



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

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

MATTER OF H-B-C-, INC.

DATE: JUNE 9, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of dry cleaning establishments, seeks to permanently employ the Beneficiary as its 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 Petitioner has the ability to pay the Beneficiary's proffered wage; and (3) the Beneficiary had at least one year of employment with a qualifying foreign employer.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by not giving sufficient weight to the evidence submitted, and by drawing unwarranted conclusions from unrelated facts.

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

I. LEGAL FRAMEWORK

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

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

....

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

the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

II. U.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 the Beneficiary will be employed 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.

The Petitioner has specified that it seeks to employ the Beneficiary as an executive, not as a manager. On appeal, the Petitioner states that a “discussion of managerial duties is not relevant to this proceeding.” Therefore, we restrict our analysis to whether the Beneficiary will be employed in an executive capacity.

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

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

If staffing levels are used as a factor in determining whether an individual is acting in an 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. Evidence of Record

The Petitioner filed the Form I-140 on October 6, 2014. On Form I-140, the Petitioner indicated that it had 14 employees. With the petition, the Petitioner submitted a letter from the Beneficiary in his

(b)(6)

Matter of H-B-C-, Inc.

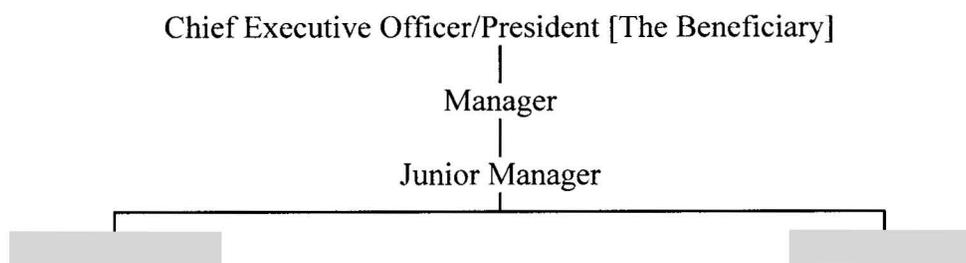
capacity as president of the petitioning entity.¹ The letter included a brief description of the Beneficiary's duties:

[The Beneficiary] will be responsible for all executive decisions and policymaking, directing and overseeing the implementation of company fiscal/marketing and administrative policies, operations and upper level managerial staff. At the same time, he will continue to provide direction and advice on Indian operations. He will be responsible for hiring/firing of upper level management and will report only to the Board of Directors.

The Beneficiary explained that the petitioning company has been active for seven years and currently consists of two locations – a dry cleaning plant and a dry cleaning drop-off location. The Petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Returns, and Georgia Employer's Quarterly Tax and Wage Reports, for the first two quarters of 2014, as well as copies of 19 IRS Forms W-2, Wage and Tax Statements for 2013. The quarterly tax returns showed that the Petitioner regularly had 14 employees during the first six months of 2014, with a mix of part-time and full-time workers.

The Director issued a request for evidence (RFE), stating that "the petitioner has not provided sufficient evidence to demonstrate that it has a subordinate level of managerial employees for the beneficiary to direct, thus allowing the beneficiary to focus primarily on the broad goals and policies of the organization rather than the day-to-day operations of the business." The Director asked the Petitioner to submit additional evidence, including an organizational chart showing the company's structure as of the petition's filing date.

In response, the Petitioner submitted two organizational charts. The first chart, showing the petitioning organization as of the petition's filing date, listed two locations. One, doing business as [REDACTED] is limited to drop off and pickup. The other, doing business as [REDACTED] operates the dry cleaning facilities for items left at both locations:



¹ We note that, as of the date of the letter (October 1, 2014), the Beneficiary was a B-2 nonimmigrant visitor, not authorized to work in the United States. See 8 C.F.R. § 214.1(e). The Petitioner acknowledges that it did not compensate the Beneficiary in 2014.

² The organizational chart uses the spelling "[REDACTED]" but other materials in the record, including an exterior photograph, show the spelling as "[REDACTED]".

(b)(6)

Matter of H-B-C-, Inc.

The chart showed three “Front Desk/Cashiers” at [REDACTED] and nine employees at [REDACTED]

- Front Desk/Cashier
- Front Desk/Cashier/Bagging
- Shirt Machine Operator
- Pant Presser
- Blouse Presser
- Pant/Blouse Presser
- Cuff/Collar Presser
- Shirt Touch-up
- Van Driver

A second organizational chart showed the Petitioner’s structure as of August 2015, including the addition of a third location, called [REDACTED]. The newer chart showed the same levels of management as the older chart, with a total of 13 lower-level employees working under the direction of the Beneficiary, the manager, and the junior manager.

The Petitioner submitted copies of three recent IRS Forms 941, Employer’s Quarterly Federal Tax Returns, showing the following information:

Quarter	Number of Employees	Wages paid
4, 2014	18 (as of 12/12/2014)	\$52,513.96
1, 2015	15 (as of 3/12/2015)	67,012.78
2, 2015	13 (as of 6/12/2015)	73,382.33

The Petitioner submitted copies of 24 IRS Forms W-2 for 2014, showing compensation of employees ranging from \$359.82 to \$17,713.93. The Petitioner explained that it experiences turnover in its presser and cashier positions.

The Petitioner also submitted a letter dated August 3, 2015, from [REDACTED] identified as manager of the petitioning company. [REDACTED] provided “a more detailed outline describing the [Beneficiary’s] almost exclusively executive duties,” excerpted below:

1. As President, [the Beneficiary] is responsible for all executive decision and policymaking

- . . . [The Beneficiary] holds overall executive responsibilities for coordinating our company’s financial and budget activities. The tasks required to *perform* these activities are delegated by [the Beneficiary] to our managerial staff and outsourced accountants who oversee the day to day work of our clerks, cashiers and cleaning plant operators. [The Beneficiary’s] executive responsibilities in this area include reviewing and analyzing market share

data, cost/benefit analyses, and economic trends . . . ; establishing and monitoring short- and long-term business plans . . . ; identifying and negotiating potential avenues for obtaining credit; and providing . . . guidance and advice to our management staff. . . .

- . . . [The Beneficiary] is currently determining the most cost-efficient ways to incorporate our accounting functions into our existing organizational structure. . . . His will be the final say in whether or not we add an Accounting Department to our current organizational structure.
- We are also currently, under [the Beneficiary's] direction, formulating marketing, sales and diversification strategies. . . . As we continue to hire new workers to expand and diversify our operations, [the Beneficiary's] responsibilities as the final word in our financial, marketing, sales and investment decisions continue to be correspondingly broader and more complex as well.

2. As President, [the Beneficiary] directs and oversees the implementation of company fiscal/marketing and administrative policies, operations and upper level managerial staff

- As Manager, I report to the President and oversee the daily work activities of our Junior Manager who assists me in supervising and coordinating the daily operations of the three components of our organization. . . .
- . . . As our highest-level executive, [the Beneficiary] directly reviews only the performance of our managerial team, who are in turn responsible for managing the employees who perform the shipping, transportation and distribution activities. [The Beneficiary] holds the final approval for any hiring or promotional decisions. He has the sole authority to fire any and all managerial staff and also determines whether any of them merit a pay increase based on their performance.
- . . . [The Beneficiary] directs our organizational operations and services by formulating, establishing and approving changes to company policies, approving budgets for such expenditures and instructing managerial personnel to implement the policies he has formulated. Since [the Beneficiary] does not directly supervise the performance or work of the employees who carry out the day-to-day tasks of our business, his responsibilities in this area are limited to reviewing performance reports prepared by our managerial staff.
- As President, [the Beneficiary] has the exclusive authority to establish and have our personnel implement the company's overall policies and direction, including establishing benchmarks for development, negotiating and executing contracts, reviewing economic analyses to target areas and approaches for further growth, and developing and authorizing marketing efforts to increase our market share. . . .

(b)(6)

Matter of H-B-C-, Inc.

The Director denied the petition, stating that the Petitioner's "broad overview of the beneficiary's duties" did not establish "the beneficiary's actual duties within the organization." The Director also found that "coordinating [the] company's financial and budget activities" and "reviewing and analyzing market share data" are operational rather than executive functions. The Director stated that the Petitioner had not identified any subordinate employees who performed financial and market analysis duties.

The Director further noted that the Beneficiary held L-1A nonimmigrant status through another company, [REDACTED] and that the Petitioner did not pay the Beneficiary in 2014. The Director stated that this information cast doubt on the Beneficiary's intention of working for the Petitioner, because he could not work for the Petitioner in [REDACTED] Georgia, "while simultaneously [working] . . . for [REDACTED] . . . [in] [REDACTED] FL." The two cities are more than 300 miles apart.

On appeal, the Petitioner states that the denial "appears to be . . . based on misstated facts and false assumptions."

B.. Analysis

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

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The Petitioner's description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity. *Id.* 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, the nature of the petitioner's business, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's actual duties and role within the petitioning entity.

The Petitioner states that it had submitted a comprehensive response to the RFE, but that the Director selectively quoted that response in the denial notice and "appear[ed] to deny this I-140 because the beneficiary obtained a temporary change of status from B-2 to L-1A for a separate company in an unrelated proceeding." The Petitioner notes that it never claimed that the Beneficiary would simultaneously work for both the Petitioner and for [REDACTED] (which is affiliated with the Petitioner through common ownership).

We agree with the Petitioner that the approved nonimmigrant petition filed by [REDACTED] is not directly relevant to the immigrant petition now before us on appeal. The record contains no

(b)(6)

Matter of H-B-C-, Inc.

evidence that the Beneficiary actually worked for [REDACTED] and the Petitioner submitted copies of pay statements showing that it employed the Beneficiary in 2015.

We disagree, however, with the Petitioner's assertion that the Director emphasized [REDACTED] petition while disregarding the Petitioner's description of the Beneficiary's duties. The Director devoted more than five pages of the denial notice to the question of whether the Beneficiary's intended position qualifies him for the classification sought. Within that lengthy discussion, there are only two sentences about [REDACTED] and its petition.

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. 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.*

The Petitioner states that its "RFE response included a response letter outlining, in detail, the specific nature of the proposed executive duties," but "the Decision refers to only one part" of that letter" (emphasis in original).

The Director quoted three full paragraphs from the job description in [REDACTED] letter, and found that much of that job description was worded so broadly that it did not identify the specific tasks that the Beneficiary performs in the course of his duties.

The Petitioner states that the Director did not explain or corroborate the finding that the Beneficiary's oversight of "financial and budget activities" and "reviewing and analyzing market share data" are not qualifying executive functions. The Petitioner also observes that [REDACTED] had stated that the Beneficiary delegated operational tasks to lower-level managers and to an outside accountant.

The Petitioner has not, on appeal, overcome the Director's finding that the job description lacks overall detail. Although the complete job description is more than two pages long, it identifies few specific duties. Much of the description simply paraphrases the statutory and regulatory definition of executive capacity. Other elements indicate that the Beneficiary reviews information and makes decisions based on that information. The record does not contain examples of reports, plans, or other data to show that these materials exist in sufficient quantities to occupy a significant portion of the Beneficiary's time. Further, the record contains little information regarding the duties performed

(b)(6)

Matter of H-B-C-, Inc.

by the Beneficiary's subordinates so it is not possible to determine what duties the Beneficiary actually delegates to the subordinate manager or junior manager or whether their assigned functions include preparing reports of "market share data, cost/benefit analyses and economic trends" that the Beneficiary is claimed to review. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, in the Beneficiary's job description, [REDACTED] stated that she and the junior manager are "responsible for managing the employees who perform the shipping, transportation and distribution activities." The Petitioner is not engaged in shipping, transportation, or distribution, except that it employs one van driver to transfer laundry between its intake centers and its central processing facility. The organizational charts showed that the Petitioner employs one van driver to cover this need. In the same paragraph, [REDACTED] also refers to the Petitioner's "five-tier management structure," which is not supported by the submitted organizational charts. It appears, therefore, that [REDACTED] signed a job description that was, at least in part, originally prepared for a different business. The reference to activities that the Petitioner does not appear to perform casts doubt on the origin and accuracy of the job description. 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).

The Director, in the denial notice, had stated that the Beneficiary's responsibility for the Petitioner's budget is non-qualifying because financial and budgetary coordination "are the duties of an individual performing the petitioner's finance function." The Petitioner, on appeal, submits general descriptions for executive positions from web sites associated with the U.S. Department of Labor, indicating that a top-level executive can "[d]irect or coordinate an organization's financial or budget activities." The web printouts address this one specific element of the decision, but they do not rebut the entire basis for the denial or establish that the Director's decision, as a whole, was in error. Responsibility for a company's budget does not, by itself, automatically or necessarily qualify the employee with that responsibility as a manager or executive for purposes of the classification sought.

A given beneficiary's control of a business does not necessarily establish eligibility for classification as a multinational executive within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive nature. Section 101(A)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). While a beneficiary may exercise discretion over a petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his or her actual duties would be primarily executive in nature.

We also consider the proposed position in light of nature of a Petitioner's business, its organizational structure, and the availability of staff to carry out the petitioner's daily operational tasks. Federal courts have generally agreed that in reviewing the relevance of the number of employees a petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether

its operations are substantial enough to support a manager.” *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company’s small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the RFE, the Director had requested job descriptions for the Petitioner’s other employees. The Petitioner’s response to the RFE did not include the requested information. These descriptions may have provided important information about, for instance, the distinction between the manager and the junior manager, and information that explains, for example, who performs administrative duties associated with the Petitioner’s individual store and overall operations. Without this information, we cannot determine who performs non-qualifying duties such as first-line supervision of the lower-level store and cleaning plant employees, nor can we determine what duties the Beneficiary delegates to subordinates. Notably, the Petitioner did not claim to employ a store manager or any supervisory employee at either of its locations at the time of filing, but later elevated three of its lower-level employees to the positions of “coordinator” and “head presser.” The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization’s structural hierarchy; added tiers of subordinate employees and amended job titles are not probative and will not establish that an organization can support an executive position. Without position descriptions for the Beneficiary’s subordinates, we cannot determine to what extent non-qualifying duties are assigned to lower-level staff.

With respect to the Petitioner’s subordinate staff, the Director noted the wages reported on IRS Forms W-2 and 941, and found them to be “significantly below the median annual wage of workers in their respective occupations.” These low wages call into question the amount of time that the workers are available to relieve the Beneficiary from performing non-qualifying tasks. The Petitioner does not address this issue on appeal. We acknowledge the Petitioner’s assertion that some positions have high turnover, which would explain the low wages on the IRS Forms W-2. Nevertheless, the Petitioner did not address the Director’s request for evidence to show that the employees are full time (and therefore consistently available to relieve the Beneficiary from performing non-qualifying operational or administrative tasks).

Because of the above deficiencies in the Beneficiary’s job description and the evidence regarding the Petitioner’s staffing, we find that the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary would be employed in an executive capacity.

III. ABILITY TO PAY

The Director denied the petition based, in part, 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 stated that it would pay the Beneficiary \$60,000 per year. The Petitioner must establish its ability to pay that salary beginning on October 6, 2014, the petition's filing date. Form I-140 instructed the Petitioner to state its gross annual income and its net annual income. The Petitioner stated that its gross annual income is \$651,598, and left blank the line for its net annual income.

The Petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2013. The Petitioner did not employ the Beneficiary in 2013, and therefore the figures on the tax return do not reflect any compensation paid to the Beneficiary. The return showed \$651,598 in gross receipts, matching the gross annual income figure on Form I-140. After expenses, the return showed net income of \$4694.

In the RFE, the Director requested a copy of the Petitioner's 2014 income tax return or other documentation required by 8 C.F.R. § 204.5(g)(2).

In response, the Petitioner submitted a copy of its 2014 IRS Form 1120 return. The Petitioner indicated that it did not pay any wages or salary to the Beneficiary during 2014. The Petitioner also submitted copies of pay receipts showing that it paid the Beneficiary the full proffered wage of \$5000 per month beginning in January 2015.

The Director denied the petition, stating that the Petitioner did not establish sufficient income or assets to pay the Beneficiary's proffered wage in 2014.

On appeal, the Petitioner states that it should only have to establish the ability to pay the Beneficiary's salary beginning with the October 6, 2014, filing date, rather than for all of 2014.

B. Analysis

We find that the Petitioner has not provided sufficient evidence to establish its ability to pay the Beneficiary's proffered wage. As indicated at 8 C.F.R. § 204.5(g)(2), the Petitioner has the burden of establishing its ability to pay commencing with the date it files the Form I-140. In order to establish the ability to pay, the Petitioner must provide copies of its annual reports, federal tax returns, or audited financial statements for the relevant time period in question.

Because the Petitioner did not employ the Beneficiary at the time of filing, the Petitioner cannot show that it paid him the proffered wage at that time. As an alternate means of determining the Petitioner's ability to pay, we will examine the Petitioner's net income figure as reflected on the federal income tax return.

The Petitioner's 2014 IRS Form 1120 return shows a net loss of \$4710 after expenses. Therefore, the Petitioner had no surplus income to pay the Beneficiary's salary.

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

Schedule L of the Petitioner's 2014 IRS Form 1120 return includes the following figures:

Current assets:	
Cash, beginning of year	\$8794
Cash, end of year	51,403
Total current liabilities:	16,750
Net current assets:	34,653

The Director noted that the Petitioner's net current assets for 2014 were lower than the Beneficiary's proffered annual wage.

On appeal, the Petitioner states that the Beneficiary's salary from October 6, 2014 through December 31, 2014 would be "just under \$15,000" and that its net current assets were sufficient to cover that prorated amount.

The Petitioner requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay the proffered wage for a three-month period any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of a beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, in this case the Petitioner has not submitted such evidence.

Based on the deficiencies discussed above, we find that the Petitioner has not established its ability to pay the proffered wage.

IV. QUALIFYING RELATIONSHIP

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary's foreign employer for at least one year while the Beneficiary was employed abroad.

To establish a "qualifying relationship" under the Act and the regulations, the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), 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).

If a beneficiary 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 beneficiary was employed overseas, then the petition must include 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. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

A. Evidence of Record

The record reflects that the Beneficiary was a managing partner with the foreign parent company from August 2007 until he entered the United States on June 10, 2014, as a B-2 nonimmigrant visitor for pleasure.

The petitioning U.S. employer has existed since 2007, but it had no relationship to the foreign company until September 6, 2014, when the foreign company purchased all shares of the U.S. company.

The Director denied the petition, stating that, as a B-2 nonimmigrant visitor without employment authorization, the Beneficiary was not working for the Petitioner as of the petition's filing date. The Director also stated that, because the foreign company purchased the petitioning entity only one month before the petition's filing date, a qualifying relationship between the two entities existed for "less than a year" at the time of filing.

On appeal, the Petitioner states that there is no "requirement that the qualifying relationship between the two companies exist for any specified period of time prior to filing."

B. Analysis

Upon review, we find that the Petitioner's assertions are correct. The Beneficiary must have worked for the foreign company for at least one year within the three years immediately preceding the beginning of his employment with the Petitioner, but the qualifying relationship need not have existed for that entire year. The qualifying relationship must exist as of the date of filing.

Here, the Petitioner formed a qualifying relationship with the Beneficiary's foreign employer in September 2014. Once that relationship was established, the Beneficiary's period of employment abroad from 2007 through 2014 met this eligibility requirement. The record shows that he has the required one year of employment with a qualifying foreign entity.

For the above reasons, we withdraw the Director's finding that the Beneficiary lacks the required one year of employment with a qualifying foreign entity.

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 H-B-C-, Inc.*, ID# 16941 (AAO June 9, 2016)