



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

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

MATTER OF B-M-2003, INC.

DATE: MAR. 31, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a commercial retail development business, seeks to permanently employ the Beneficiary as its Executive Manager 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.<sup>1</sup> The Director concluded that the evidence of record did not establish: (1) a qualifying relationship between the Petitioner and the Beneficiary's foreign employer; (2) that the Beneficiary will be employed in a qualifying managerial or executive capacity; (3) that the Beneficiary has been employed abroad in a qualifying managerial or executive capacity; (4) that the Petitioner has been doing business for at least one year prior to the petition's filing date; and (5) that the foreign company continues to do business.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by misstating or misinterpreting evidence, and by applying an improper standard of proof. The Petitioner states that a closer examination of the evidence, including newly submitted exhibits, resolves apparent discrepancies in the record.

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

## I. LAW

A U.S. 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. Section 203(b) of the Act states in pertinent part:

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<sup>1</sup> The Director denied the petition for abandonment on November 22, 2014 and on May 18, 2015, but in both instances reopened the proceeding in order to allow the Petitioner to respond to a request for evidence that was initially issued on July 17, 2014 and re-issued on January 29, 2015. The Director ultimately issued a decision denying the petition on its merits on August 10, 2015.

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(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.

## II. QUALIFYING RELATIONSHIP

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

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).

The pertinent regulation at 8 C.F.R. § 204.5(j)(2) defines the term “affiliate” as follows:

- (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.

### A. Facts

The Petitioner filed Form I-140 on April 2, 2010. The Petitioner submitted a copy of a letter dated February 9, 2009, from [REDACTED] who stated that she “wholly owned” both the Petitioner and the Beneficiary’s claimed foreign employer located in Israel. If such common ownership by the same individual existed, it would qualify the two companies as affiliates. In support of the petition, the Petitioner submitted translated minutes from an April 1, 2005, meeting of the foreign company’s board of directors referred to the company’s decision “to establish a branch in [REDACTED] U.S.A.,” which the Beneficiary would manage. Although the 2005 document referred to the petitioning U.S. company as a “branch,” the record shows that the Petitioner is a separate legal entity, incorporated in Texas on [REDACTED]

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The Director issued a request for evidence (RFE) on January 29, 2015. The Director instructed the Petitioner to submit documentary evidence of the ownership of the petitioning U.S. company and the foreign company. In response, the Petitioner stated that it “was originally owned by [redacted] but at the beginning of [redacted] the ownership of the Petitioner was transferred from [redacted] to [the Beneficiary],” as shown by copies of share certificates in the record. A share certificate dated [redacted] 2005, named [redacted] as the sole owner; the Beneficiary’s name appears on a later certificate dated January 1, 2012. The Petitioner also stated: “The Foreign Organization (‘F.O.’) is owned by [the Beneficiary],” as shown by a “Judicial Decree showing that the ownership of the F.O. was transferred to [the Beneficiary].”

The judicial decree in question is a final decree of divorce between the Beneficiary and [redacted] signed on [redacted] Paragraph H-7 on page 33 of the decree awarded sole ownership of the petitioning U.S. company to the Beneficiary. The divorce decree did not directly, specifically refer to the foreign entity, but on page 35, under the heading “Property in Israel,” the decree stated: “Any assets in Israel are awarded to the person in whose name they are held in or titled.” This order, therefore, does not “show[] that the ownership of the F.O. was transferred to [the Beneficiary].” Rather, it shows the opposite, indicating that any property in Israel, including the foreign company, remained in the hands of whoever owned that property before the decree.

The Director denied the petition on August 10, 2015. In the denial notice, the Director stated that “the petitioner has not submitted any legal corporate documentation for the foreign company,” and therefore the Petitioner had not established a qualifying relationship with the foreign company.

On appeal, the Petitioner acknowledges that the terms set forth in the August 2013 divorce decree “sever[ed] the companies’ relationship as affiliates,” but the Petitioner contends that “the Petitioner . . . has become the successor-in-interest to the foreign employer.”

## B. Analysis

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

On appeal, the Petitioner states (emphasis in original):

[T]he Petitioner . . . has taken over the foreign entity’s . . . rights, duties, obligations, and assets in the U.S., including its immigration liabilities. This means that the Petitioner . . . has become the successor-in-interest to the foreign employer. Therefore, the Petitioner satisfies the requirement at 8 CFR § 214.5(j)(3)(C) [*sic*] as it “*is the same employer . . . by which the alien was employed overseas.*”

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The Petitioner, however, has not shown that the foreign company ever owned the petitioning company, or had any “rights, duties, obligations [or] assets in the U.S.” which it then transferred to the Petitioner. Rather, the record indicates that petitioning U.S. company has changed ownership from one individual [REDACTED] to another (the Beneficiary). The “employer . . . by which the alien was employed overseas” remains the foreign entity in Israel.

Although the Petitioner previously claimed, in response to the RFE, that the divorce decree gave the Beneficiary ownership of both companies, the Petitioner now acknowledges that there is no longer any shared ownership between the two companies. Therefore, any qualifying relationship that the Petitioner may once have had with the foreign entity, through [REDACTED] common ownership, no longer exists. As a result, the Petitioner claims no current qualifying relationship with any foreign company.

The regulation at 8 C.F.R. § 103.2(b)(1) requires the petition to be approvable not only at the time of filing, but also throughout the adjudication of the petition. Acknowledging this requirement, the Petitioner asserts that a qualifying relationship existed at the time of filing in April 2010, and would have continued through the adjudication of the petition if “the petition had been adjudicated . . . in the stipulated timeframe of 9 months. . . . The undue delay caused by the immigration service should not be held against [the Beneficiary], as businesses constantly evolve.” The Petitioner does not identify any statute, regulation, or other controlling authority that “stipulated [an adjudicative] timeframe of 9 months.” More to the point, there is no arbitrary cutoff date after which time we can no longer take disqualifying circumstances into account.

Furthermore, the business changed hands because the Beneficiary divorced the owner of the company, a process begun the same year the petition was filed. The divorce decree concludes with a passage that reads: “This divorce was JUDICIALLY PRONOUNCED and RENDERED on [REDACTED] 2010, but SIGNED on Aug. 26, 2013” (emphasis in original). Likewise, a discussion of tax liability in the divorce decree indicates that the division of assets effectively occurred in 2010. As such, even if adjudicative delay entitled the Petitioner to relief from basic eligibility requirements (which is not the case), the record indicates that the division of assets was underway in 2010. The qualifying relationship ceased to exist no later than January 1, 2012, when the Beneficiary was issued all outstanding shares in the petitioning company.

The Petitioner now acknowledges that the qualifying relationship between the Petitioner and the foreign company has ceased to exist. That qualifying relationship, however, is a fundamental statutory requirement for the immigrant classification sought, and the Petitioner does not claim to have a current qualifying relationship with any foreign entity. For this reason, the petition cannot be approved, and the appeal must be dismissed.

### III. EMPLOYMENT IN A QUALIFYING 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 qualifying managerial or executive capacity; and (2) the Beneficiary was employed abroad in a qualifying 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.

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

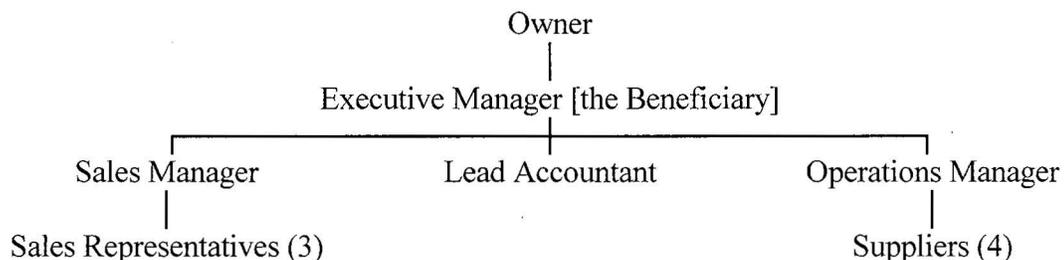
The regulation at 8 C.F.R. § 204.5(j)(5) requires the Petitioner to submit a statement which indicates that the Beneficiary is to be employed in the United States in a managerial or executive capacity. The statement must clearly describe the duties to be performed by the Beneficiary.

##### 1. Facts

On Form I-140, the Petitioner claimed eight employees at the time of filing. In her letter of February 9, 2009, [REDACTED] described the Beneficiary's intended duties in the United States:

- Day to day operations and management of our offices and various store sites;
- Contract negotiations with vendors and our customer base;
- Negotiations with suppliers and vendors;
- Supply chain management;
- Hiring, firing and training of employees at our various locations in [REDACTED]
- In charge of Marketing and Advertising;
- Management of Special events.

An organizational chart showed the following information:



The Petitioner submitted copies of 12 IRS Forms W-2, Wage and Tax Statements, for 2008. The Petitioner paid a total of \$49,309.50 in wages that year. Six of the names on the organizational chart also appear on the IRS Forms W-2:

The Beneficiary	\$5,625.00	Sales Representative #1	\$10,088.75
Sales Manager	2,611.00	Sales Representative #2	5,897.50
Operations Manager	6,609.75	Sales Representative #3	2,397.50

The six other individuals named on the IRS Forms W-2, but not on the organizational chart, each earned between \$728 and \$4,595 in 2008. The Petitioner did not submit evidence of wages paid to employees in 2009 or in the first quarter of 2010.

In the January 29, 2015, RFE, the Director stated that the general description of the Beneficiary's duties is not sufficient. The Director asked for a description of the Beneficiary's duties to show that he will primarily perform qualifying managerial or executive duties. The Director also requested evidence of wages paid to employees for the period 2010 through 2014.

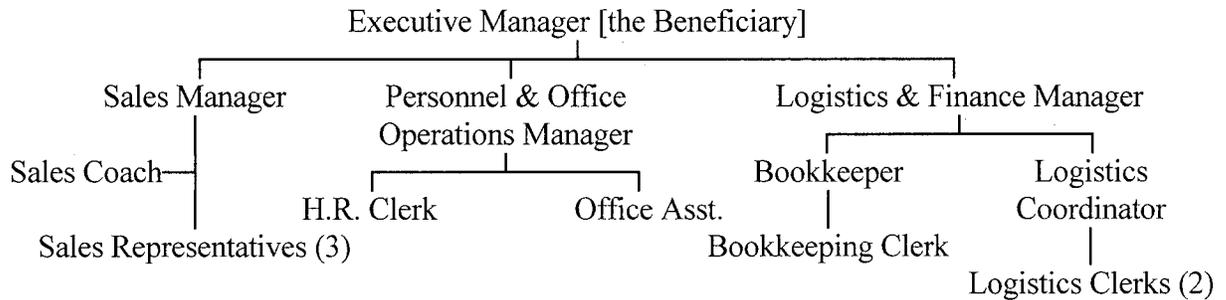
In response, the Petitioner submitted a statement from the Beneficiary, in his capacity as executive manager of the petitioning company. The Beneficiary stated:

As our company's executive manager, [the Beneficiary] will continue to manage the entirety of the organization. Specifically, he will continue to oversee and manage all business operations . . . , and set strategic policies and objectives, manage all sales and marketing efforts . . . , and formulate revenue campaigns based on . . . market analyses, attend business trade shows and exhibitions making business decisions based on these. [The Beneficiary] will also continue to plan, formulate, and implement administrative and operational policies and procedures . . . . Furthermore, [the Beneficiary] will continue to supervise and control the work of other subordinate managerial employees, including the Sales Manager, the Personnel & Office Operations Manager, and the Logistics & Finance Manager, as well as the work of other professionals including the company's accountants and attorneys. Finally, [the Beneficiary] will continue to supervise and review all company decisions related to all hiring and firing, as well as other personnel actions. . . .

The Beneficiary listed the approximate percentage of time he devotes to each task:

- Act as a liaison to, and a representative for our company's foreign related company (10%)
- Manage all business operations, including financial aspects of the business such as investments and borrowing, and set strategic policies and objectives, manage all sales efforts, and manage all hiring and firing of employees, and managing the work of the subordinate managers (30%)
- Select and oversee independent contract and service providers including lawyers, accountants and other service providers (20%)
- Oversee the marketing, advertising, and all related promotional activities for the Company (10%)
- Plan, formulate and implement administrative and operational policies and procedures such as whether or not to purchase additional businesses or choosing new business and investment avenues for the company (20%)
- Obtain new business as well as new business ideas by attending trade shows and exhibitions (10%)

The Petitioner also submitted an updated organizational chart showing 15 employees:



The Petitioner submitted copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2013 and 2014 but did not provide the requested Forms 941 for the years 2010 through 2012. The Petitioner reported paying total wages of \$30,833.80 in 2013 and \$45,078.79 in 2014. The Petitioner also submitted copies of IRS Forms W-2, showing that the Petitioner paid nine employees in both 2010 and 2011, 12 in 2012, 26 in 2013, and 24 in 2014.

Based on a review of the Petitioner's 2010 IRS Form W-2s, we note that the Petitioner paid only the Beneficiary and one other employee, a sales representative, who appeared on the organizational chart submitted in April 2010. The sales representative earned a total of \$79.25 in 2010. The other seven employees who received wages in 2010 were not identified on the initial organizational chart, and the other five individuals identified on the initial organizational chart did not receive wages in 2010. The remaining individuals who did receive wages earned, collectively, \$19,752.89 in wages in 2010. Six of the nine employees who received W-2s earned less than \$2,500 for the year.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would serve in a qualifying managerial or executive capacity. The Director noted that none of the Beneficiary's subordinates appear to earn wages consistent with full-time employment, and concluded that "the petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing the day-to-day duties required to operate the business."

On appeal, the Petitioner asserts that the Director misstated the Beneficiary's job description, and that the employees only appear to have low salaries because the employees divide their work between several businesses that the Beneficiary owns.

## 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. In addition, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act.

The Petitioner, on appeal, asserts that the Director inaccurately paraphrased the Beneficiary's job description. For instance, whereas the percentage breakdown job description indicated that the Beneficiary would "Plan, formulate and implement administrative and operational policies and procedures such as whether or not to purchase additional businesses or choosing new business and investment avenues for the company," the Director stated that "looking for additional business opportunity and investments" is not a qualifying managerial or executive function.

The Petitioner states that the Director "does not refer to the support letter from [the Petitioner], which details all of the Beneficiary's job duties." The Director quoted the percentage breakdown on page 5 of the denial notice. The Petitioner asserts that setting policy relating to growth and investment "is fundamentally different from . . . 'looking for' business opportunities and investments." The Petitioner maintains, on appeal, that the Beneficiary has delegated the task of "'looking for' business opportunities" to "his subordinates." The Petitioner, however, does not identify any employee, by name or title, holding that responsibility. Therefore, there is no evidence to support the Petitioner's assertion on appeal. 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)).

The Petitioner's assertions on appeal rely heavily on the job description submitted with the RFE response in 2015. In that description, the Beneficiary stated that he spends 10% of his time acting "as a liaison to, and a representative for [the petitioning] company's foreign related company." As discussed, ownership ties between the Petitioner and the foreign company were severed no later than January 2012, when the Beneficiary assumed sole ownership of the Petitioning company. The Petitioner submitted no evidence to show a continued need for liaison between the two companies in 2015. This discrepancy calls into question the accuracy and reliability 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies,

absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

Further, the Beneficiary's position description submitted in response to the RFE, appeared to reflect his job duties as of 2015, not as of April 2010 when the petition was filed, as it refers to staff who were not included on the initial organizational chart. The initial position description suggested that the Beneficiary would be involved in the non-managerial functions of the company, including its marketing and advertising activities, supply chain matters, supplier negotiations, "negotiations" with the company's retail customer base, and "day-to-day operations and management" of various store locations. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify a beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. The brief position description that accompanied the petition did not meet the Petitioner's burden to establish eligibility at the time of filing.

The fact that the Beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the Beneficiary may exercise discretion over the Petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the position description alone is insufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

We also consider the proposed position in light of nature of the 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).

When we consider the assertion that the Beneficiary has discretion to make plans for the company, while his subordinates carry out those plans, we must examine the evidence relating to the Petitioner's staffing. The organizational chart submitted in response to the RFE shows significantly greater complexity than the version submitted initially. The regulation at 8 C.F.R. § 103.2(b)(1)

requires the Petitioner to establish eligibility as of the filing date, and continuing through the adjudication of the petition.

We also look to the Petitioner's staffing and structure in determining whether a Beneficiary qualifies as a personnel manager. 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. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2).

In 2010, the year the Petitioner filed the petition, the Petitioner paid a total of nine employees including the Beneficiary. As noted, only one of those employees, a sales representative, appeared on the Petitioner's organizational chart submitted in 2010, and that individual earned less than \$80. Therefore, the initial organizational chart does not appear to provide an accurate representation of the Petitioner's actual personnel, staffing levels, or structure as of the date of filing. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

We cannot determine which, if any, of the other seven employees named on the 2010 Form W-2s were employed at the time of filing or what positions they may have held. The Petitioner did not provide the requested IRS Forms 941 for 2010, which would have established how many employees worked in each quarter. 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. at 165.

Here, while we do not doubt that the Beneficiary has the authority to hire and fire subordinate employees, the record does not support a finding that he supervised a subordinate staff of supervisory, professional, or managerial employees at the time the petition was filed. The record does not contain a credible organizational chart showing the structure of the company as of 2010 and does not support the Petitioner's claim that it employed eight employees when the petition was filed. The total amount the Petitioner paid in wages in 2010, if averaged, would be equal to 53 hours of work per week at minimum wage. Given the Petitioner's claim that it operates multiple retail locations in a shopping mall, its operating hours would exceed 53 hours per week, and it is reasonable to believe that all of its employees, including the Beneficiary, were required to directly provide the products and services of the business in order for it to remain operational and meet the terms of its lease agreements.

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On appeal, the Petitioner submits letters from business associates, stating that the Beneficiary is part owner of several different businesses dating back to 2010. Certified Public Accountant [REDACTED] states: “Although these are distinct business entities, [the Beneficiary] has his employees work at all of the businesses and draw salaries from each of the entities separately. They are effectively employees of all the businesses and draw a separate pay check from each of the entities.” The Petitioner submits no other evidence related to these companies, such as their articles of incorporation, tax returns, evidence of business activities, or copies of stock certificates issued to the Beneficiary as evidence of his ownership. Again 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. at 165.

The Petitioner submits copies of its own IRS Forms W-2 for the years 2010 through 2014, but does not submit those forms for the other companies. Instead, stating that “such a high volume of documents could cloud the record,” the Petitioner submits spreadsheets containing “an alternative summary of the W-2 information,” attested by a business partner whom the Petitioner had not previously identified as such in this proceeding.<sup>2</sup> According to this new information, many of the Petitioner’s employees work at several different businesses that the Beneficiary owns or co-owns.

An employee list for 2010 includes fifteen names, identifies the companies that paid their wages, and states that they collectively earned over \$101,000. Notably, although the Petitioner submitted copies of nine Form W-2s issued in 2010, the employee list identifies only four individuals who worked for the petitioning company during that year. Only three of these four individuals received a W-2 in 2010. This new evidence does not support the Petitioner’s claim that the Beneficiary had sufficient personnel to relieve him from performing the day-to-day, non-managerial functions of the petitioning company at the time of filing and in fact only further confuses the record, as the Petitioner now appears to claim that a total of four people, other than the Beneficiary, worked for the company during the year the petition was filed, and has documented wages paid to only three of them.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm’r 1998). Furthermore, because 8 C.F.R. § 103.2(b)(1) requires every petitioner to establish eligibility at the time of filing, USCIS cannot properly approve the petition at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

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<sup>2</sup> The Petitioner states: “Should the AAO need specific W2 or other corroborating evidence of employment . . . please reach out to us and we will make the same available.” The Petitioner has had multiple opportunities to perfect the record since 2010, and we consider the record to be complete as it now stands. We consider the Petitioner’s response to the RFE to be a request for a decision under the regulations at 8 C.F.R. § 103.2(b)(11) and (14).

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In support of the appeal, the Petitioner submits a new organizational chart (too complex to reproduce here), showing an overlapping management structure that encompasses the Petitioner and three other U.S. companies. The chart depicts a shared management structure, dividing employees into individual companies only at the sales representative level.

The Petitioner asserts that it had previously submitted “a poorly drafted organizational chart that left out a multitude of sales representatives,” but the Petitioner has not submitted corroborating evidence to show that the new chart is more accurate or reliable. The new chart places the sales coach under the authority of the logistics and finance manager, and replaces the bookkeeping clerk with two contract accountants. Given these changes, the new chart is not simply an expansion or clarification of the earlier chart. Rather, it shows a new structure that cannot be reconciled with the chart submitted with the RFE response or the initial chart submitted in 2010.

The Petitioner has not shown that the complicated, multi-company management structure shown in the latest chart was in place at the time it filed the petition.<sup>3</sup> Not until the appeal did the Petitioner claim to be part of an integrated organization of related U.S. companies. Furthermore, the newly claimed corporate structure does not demonstrate that the Beneficiary will be primarily employed in a managerial or executive capacity with the petitioning U.S. employer. The other companies are not the Petitioner, and the record lacks evidence of the Petitioner’s claimed affiliate relationship with these entities.

Without sufficient evidence of the employment of subordinates to perform non-qualifying functions, we find that the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary’s proposed position in the United States would consist primarily of tasks within a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

## B. Foreign Employment in a Qualifying 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. Facts

\_\_\_\_\_ letter of February 9, 2009, included this description of the Beneficiary’s earlier employment at the Petitioner’s foreign affiliate:

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<sup>3</sup> Furthermore, the IRS Form 941 quarterly returns from 2013 and 2014 do not show that the Petitioner ever employed 15 at the same time, as shown on the organizational chart. The Petitioner has employed an increasing number of people from year to year, but their IRS Forms W-2 show very low pay, consistent with short-term and/or part-time employment.

[The Beneficiary] was an Executive Manager of the company abroad and he was responsible for:

- Construction site operations and management
- Overall supervision of the construction site
- Coordination and management of all parties involved in the project
- Supplies management
- Contact and communication with the official authorities
- Tracking, auditing, and periodic report to customers

Contract negotiations

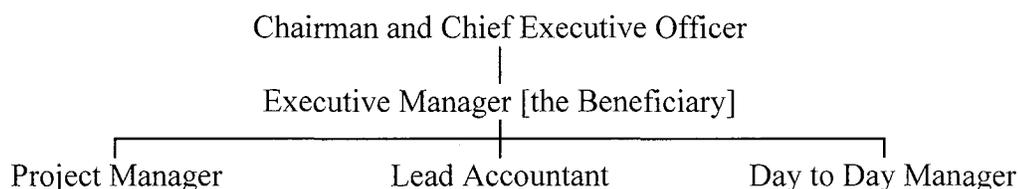
Partners recruit and management

- Market research
- Potential partners assessment and test
- Terms and conditions negotiations
- Partners supervision and performance tracking

Project Management

- Select appropriate methodology per project
- Build project plan
- Track and audit plan vs. actual
- Ensure within budget, within time and within plan metrics

The foreign company's organizational chart showed the following structure:



The fourth level of the organizational chart consisted of four names, without titles, not indicating to whom those four individuals reported.

In the RFE, the Director asked for evidence to show that the Beneficiary primarily performed qualifying managerial or executive duties for the foreign company. The Director also requested job descriptions for the Beneficiary's subordinates. In response, the Petitioner submitted a letter on the foreign company's Hebrew-language letterhead, dated April 14, 2015, and signed by the

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Beneficiary, who stated: “I am the representative for the Israeli company.” The Beneficiary listed the following duties, with the approximate percentage of time he devoted to each:

- Manage all business operations, including financial aspects of the business such as investments and borrowing, and set strategic policies and objectives, manage all sales efforts and all hiring and firing of employees, and managing the work of the subordinate managers (35%)
- Select and oversee independent contractors and service providers including lawyers, accountants and other service providers (20%)
- Oversee the marketing, advertising, and promotion activities for the Company (10%)
- Plan, formulate and implement administrative and operational policies and procedures, including whether or not to purchase additional businesses or choosing new business and investment avenues for the company (25%)
- Obtain new business and new business ideas by attending trade shows and exhibitions (10%)

The Petitioner did not submit evidence regarding subordinate employees or contractors. Instead, the Beneficiary stated that “it is quite difficult to specify the exact number of contractors used on any given day because it is always shifting.”

In the denial notice, the Director noted that the Petitioner did not submit requested evidence and information such as job descriptions for the Beneficiary’s subordinates. The Director concluded that the Petitioner had not met its burden of proof to establish that the Beneficiary had worked in a qualifying managerial or executive capacity abroad. On appeal, the Petitioner submits a new, undated letter from [REDACTED]

## 2. Analysis

Upon review, the Petitioner has not established that the Beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

In her new letter, [REDACTED] states:

[The Beneficiary] was the person primarily responsible for overseeing the corporate functions of the company. These duties largely involved project management and setting guidelines for the company in various business dealings, including sales, marketing, contracts with suppliers, and personnel decisions. . . .

As the employee in charge of [the company’s] projects, [the Beneficiary] supervised the primary construction site and ensured that all applicable regulations and contract terms were complied with by [the company’s] employees and contractors. He also reviewed the actions of [the company’s] supervisors and team-leaders in their interactions with . . . customers, vendors, and regulators. . . .

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Additionally, [the Beneficiary] had authority to review employee performance and make personnel decisions based on a worker's performance over the course of a contract.

As the executive manager, [the Beneficiary] was involved in [the company's] various business dealings and negotiations. His approval was required before [the company] could be bound to any contract.

██████████ letter attests to the level of the Beneficiary's discretionary authority, but it does not address specific issues that the Director raised in the RFE and again in the denial notice. The Director, for example, had requested job descriptions and corroborating evidence regarding the Beneficiary's claimed subordinates at the foreign company, and "evidence to document the number of contractors used."

Counsel for the Petitioner asks that ██████████ letter "be given the credence it deserves" because "direct evidence from more than 10 years ago from a developing country is impossible to produce within a limited timeframe." The Petitioner does not corroborate this claim. The assertions of counsel do not constitute evidence. *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). We note that ██████████ herself did not claim that records were unavailable, except to note that the company's "accountant . . . has been unable to compile [financial] information in a timely manner" to show that the company remains in business.

The Petitioner documents the prior approval of nonimmigrant petitions, granting the Beneficiary nonimmigrant status as an L-1A intracompany transferee in an executive or managerial capacity. The Petitioner states: "considering that the Beneficiary has qualified for the L classification on multiple occasions since 2006 it is 'more likely than not' that [the Beneficiary] has the one year of employment with a qualifying entity abroad." The decision does not indicate whether the Director reviewed the prior approvals of the nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same evidence contained in the current record, the approvals would have been in error. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). A federal agency is not required to treat acknowledged errors as binding precedent. *See Sussex Eng'g Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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We note that, in the RFE, the Director had requested “a definitive statement from *the foreign company* which describes the beneficiary’s job duties” (Director’s emphasis). The Petitioner responded by submitting a letter from the Beneficiary, on the foreign company’s letterhead, in which the Beneficiary stated: “I am the representative for the Israeli company.” When the Beneficiary signed this letter on April 14, 2015, however, the qualifying relationship between the two companies had already been severed. There is no evidence that the Beneficiary continued to have any role at the foreign company in 2015, or that he was authorized to act as its representative.

We find that the Petitioner has not provided sufficient evidence to support the claim that the Beneficiary’s former employment in Israel was in a qualifying managerial or executive capacity. Based in part on this finding, the appeal will be dismissed.

#### IV. 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, and that both the Petitioner and the foreign company are still doing business. *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. U.S. Employer Doing Business

The petitioning U.S. employer must establish that it has been doing business for at least one year. See 8 C.F.R. § 204.5(j)(3)(i)(D).

##### 1. Facts

Form I-140 indicates that the Petitioner was incorporated on [REDACTED] but the company’s certificate of incorporation dates from [REDACTED]. In August 2005, the Petitioner began renting a self-storage space with an adjacent office. The Petitioner submitted copies of invoices, tax returns, bank statements, and other documentation, most of it from 2007 and early 2008, including several leases for kiosks located in a shopping mall whose terms had expired in 2008. The Petitioner did not submit documentation from the year immediately preceding the petition’s filing date of April 2, 2010.

In the RFE, the Director noted that “the petitioner only submitted several invoices from January 2007.” The Director asked for evidence of the Petitioner’s regular, systematic, and continuous provision of goods and services for at least a year prior to the petition’s filing date. The Director stated that the requested evidence “may consist of, but is not limited to,” documentation such as receipts, invoices, and contracts.

In response, the Petitioner submitted a letter dated April 24, 2015, from [REDACTED] leasing representative of the [REDACTED] shopping mall. [REDACTED] stated that the Petitioner “has been

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operating here at the [REDACTED] for more than nine years,” and that she had worked at the mall for six years and so could personally attest to the Petitioner’s activity during that time.

In the denial notice, the Director stated that the Petitioner’s response to the RFE did not include “service contracts which would enable USCIS to conclude that the company has engaged in business transactions that involved the provision of goods and/or services . . . on a ‘regular, systematic and continuous’ basis.” On appeal, the Petitioner states that it need only establish eligibility by a preponderance of the evidence; there is no requirement for the submission of specific types of evidence, such as contracts. The Petitioner submits photographs of kiosks and storefronts; copies of recent lease agreements; and another letter from [REDACTED]

## 2. Analysis

The Petitioner’s earliest evidence of business activity dates from 2005, but there is a gap in the evidence during the year immediately preceding the filing of the petition (April 2009 to April 2010). This gap is significant, because the regulatory definition of “doing business” requires the activity to be “continuous.” See 8 C.F.R. § 204.5(j)(2).

[REDACTED] dated her first letter April 24, 2015, less than five years after the petition’s April 2, 2010 filing date. Therefore, her imprecise statement that she could attest to six years of activity by the Petitioner does not, on its face, establish that the Petitioner was doing business at least a year before the filing date. [REDACTED] stated that the Petitioner had operated “at the [REDACTED] for more than nine years,” but she did not cite or provide copies of any evidence to show how she knew of the company’s activity before she herself worked at the [REDACTED]

The Petitioner has established, by a preponderance of the evidence, that the company has been doing business in recent years, and was engaged in activity in 2007 and 2008, but there remains a gap in the record during the year immediately preceding the filing date. Therefore, the evidence does not establish that the Petitioner had been engaged in the regular, systematic, and continuous provision of goods and/or services for at least a year at the time of filing. It is possible that the Petitioner was doing business, but it has not submitted the necessary evidence to support that conclusion. See *Matter of Soffici*, 22 I&N Dec. at 165. Based in part on this finding, the appeal will be dismissed.

## B. Foreign Employer Doing Business

The Petitioner must be part of a multinational organization. *Multinational* means that the qualifying entity, or its affiliate or subsidiary, conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). Because the statute and regulations require a qualifying relationship to exist between the Petitioner and the foreign employer at the time of filing, and for the Petitioner to remain eligible throughout the period of adjudication, the Petitioner must establish that a qualifying foreign entity is doing business.

1. Facts

The Petitioner's initial submission included documentation relating to the foreign entity, such as a financial statement from 2003, but the submitted evidence did not show that the foreign company was still doing business as of the petition's filing date of April 2, 2010. Because all the initial evidence was more than a year old at the time of filing, the Director, in the RFE, requested evidence to show that the foreign entity continues to do business. The Director stated that such evidence might consist of "[r]eceipts, invoices, and detailed reports to show that the foreign organization traded or exchanged goods or services." In response, the Petitioner submitted financial statements for 2010 to 2013, copies of utility bills from March 2015, and automobile registration and insurance documents from 2014.

In the denial notice, the Director found that the Petitioner had not submitted "evidence of actual business transactions" by the foreign entity. On appeal, the Petitioner states that the new letter from [REDACTED] "confirms that the foreign affiliate is actively doing business in Israel."

2. Analysis

In her new letter, [REDACTED] states that the foreign company "remains active in Israel." The Petitioner submits printouts from two Israeli websites, referring to the company as "active." These printouts attest to the company's administrative status, but they do not demonstrate that the foreign company is engaged in the regular, systematic, and continuous provision of goods and/or services. The Petitioner, therefore, has not met its burden of proof in this respect. For this additional reason, the appeal will be dismissed.

Furthermore, the Director explained that the foreign company's ongoing business activity is relevant for the purposes of demonstrating the continued existence of a qualifying relationship between the two companies. The Petitioner has stipulated that no qualifying relationship exists between the Petitioner and the foreign company. Because there is no shared ownership or control between the two companies, the foreign company's current status is arguably moot. The Petitioner does not claim to have a qualifying relationship with any active foreign entity and can no longer meet the definition of "multinational" at 8 C.F.R. § 204.5(j)(2). For this additional reason, the appeal will be dismissed.

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.

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**ORDER:** The appeal is dismissed.

Cite as *Matter of B-M-2003, Inc.*, ID# 16116 (AAO Mar. 31, 2016)