's response to the RFE included a copy of [REDACTED] 2014 IRS Form 1120S tax return. Schedule K-1 of that return identified [REDACTED] as [REDACTED] sole shareholder. The return was prepared in early 2015, after the December 2014 filing date. Therefore, this document, on its face, contradicts the Petitioner's claim that it, or its parent company, owned [REDACTED] at the time of filing.

Because the record does not support the claim that the Petitioner owns either [REDACTED] or [REDACTED] we need not and will not consider the evidence that the Petitioner has submitted regarding the business activities of those two entities. The Petitioner asserts that the Beneficiary is also employed by [REDACTED] but his duties with that company are not with the petitioning U.S. employer and cannot establish eligibility.

With respect to the Petitioner itself, the company came into existence less than a year before the petition's filing date, and therefore it cannot meet the statutory requirement that it must have done business for at least a year prior to filing. Furthermore, the Petitioner has not established that it has engaged in any activity that would meet the regulatory definition of doing business. The Petitioner has not identified any goods or services that it provides; all the business documentation in the record relates to [REDACTED] and [REDACTED]. Some invoices in the record refer to [REDACTED] and [REDACTED] both named on assumed name certificates, but, as the Petitioner has acknowledged, those names were already used by [REDACTED]. Some materials, such as bank statements, name both [REDACTED] and [REDACTED]. There is no evidence that the invoices relate to business activity conducted by the Petitioner, independently of [REDACTED].

The record does not establish that the Petitioner has done business at all, and it has not existed for the required year. Absent evidence of qualifying ties to [REDACTED] and [REDACTED] the Petitioner has documented only that it exists. By regulation, the mere presence of an agent or office does not qualify as doing business. *See* 8 C.F.R. § 204.5(j)(2).

For the above stated reasons, we find that the Petitioner has not established that it was doing business for at least one year prior to the petition's filing date.

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: (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.

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 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. Employment in a Managerial or Executive Capacity in the United States

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.

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1. Evidence of Record

In his introductory letter, [redacted] stated:

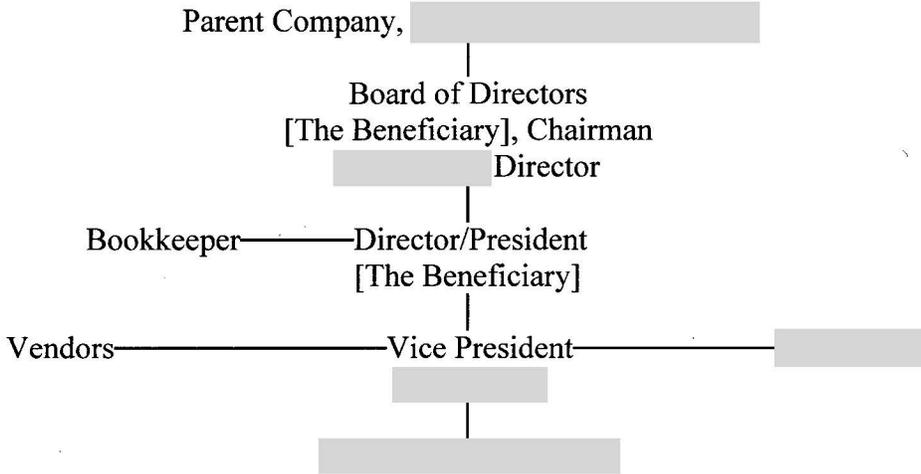
We have a business enterprise with 16 employees. . . . As Director, President, and Chief Executive Officer of the company, [the Beneficiary] makes the major decisions, oversees the overall operations of the company and manages the Managers and officers of the two companies. . . . He reports only to the overseas foreign parent company.

....

. . . [H]e will spend about 75% of his time interfacing with the top Managers and officers he manages. This involves sessions with individuals who report to him and group "staff" meetings. He also must evaluate the performance of the persons he supervises.

As you can see from the Organizational Chart, he will be managing the Vice President, and three Managers of [redacted] which has been folded into this company. He will also be overseeing the President of [redacted] which has been acquired by this company.

The Petitioner submitted an organizational chart showing the following structure:



With regard to the Petitioner's two claimed subsidiaries, the chart indicated that [redacted] and [redacted] each employed a manager, an assistant manager, a head clerk/cashier, and front line employees such as cashiers and stockers. For [redacted] the chart identified [redacted] as the manager but showed no other employees, instead indicating that the company is in a "Development Stage." The chart also indicated that [redacted] was in a "Development Stage," with a president [redacted] manager, and assistant manager.

In the RFE, the Director stated that the Petitioner had "only provided [a] general description of the beneficiary's duties." The Director asked the Petitioner to submit a more detailed statement, listing the Beneficiary's specific job duties and the percentage of time devoted to each. The Director also requested job descriptions for the Beneficiary's subordinates.

In response, the Petitioner submitted an unsigned statement on company letterhead. Relevant portions of the statement appear below (note: errors in the original text have not been changed):

[The Beneficiary] in his capacity as Director of our company will be supervising Four Managers through [the] General Manager. He would provide strategic and policy guidance and brief and seek feed back and views on new policies and marketing strategies. Resolve issues and facilitate work of the departments. . . .

. . . In his capacity as Director, [the Beneficiary] continues to be involved in all major decisions affecting the operations of the company. He has been serving as Director [for the] last several years. . . . He has established and maintains financial relations and develops and implements overall operating structure, budget, personnel policies, and marketing plans. The beneficiary is at the apex of management structure of . . . our entity and has absolute authority to hire, promote, transfer and de hire the top management team. The top management team, in turn, perform these management functions for the lower echelon of the company in their respective areas of responsibility. . . . He through General Manager and Departmental heads conducted outreach to the other multinational clients and companies and sought new business and developed new clients. He co-ordinated with local authorities to formulate company policies, manage departmental operations in our office. He develops protocols and operational procedures for various projects.

He will oversee the entire operations of the US Company. Hire, train and supervises Managers for US Operations. He develops survey of markets and suggests the parent company about the profitability of operations. He explores expansion and diversification of operations and investments and develops business strategy and confers with clients and outside professionals. He ensures the timely completion of targets and review the progress of ongoing operations. His duties with our entity in US includes: Plan, direct, and coordinate the operations of our Business development and Marketing of our services through Managers and four departmental heads. Direct and coordinate an organization'S financial and budget activities to fund operations, maximize investments, and increase efficiency; Confer with board members, organization officials, and staff members to discuss issues, coordinate activities, and resolve problems. Analyze operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change; Direct, plan, and implement policies, objectives, and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, or to increase productivity; Approve budgets including those for funding and implementation of programs. He through

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Managers is responsible for hiring, promoting, transferring and firing Departmental heads.

Since we have consolidated two other entities into ours, his duties will include the overall supervision and oversight of those two components of our operation in the same manner as above.

In a separate statement, the Petitioner stated that the Beneficiary “typically spends two days a week in [redacted] to oversee the operation of [redacted] And three days a week in [redacted] at the corporate headquarters, principally overseeing the operation of [redacted] and its constituent businesses. The Petitioner stated that the Beneficiary “typically spends about 75% of his time interfacing with his various Managers. He spends 5 hours per week on travel time and about 5 hours per week on miscellaneous matters.”

To show the “Duties of Executives and Managers” at the petitioning company, the Petitioner submitted a chart indicating that the Beneficiary has “meetings with managers” regarding such subjects as “sales,” “business promotions,” and “check[ing] bank records.” [redacted] as director and vice president, is to “assist the president in the performance of all his duties.” The section of the chart designated for [redacted] named the president (the Beneficiary) and three “store managers,” followed by a list of ten topics such as “payments of accounts payable,” “marketing,” and “reconciliation of bank deposits and cas[h] drawer.” The same list of ten topics appears in the [redacted] section of the chart, under [redacted] name.

The Director denied the petition, based in part on a finding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial executive capacity.

On appeal, the Petitioner states that it has submitted the required information and evidence, and that the Director did not adequately explain the grounds for denial.

2. Analysis

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

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary’s proposed job duties with the petitioning entity. *See* 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary’s employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). We then consider the beneficiary’s job description in the context of the petitioner’s organizational structure, the duties of the beneficiary’s subordinates, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary’s actual duties and role within the petitioning entity.

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The Petitioner's discussion of the Beneficiary's claimed duties as a manager or executive encompasses not just the petitioning entity, but a larger "enterprise" that also includes [REDACTED] and [REDACTED]. For reasons already explained, the Petitioner has not established its ownership or control of either of those companies. Therefore, we will not take those companies or their employees into account when considering the Beneficiary's claimed managerial or executive duties. We note that the Petitioner and [REDACTED] issued separate IRS Forms W-2, Wage and Tax Statements, to the Beneficiary for 2014, which indicates, on its face, simultaneous but separate employment.

In the denial notice, the Director noted that, although the RFE had included a request for specific information about the Beneficiary's work schedule and job descriptions for his subordinates, the Petitioner's response did not include the requested information. The Director cited 8 C.F.R. § 103.2(b)(14), which establishes that an incomplete response to an RFE can be grounds for denial.

The Petitioner responds, on appeal, that the Petitioner submitted all requested evidence and the Beneficiary's job description. That job description, however, lacked detail. [REDACTED] statement that the Beneficiary "makes the major executive decisions, oversees the overall operations of the company and oversees the Managers and Officers of the two subsidiary companies" addressed his level of authority, but does not describe the specific tasks that the Beneficiary performs in order to exercise that authority. Also, in that statement, [REDACTED] language moves back and forth between the past, present, and future tenses, making it difficult to tell when he is describing the Beneficiary's duties in the U.S. or his earlier work overseas. At one point, [REDACTED] stated that the Beneficiary "has been serving as Director [for the] last several years," but when he made that statement, the petitioning entity had existed for only about 15 months.

The Director had asked for a breakdown of the percentage of time that the Beneficiary devotes to "all specific daily duties (rather than categories of duties)." The Petitioner responded with the broad statement that the Beneficiary "will spend about 75% of his time interfacing with the top Managers and the officers he manages," while dividing the remaining 25% of his time between travel and "miscellaneous matters." The Petitioner's unsigned statement in response to the RFE also included wording copied directly from a 2013 letter from the foreign entity, describing the Beneficiary's earlier work in Pakistan.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Here, the Petitioner has not provided the level of specificity necessary to show that the Beneficiary will primarily perform qualifying managerial or executive tasks.

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. 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).

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The Director, in the RFE, had requested a list of the Beneficiary's direct subordinates and "a brief description of their job titles, duties and education level, and whether they work full or part time." The Petitioner's response only partially addressed this request. The "Duties of Executives and Managers" chart identified the individuals but did not list their duties. Instead, the Petitioner submitted lists of subjects that the officials discussed during meetings, and stated that the task of the vice president is to "assist the president in the performance of all his duties."

The Petitioner did not, as requested, specify which employees worked full-time. The Director, in the denial notice, concluded that "many of them are part-time employees." On appeal, the Petitioner states: "There was no evidence cited for this conclusion." The Director, however, did explain the basis for that finding. Specifically, the Petitioner had submitted copies of several 2014 IRS Forms W-2 issued to employees of the Petitioner, [REDACTED] and [REDACTED]. Two IRS Forms W-2 issued by the Petitioner for that year show that the Beneficiary earned \$12,000 and [REDACTED] received \$7,200. Of the 22 forms issued by [REDACTED] the Beneficiary's form (showing \$30,000) is the only one showing a sum greater than \$10,000 for the year. The four-figure sums shown on the IRS Forms W-2 are too low to reflect a year's full-time employment, even at minimum wage.

As explained previously, the Petitioner has not shown that it either owns or controls [REDACTED]. The Beneficiary may work at both companies, as shown by the issuance of two 2014 IRS Forms W-2, but [REDACTED] is not the petitioning U.S. employer. The record contains no information about what business activities take place at the petitioning company (as opposed to [REDACTED]). The passive activity of owning [REDACTED] even if the Petitioner had documented it, is not a business activity that requires active managerial or executive oversight.

The four IRS Forms W-2 issued by [REDACTED] tend to show greater amounts than the forms issued by the other companies, but the Petitioner has not established its affiliation with [REDACTED]. The Petitioner claims to have acquired both [REDACTED] and [REDACTED] in non-financial transactions, thus placing those two companies under the Petitioner's (and thus the Beneficiary's) authority, but, as explained above, the record does not support these claims. The record contains no direct documentation of [REDACTED] ownership, but secondary materials dating from both before and after the petition's filing date identify [REDACTED] as that company's sole shareholder.

Because the Petitioner submitted evidence that refutes, rather than supports, its claim to own [REDACTED] we can give no credence to the Petitioner's claim that the Beneficiary has executive or managerial authority over [REDACTED]. Furthermore, this serious discrepancy casts doubt on the credibility and reliability of the Petitioner's other claims. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Section 204(b) of the Act, 8 U.S.C. § 1154(b), permits approval of the petition only when the Petitioner has established to our satisfaction that its material claims are true.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function"

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within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes 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 attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner’s description of the beneficiary’s daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Int’l*, 19 I&N Dec. 593, 604 (Comm’r 1988).

The Petitioner has not identified any functions that occur at the petitioning company, except relating to that company’s claimed oversight and authority over [REDACTED] and [REDACTED]. Because the Petitioner has not established that it actually has this claimed authority, it is not evident that any business activity takes place at the petitioning company for the Beneficiary to manage or oversee. The Petitioner has not shown that there is any essential function for the Beneficiary to manage.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. §1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct[] the management” and “establish[] the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and “receive[] only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

As above, the Petitioner states that the Beneficiary’s executive authority derives from the company’s claimed authority over [REDACTED] and [REDACTED]. For reasons already explained, the Petitioner has not established that these companies are, in fact, part of the petitioning organization. Without the necessary evidence, the Petitioner’s assertion that the Beneficiary is an executive of the organization is without foundation. Without evidence that the Petitioner itself conducts business of some kind, there can be no basis to find that the Beneficiary exercises executive authority over that business.

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.

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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

In his introductory letter, [REDACTED] described the Beneficiary's claimed employment abroad:

Prior to his transfer to the U.S. subsidiary corporation, [the Beneficiary] supervised four Managers with [REDACTED] our parent company. He provided strategic and policy guidance and reviewed feed-back and views on new policies and marketing strategies. He resolved issues and facilitated the work of the various departments of the company. His position was that of Director. . . . He initially joined the company as shareholder Director and subsequently assumed the responsibilities of Director of the company for Pakistan operations. He was in this position from 2001.

....

He oversaw the operations of the entire company in Pakistan. The overwhelming majority of his time was spent directing the activities of the Managers under him, in particular, the General Manager.

The Petitioner submitted a copy of a letter from [REDACTED] president and founder of [REDACTED] (and the Beneficiary's father). [REDACTED] had written the letter, dated November 5, 2013, in support of an earlier filing seeking to extend the Beneficiary's L-1A nonimmigrant status. [REDACTED] stated:

[The Beneficiary] has been Director of our company and specifically heads [REDACTED] and [REDACTED] in addition to being on the Board of [REDACTED] . . .

....

He has established and maintained financial relations and developed and implemented overall operating structure, budget, personnel policies, and marketing plans. [The Beneficiary] is at the apex of the management structure of our entity and has absolute authority to hire, promote, transfer and de hire the top management team. The top management team in turn performs these management functions for the lower echelon of the company in their respective areas of responsibility.

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....

[The Beneficiary's] duties with our entity in Pakistan included:

1. To plan, direct, and coordinate the operations of our Business Development and Marketing services through General Managers and departmental heads.
2. Through General Managers, he is responsible for hiring, promoting, transferring and firing departmental heads.
3. He oversees timely completion of projects to the satisfaction of clients.
4. Through General Managers and Departmental Heads, he conducts outreach to the other multinational clients and companies. He sought out new business and developed new clients.
5. He coordinated with local authorities, investors and immigration authorities for bringing expatriate staff from overseas.
6. Formulates company policies and manages departmental operations in our office. [The Beneficiary] develops protocols and operational policies for various projects within our business divisions.
7. He plans the efficient and economic utilization of company resources and materials at the department level and implementation of policies at the operational level. Reduces wastage and ensure[s] time management.
8. Review Finance and Budget of the company and ensures that the departments stay[] within budget and generate[] enough revenue for the profitability of the company.
9. Confers with third party outside consultants for fashion designs and new trends in the clothing and fabrics.
10. Coordinates participation and displays services at expos in Pakistan and Overseas for marketing and generating new orders.
11. Analyzes sales statistics gathered by staff to determine sales potential and inventory requirements to monitor the preferences of customers.
12. Confers with department heads to ensure coordination of activities. Reports to Board of Directors about the progress of company operations.

The time distribution for projects has been as follows:

- | | |
|---|-----|
| 1. Business Development and communication with clients both existing and potential. | 40% |
| 2. Staff development, Supervision and co-ordination with Management. | 10% |
| 3. Analytical work and Management. | 20% |
| 4. Human Resource Management and Development. | 15% |
| 5. Operational details and supervision. | 10% |
| 6. Staff meetings and morale development. | 5% |

The Petitioner submitted a copy of the Beneficiary's résumé. On that document, the Beneficiary did not claim to have served as the foreign company's director, but rather "as Marketing Director in [REDACTED]"

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██████████ in addition to Managing ██████████ & ██████████' from January 1999 to June 2012. The résumé listed the following responsibilities:

- Instilling a marketing led ethos throughout the business
- Researching and reporting on external opportunities
- Understanding current and potential customers
- Managing the customer journey (customer relationship management)
- Developing the marketing strategy and plan
- Management of the marketing mix
- Managing agencies
- Measuring success
- Managing budgets
- Ensuring timely delivery
- Writing copy
- Approving images
- Developing guidelines
- Making customer focused decisions

In the RFE, the Director requested “a definitive statement from *the foreign company* which describes the beneficiary’s job duties,” and an organizational chart for the foreign entity.

The Petitioner’s response included an organizational chart, too complex to reproduce here in chart form. The chart showed a chairman at the top of the organization, with four direct subordinates:

- GM Import and Administration (3 identified subordinates)
- Head of Production and Planning (13 identified subordinates)
- Head of Quality Control & Assurance (6 identified subordinates)
- GM Marketing & Sales (6 identified subordinates)

The Petitioner also submitted a letter from ██████████ repeating the brief job description that had appeared in his earlier letter.

The Director, in denying the petition, stated that the Petitioner had not submitted “a statement from the foreign company and all other required information.” The Director found that the Petitioner had not submitted sufficient evidence to establish “the qualifying period of managerial employment abroad.”

On appeal, the Petitioner states that the Petitioner had submitted a “[l]engthy description” of the Beneficiary’s foreign job duties.

2. Analysis

The Petitioner, on appeal, offers no detailed rebuttal to the Director’s findings regarding the Beneficiary’s foreign employment. The Petitioner states only that the record contains a lengthy job

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description of the Beneficiary's foreign position. This assertion is correct, but the Director, in the RFE, had requested more information from the foreign company. The Petitioner's response to the RFE did not include that information. The Petitioner effectively acknowledges as much on appeal, because the Petitioner does not include any new statement from the foreign entity in its list of the materials submitted in response to the RFE.

The job descriptions that the Petitioner has submitted are not consistent. [REDACTED] stated that the Beneficiary had served as the foreign company's "Director . . . since 2001." [REDACTED] provided the same title, but no date. The Beneficiary's own résumé stated that he was "Marketing Director" from 1999 to 2012.

[REDACTED] had stated that the Beneficiary "[c]onfers with third party outside consultants for fashion designs and new trends in the clothing and fabrics." The record, however, contains no other indication that [REDACTED] is engaged in the manufacture, distribution, or sale of "clothing and fabrics." The company's letterhead refers to the company as a "Manufacturer and Exporter of Pharmaceuticals & Veterinary Medicines." The Petitioner submitted two copies of a "Company Profile" booklet which identified the foreign entity as "a pharmaceuticals company focused on drug delivery technologies and pharmaceuticals products." The booklet identified four subsidiaries, all pharmaceutical companies. The reference to "clothing and fabrics," therefore, is of significant concern, as it calls into question the origin and authorship of the job description.

The foreign company's organizational chart, submitted in response to the RFE, did not mention clothing or fabrics. Also, it did not show any of the foreign company's subsidiaries, such as [REDACTED] and [REDACTED] it did not show any position with the title "director" (the title that, according to both [REDACTED] and [REDACTED] the Beneficiary held at the foreign company). The Petitioner has not submitted any first-hand evidence to establish that [REDACTED] does, in fact, own [REDACTED] and [REDACTED]. This is a significant omission, given the serious questions regarding the Petitioner's claimed ownership of [REDACTED] and [REDACTED].

The record contains no detailed information about the Beneficiary's claimed work "[m]anaging [REDACTED] & [REDACTED]. The Beneficiary's résumé refers to "writing copy," which is not a managerial or executive duty, and many other elements of the Beneficiary's own description of his foreign work is very general, such as "[e]nsuring timely delivery" and "[m]anaging customer focused decisions," which describe goals rather than the means of reaching those goals.

For the above reasons, the Beneficiary's foreign job descriptions, while (at times) detailed, lack consistency and therefore credibility. Based on these deficiencies and inconsistencies, the Petitioner has not established that the Beneficiary was employed abroad in a managerial or executive capacity.

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IV. ABILITY TO PAY

The Director denied the petition based on a finding 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.

A. Evidence of Record

On Form I-140, the Petitioner indicated that it would pay the Beneficiary \$60,000. Instructed to list its gross and net annual income, the Petitioner provided the following figures:

2013 Gross:	\$885,023
2013 Net:	14,265
2014 Gross (estimated):	1,000,000
2014 Net (estimated):	25,000

Because the Petitioner did not exist in 2013, and filed the petition in 2014, it had no income tax return of its own to submit with the petition. The Petitioner submitted copies of the 2013 income tax returns for its claimed subsidiaries. As noted above, [REDACTED] filed IRS Form 1120S. [REDACTED] filed IRS Form 1120, U.S. Corporation Income Tax Return. The returns showed the following figures:

	[REDACTED]	[REDACTED]	Total
Gross receipts or sales	\$520,674	364,349	885,023
Total income	150,575	152,339	302,914
Net income	2520	11,745	14,265

From the above figures, it is clear that the Petitioner added the amounts from the two tax returns, and listed the sums on the petition form.

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In the RFE, the Director stated that [REDACTED] and [REDACTED] are separate entities from the Petitioner, and therefore their income tax returns cannot establish the Petitioner's ability to pay the Beneficiary's proffered wage. The Director requested copies of federal income tax returns, annual reports, or audited financial statements for the petitioning entity.

In response, the Petitioner submitted copies of the Beneficiary's monthly pay statements from August and September of 2015. Each statement showed a \$5000 payment. The Petitioner also submitted copies of IRS Forms W-2 for 2014, showing that the Petitioner paid the Beneficiary \$12,000, and [REDACTED] paid him \$30,000.

The Director, in the denial notice, stated that the submitted evidence did not establish the Petitioner's ability to pay the Beneficiary's proffered wage from the filing date onward. The Director acknowledged the Petitioner's submission of the tax returns for [REDACTED] and [REDACTED] but refused to consider them because the Petitioner had not established its claim to be their successor in interest.

On appeal, the Petitioner states that the August and September 2015 pay statements show that the Beneficiary is now receiving the proffered wage. The Petitioner submits a copy of [REDACTED] IRS Form 1120 return for 2014, which was not included in the Petitioner's response to the RFE.

B. Analysis

We note that, in the denial notice, the Director misstated the amount shown on the Beneficiary's 2014 IRS Form W-2 from the Petitioner. The Director stated that the amount was \$7200, but this was actually the amount shown on the form issued to [REDACTED]. This error did not affect the outcome of the proceeding. The figure on the Beneficiary's own form, while higher than \$7200, was still significantly lower than it would have been had the Petitioner paid him the full proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The Petitioner may supplement these documents with other relevant evidence, but it must submit at least one of the three types of evidence described above. Here, the Petitioner has not submitted any of the required document types for the petitioning entity itself. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As previously discussed, the Petitioner is not the successor in interest of either [REDACTED] or [REDACTED] and it has not credibly demonstrated that the assets of either company were, or are, available to the Petitioner to pay the Beneficiary's proffered wage. Therefore, like the Director, we will not consider those companies' tax returns when determining the Petitioner's ability to pay the proffered wage.

The Director, in the denial notice, observed that the September 2015 pay statement showed a year-to-date figure of \$24,000, which means that the Petitioner cannot have been paying the Beneficiary the full proffered wage throughout the earlier months of 2015. The Petitioner, on appeal, states that the Beneficiary's recent pay statements showed payments of \$5000 per month, equivalent to the annual

proffered wage of \$60,000. The Petitioner states that it need not have actually been paying the Beneficiary the full wage; “only an ability to pay it when his status is adjusted.”

The Petitioner is correct that it need not have actually paid the Beneficiary’s full proffered wage in the past, but nevertheless, the Petitioner must document its ability to pay beginning at the filing date, and continuing until the Beneficiary attains lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2). The August and September 2015 pay statements do not show that the Petitioner was able to pay the proffered wage as of the petition’s filing date of December 19, 2014.

Furthermore, there is an unexplained discrepancy in the pay statements. As the Director noted, the September 2015 pay statement showed a year-to-date figure of \$24,000. The August statement, however, showed a year-to-date figure of \$21,000. The two sums differ by only \$3,000, even though the Petitioner supposedly paid the Beneficiary \$5000 in September 2015. This discrepancy raises still further questions about the reliability and credibility of the Petitioner’s documentation. 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.

V. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of D-I, Inc.*, ID# 17038 (AAO July 7, 2016)