



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

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

MATTER OF BCDCH-A-W- LLC

DATE: MAY 5, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, described as a provider of health care related services, seeks to permanently employ the Beneficiary as its nursing and personal care services division 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, Nebraska Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; (2) the Petitioner has been doing business for at least one year prior to the petition's filing date; (3) the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity; (4) the Beneficiary has been employed abroad in a qualifying managerial or executive capacity; and (5) 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 addressing three of the five stated grounds for denial.

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. QUALIFYING RELATIONSHIP

The Director denied the petition based 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 regulations at 8 C.F.R. § 204.5(j)(2) define the relevant terms as follows:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; [or]
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. . . .¹

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The Director determined that the Petitioner had not established that it was a qualifying multinational organization at the time of filing, or that it remained one afterwards. This determination rested on two related findings, the first relating to ownership and control of the petitioning entity, and the second relating to ongoing business activity by the foreign employer.

¹ A third element of the definition, applicable only to certain accounting firms, is not relevant here.

(b)(6)

Matter of BCDCH-A-W- LLC

A. Ownership and Control

1. Evidence of Record

The Petitioner filed Form I-140 on February 25, 2015. The only document submitted with the petition was an undated statement from [redacted] manager and general partner of the petitioning company. [redacted] stated:

The subsidiary and affiliate relationship of the following persons to [the Petitioner], as of February 14, 2015 to present are as follows:

| | |
|--|------------|
| [The Beneficiary] (a sole proprietor from the Philippines) | 34% |
| [redacted] (a professional partnership company from the Philippines) | 34% |
| [redacted] | 32% |
| Total Percentage | <hr/> 100% |

The Director issued a request for evidence (RFE) on April 15, 2015. The Director stated that the Petitioner had not submitted sufficient evidence to establish a qualifying relationship between itself and the Beneficiary's former foreign employer. The Director instructed the Petitioner to submit additional evidence, including copies of stock certificates, articles of incorporation or organization, the partnership agreement for [redacted], and other related documents.

In response, [redacted] repeated the percentage figures shown above. The Petitioner also submitted copies of the following documents:

- Three certificates of membership, dated February 14, 2015, stating that the Beneficiary, her spouse, and [redacted] each has an "economic membership interest" in the Petitioner equal to the percentages stated previously;
- The Petitioner's Articles of Organization, executed on February 9, 2015, and filed with the State of Florida on February 19, 2015;
- Articles of Conversion, filed with the Articles of Organization, stating that the petitioning company was previously a general partnership, "[redacted]" formed in Nevada on March 9, 2013;
- A certificate from the Florida Department of State, certifying that the Petitioner "is a limited liability company organized under the laws of the State of Florida, filed on February 19, 2015, with an organizational date deemed effective March 9, 2013"; and
- The Petitioner's Nevada Application for Registration of Foreign Limited-Liability Company, dated May 14, 2015.

(b)(6)

Matter of BCDCH-A-W- LLC

The Petitioner also submitted a copy of [REDACTED] IRS Form 1040, U.S. Individual Income Tax Return. The tax return included Schedule C, Profit or Loss From Business (Sole Proprietorship). The business identified on Schedule C, [REDACTED] had the same address as the Petitioner, and the same name but without the “LLC” identifier.

The Petitioner also submitted a copy of the articles of partnership for [REDACTED]. The articles read, in part:

ARTICLE II: That the purpose[s] of the said partnership are: To engage in the business of nursing, physical therapy [*sic*], and other businesses. . . .

ARTICLE III: The partnership began July 1, 2013 and shall continue until dissolved by mutual agreement.

The articles identified the Beneficiary and her spouse as the entity’s general partners, with the Beneficiary’s spouse named the managing partner.

The Petitioner submitted a copy of a Certificate of Business Name Registration, issued to the Beneficiary, attesting to the registration of the name [REDACTED] for five years beginning February 18, 2013. The Petitioner also submitted a copy of a Philippine Annual Income Tax Return for 2014 which the Beneficiary had filed on behalf of [REDACTED]. The Petitioner submitted no organizational documents relating to the meat store. As a sole proprietorship, the business would have no legal existence as an entity separate from the Beneficiary.

The Director denied the petition on August 10, 2015, stating: “Documentation was not provided establishing the qualifying relationship between [REDACTED] and [the Petitioner].”

On appeal, the Petitioner submits copies of previously submitted documents, and a resolution dated February 25, 2015 appointing the Beneficiary, her spouse, and [REDACTED] as members of the Petitioner’s board of managers.

2. Analysis

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

(b)(6)

Matter of BCDCH-A-W- LLC

While the Petitioner claims that the Beneficiary holds a minority interest in the petitioning entity, these statements are not well documented. [REDACTED], on her 2014 IRS Form 1040 income tax return, referred to “[REDACTED]” as a sole proprietorship, meaning that [REDACTED] was the company’s sole owner in 2014. A statement dated February 19, 2015, claimed that the Beneficiary directly owned 34% of the company, and indirectly owned another 34% through her ownership of [REDACTED]. The record, however, does not document how the ownership interest in the company changed hands. There is, for example, no evidence of payment or other consideration in exchange for [REDACTED] surrendering most of her interest in the petitioning company.

The Petitioner has submitted documentation relating to two different businesses in the Philippines: [REDACTED] and [REDACTED] (The unidentified “sole proprietorship” mentioned in [REDACTED] initial statement appears to be [REDACTED]). The Petitioner did not initially specify which of these businesses had a qualifying relationship with the Petitioner.

In subsequent submissions, the Petitioner concentrated its attention on [REDACTED]. The Petitioner has established the legal existence of [REDACTED], but has provided no documentation to show that the entity has ever done business or employed the Beneficiary. If the Beneficiary never worked for [REDACTED] overseas, then that company’s ownership connection to the Petitioner is not relevant to the proceeding at hand and cannot establish the Beneficiary’s eligibility for the classification sought. By statute, the Beneficiary must have worked for a qualifying foreign employer before traveling to the United States to work for the Petitioner as a manager or executive. *See* section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(3)(i)(B). It cannot suffice for the Beneficiary to establish a foreign company that she owns, but which has never employed her.

The preponderance of the evidence supports a finding that the Beneficiary is the sole proprietor of [REDACTED].

The Petitioner claims, on appeal, that part of the petitioning company changed hands again. The newly submitted “Resolution of All the Economic Members of the [petitioning] LLC” indicates that [REDACTED], the Beneficiary, and the Beneficiary’s spouse are all “appointed as members of the Board of Managers . . . effective February 25, 2015.”

The record does not show that this changed arrangement was in place at the time the Petitioner filed the petition on February 25, 2015. We note that, when the Petitioner mailed its response to the RFE on July 6, 2015, that response did not include a copy of the February 25 resolution. Instead, the Petitioner submitted documents that reasserted the February 19 ownership structure, with the Beneficiary holding 34% of the company, [REDACTED] holding another 34%, and [REDACTED] holding the remaining 32%. If the membership structure had changed on February 25, 2015, as the Petitioner claims on appeal, then these documents would have been obsolete when the Petitioner submitted them in July 2015.

The petition must be approvable based on the circumstances at the time of filing, and must remain approvable throughout adjudication. *See* 8 C.F.R. § 103.2(b)(1). The filing of new documentation after

(b)(6)

Matter of BCDCH-A-W- LLC

the filing date, to alter the ownership of the petitioning entity, cannot retroactively establish that qualifying conditions existed as of the filing date. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Section 204(b) of the Act, 8 U.S.C. § 1154(b), allows for the approval of an immigrant visa petition only upon a determination “that the facts stated in the petition are true.” *See also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner has not established that it has a qualifying relationship with [REDACTED]. The two entities are not owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. The Beneficiary appears to be the sole owner of [REDACTED], but she is not the sole owner of the petitioning entity.

Two entities can also be affiliates if they are subsidiaries, both owned and controlled by the same parent or individual. If the Beneficiary is the sole proprietor of [REDACTED] as claimed, then she alone has ownership and control of that company. The Petitioner has not shown that the Beneficiary has ownership and control of the petitioning entity.

For the above reasons, the Petitioner has not established the shared ownership and control necessary to show a qualifying relationship between the Petitioner and the Beneficiary’s foreign employer.

B. Foreign Entity Doing Business

The regulation at 8 C.F.R. § 204.5(j)(2) provides the following definitions:

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.

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.

The regulatory definition of “multinational” includes the verb “conducts,” in the present tense. A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). Therefore, it cannot suffice to say that a qualifying relationship once existed, or will exist in the future. The qualifying relationship must exist at the time of filing, and the Petitioner must qualify as a multinational organization throughout the adjudication of the petition.

(b)(6)

Matter of BCDCH-A-W- LLC

1. Evidence of Record

In the RFE, the Director requested evidence “to show that the beneficiary’s employer abroad was doing business when [the Petitioner] filed the petition, and continues to do business,” such as licenses, leases, payroll documents, and invoices.

In response, the Petitioner submitted copies of the following documents pertaining to [REDACTED] in the Philippines:

- A Certificate of Business Name Registration, valid from February 18, 2013 to February 18, 2018, issued to the Beneficiary by the Philippines’ Department of Trade and Industry;
- A Business Permit issued by the [REDACTED] issued February 9, 2015, naming the Beneficiary on the line marked “Proprietor’s/Owner’s/Operator’s/ Manager’s Name”;
- A 2014 BIR Form 1701, Annual Income Tax Return, which the Beneficiary filed on the company’s behalf on June 19, 2015; and
- An audited financial statement, dated June 4, 2015, for calendar year 2014.

The Petitioner submitted an undated statement from the Beneficiary, identifying her as “the General Manager of [REDACTED]” which has sold “meat products and related services from February 18, 2013 up to the present.” The Petitioner submitted monthly payroll statements, signed by the Beneficiary, indicating that the foreign company paid four employees each month during the first six months of 2015.

In the denial notice, the Director found that the Petitioner had not established that “the foreign business entity was doing business at the time of filing Form I-140 and continues to do business.” The Petitioner, on appeal, does not address this finding, either with a statement or with new evidence that relates to the issue.

2. Analysis

Taken together, the regulatory definitions of “multinational” and “doing business” at 8 C.F.R. § 204.5(j)(2) require the Petitioner to be part of a business organization that actively conducts business activity in the United States and at least one other country. The Petitioner, on appeal, does not address, dispute, or acknowledge the Director’s findings regarding the foreign entity’s ongoing business activities. When an appellant offers no argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff’s claims abandoned when not raised on appeal to the AAO). Nevertheless, we will discuss the issue briefly, to establish that we agree with the Director’s conclusions.

The Petitioner submitted some documentation regarding [REDACTED], but the submitted evidence does not fully address the Director’s concerns. Permits and licenses establish an entity’s

(b)(6)

Matter of BCDCH-A-W- LLC

ability to do business, but they do not establish that business activity has actually occurred, and they cannot show that business activity continued after their dates of issue. The Petitioner submitted an audited balance sheet for the foreign company, “for the year ended 31 December 2014,” and an income tax return for that same year, but these documents do not show that the company remained actively in business in 2015. The Petitioner has submitted statements from the Beneficiary indicating that the foreign company continued to pay its employees after the Beneficiary left the Philippines in August 2014, but the Petitioner has submitted no direct documentary evidence to support these claims. Such unsupported statements cannot meet the Petitioner’s burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165.

The Petitioner has not established that [REDACTED] continued to do business after the Beneficiary, its sole proprietor, left the Philippines in August 2014. For this reason (and for the reasons listed further above), the Petitioner has not shown that a qualifying relationship existed between the two entities at the time of filing and continues to exist now.

III. DOING BUSINESS

The Director denied the petition based 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.

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

On Part 5 of Form I-140, the Petitioner provided the following information:

- 2.b. Date Established: 03/09/2013
- 2.c. Current Number of U.S. Employees: [blank]
- 2.d. Gross Annual Income: \$81.96
- 2.e. Net Annual Income: -\$1,828.04

The Petitioner’s initial submission included no evidence that the Petitioner had been doing business for a year, or was doing business at the time of filing. In the RFE, the Director asked for documentation including, but not limited to, copies of the Petitioner’s business license, certificate of good standing, lease, tax and payroll records, contracts, and invoices.

In response, the Petitioner submitted copies of documents, described above, including various state filings and [REDACTED] 2014 federal income tax return. The Petitioner also submitted a statement from [REDACTED], which reads, in part:

[The Petitioner] has started its operation [from March 9, 2013 to May 30, 2015] as a distributor of health and wellness products.

(b)(6)

Matter of BCDCH-A-W- LLC

On June 1, 2015, the company expanded and organized the Nursing and Personal Care Services Division.

The Petitioner also submitted a copy of a residential lease agreement, effective June 1, 2015, indicating that [REDACTED] had leased space to the Petitioner rent-free.

The Director denied the petition, stating that the Petitioner had not submitted evidence to show that it had been doing business for at least a year prior to the filing date.

On appeal, the Petitioner does not address this finding.

B. Analysis

By not addressing the “doing business” issue on appeal, the Petitioner has effectively abandoned that issue. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1228 n.2. For the reasons explained below, we agree with the director’s finding.

The Petitioner claims to have been in operation since March 9, 2013, but all of the submitted documentation relating to the Petitioner (including state filings) dates from February 2015 or later. The Petitioner created and/or filed most of these documents while preparing the petition, or while preparing its response to the RFE. The Petitioner’s lease (for rent-free use of [REDACTED] own house) was effective June 1, 2015, several months after the February 25, 2015, filing date. Bank statements in the record show that the Petitioner opened its bank account on May 27, 2015.

The only reference to business activity before February 2015 appears on Schedule C submitted with [REDACTED] IRS Form 1040 income tax return for 2014, prepared on March 10, 2015. (The tax return listed [REDACTED] occupation as “registered nurse.”) That tax return reported gross receipts or sales totaling \$82, a sum that does not realistically reflect a year’s worth of regular, systematic, and continuous provision of goods and/or services. The Director asked for copies of invoices, contracts, and other documents that the regular conduct of business would tend to produce, but the Petitioner did not submit this evidence.

We note that the Petitioner’s July 2015 budget, submitted in response to the RFE, includes \$590 for a “Business license.” The record contains no documentation showing that the Petitioner possessed a license before July 2015, and no evidence that the Petitioner actually paid the license fee shown.

The record indirectly documents minimal commercial activity by the Petitioner. We agree with the Director’s undisputed finding that the Petitioner has not established that it was doing business for at least one year prior to the filing of the petition.

IV. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based 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 has been employed abroad in a qualifying managerial or executive capacity. The Petitioner does not claim that the Beneficiary will serve in an executive capacity, so we will restrict our analysis to whether the Petitioner established that the Beneficiary will be and has been employed in a managerial 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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

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

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. Evidence of Record

The Petitioner’s initial submission did not address the issue of the Beneficiary’s managerial or executive capacity with the petitioning company. In the RFE, the Director asked for a detailed position

(b)(6)

Matter of BCDCH-A-W- LLC

description, including the percentage of time spent on each duty, and a list of the Beneficiary's subordinate employees.

In response, [REDACTED] stated that the Beneficiary "has been appointed and [is] currently functioning as a manager of [the Petitioner's] Nursing and Personal Care Services Division. . . . She has one employee and one independent contractor under her supervision." In a separate statement, [REDACTED] provided the following list of the Beneficiary's claimed managerial duties.

Performs general managerial duties, this includes, but [is] not limited to, recruiting, interviewing, hiring and termination of employees and independent contractors within the Division and propose and approve budget within the Division. Negotiate contracts.

Accomplishes staff results by communicating job expectations; planning, monitoring, and appraising job results; coaching, counseling, and disciplining employees; developing, coordinating, and enforcing systems, policies, procedures, and productivity standards.

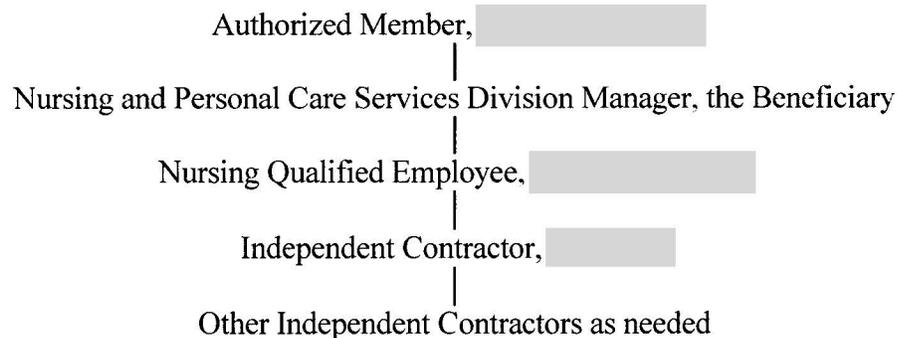
Establishes strategic goals by gathering pertinent business, financial, service, and operations information; identifying and evaluating trends and options; choosing a course of action; defining objectives; evaluating outcomes.

Accomplishes financial objectives by forecasting requirements, preparing an annual budget; scheduling expenditures; analyzing variances; initiating corrective actions within the Division.

Contributes to team effort by accomplishing related results as needed.

Perform other duties as assigned by the authorized member [i.e., [REDACTED]].

The Petitioner submitted an organizational chart showing four employees and two contractors. Three of these individuals worked in the Business Support Services Division, outside the Beneficiary's chain of command. The Beneficiary's section of the organizational chart shows the following hierarchy:



(b)(6)

Matter of BCDCH-A-W- LLC

In the denial notice, the Director stated that the Petitioner submitted “vague and generalized descriptions” which “failed to include the percentage of time spent on each duty.”

On appeal, the Petitioner submits a new job description, signed by the Beneficiary’s spouse. The new description repeats the earlier version, with two added sentences:

Focuses on managing and training professional nurses, long-term care administrators and caregivers on a full-time basis, at least 40 hours a week.

[The Beneficiary] is also one of the members of the Board of Managers of [the petitioning company].

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 managerial 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.

Where the job description provides details about the Beneficiary’s work, the record lacks evidence that the description realistically depicts the Beneficiary’s actual day-to-day duties.

The Petitioner’s submission on appeal does not address or remedy the Director’s concerns about the job description. The passage added to the new description does not clarify vague statements such as “[c]ontributes to team effort by accomplishing related results,” and it does not establish the time devoted to individual tasks. Instead, the added passage raises new questions. The Petitioner claims to employ one “nursing qualified employee” [REDACTED] who, on her income tax return, identified her occupation as “registered nurse”). The Petitioner employs no “long-term care administrators and caregivers” whose management and training would occupy “at least 40 hours a week.” Therefore, this newly-claimed element of the Beneficiary’s work does not reflect duties that the Beneficiary would

(b)(6)

Matter of BCDCH-A-W- LLC

have been able to perform at the time the Petitioner filed the petition, or even the appeal. Rather, it amounts to speculation about possible future tasks.

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).

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. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 204.5(j)(2).

The Petitioner has not shown that it had employees for the Beneficiary to oversee as of the filing date. On the petition form, the Petitioner left blank the space designated for "Current Number of U.S. Employees." [REDACTED], in a statement submitted in response to the RFE, stated that the Beneficiary "has one employee and one independent contractor under her supervision," but she did not indicate that those workers were employed on the filing date of February 25, 2015. Rather, [REDACTED] stated that the company was solely "a distributor of health and wellness products" until "May 30, 2015," and that "[o]n June 1, 2015, the company expanded and organized the Nursing and Personal Care Services Division" that the Beneficiary intends to oversee.

Even taking the Petitioner's stated plans into account, the Petitioner has submitted no evidence to show that these nurses, long-term care administrators and caregivers would be professionals. (The Petitioner's use of the term "professional nurses" in the job description cannot suffice in this regard.) Direct supervision of non-professional employees does not qualify as a managerial capacity. *See* section 101(a)(44)(A)(iv) of the Act.

The organizational chart shows only employee (as opposed to contractor) under the Beneficiary's supervision. That employee, however, is [REDACTED] whom the organizational chart also shows at the top of the organization, outranking the Beneficiary, and who owns the house from which the

(b)(6)

Matter of BCDCH-A-W- LLC

business would operate rent-free. Given this arrangement, it is not evident that the Beneficiary has the authority to fire or discipline [REDACTED]

The Petitioner states that the Beneficiary also supervises an independent contractor, with more to be hired in the future, but the Petitioner has submitted no evidence of its employment of contractors. The Petitioner has submitted a copy of an Independent Contractor Services Agreement between the Petitioner and [REDACTED] but that agreement identifies the Petitioner, not [REDACTED] as the independent contractor. (The record contains no evidence that the Petitioner has actually rendered services for [REDACTED] or received payment from that company.) Also, the agreement is dated June 15, 2015, and therefore was not in effect as of the filing date.

Without sufficient evidence of the employment of subordinates to perform non-managerial 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.

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 the present instance, at the time of filing, the Beneficiary was already in the United States, having entered on August 29, 2014, but was not yet working for the Petitioner. Her B-1/B-2 nonimmigrant status did not authorize her to work for a U.S. employer. The Beneficiary began working for the Petitioner in June 2015 after obtaining employment authorization.

The Petitioner's initial submission did not address the Beneficiary's employment abroad, except to identify her as the sole proprietor of a then-unidentified business.

In response to the RFE, the Petitioner submitted the following statement from the Beneficiary:

I . . . hereby certify that I am the General Manager of [REDACTED] I have the following duties and responsibilities:

I sell meat products and related services from February 18, 2013 up to the present. I have the full authority to function as a general manager of the said business. I oversee the operation of the store. I manage four people mainly the operations manager, supply manager, delivery staff and butcher. I own 100% of the business.

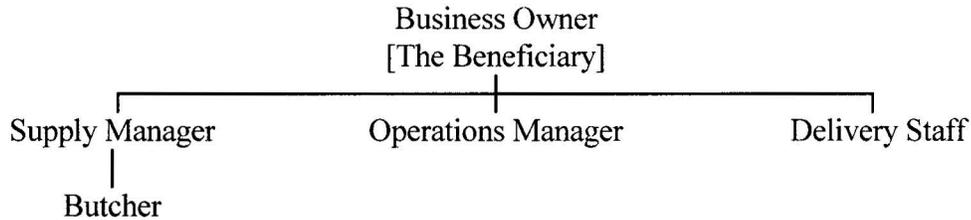
(b)(6)

Matter of BCDCH-A-W- LLC

My aim is to maximize profit while minimizing costs. I ensure that promotions are accurate and merchandised to the company's standards, staff are fully versed on the target for the day and excellent customer care standards are met.

I analyze sales figures and forecast future sales. I interpret trends to facilitate planning.

The Petitioner submitted an organizational chart for [REDACTED]



The Petitioner submitted six statements from the Beneficiary, attesting to [REDACTED] payroll expenses each month from January through June of 2015. The Beneficiary stated that paid its employees a total of P51,000 each month. The Beneficiary also attested to the foreign company's BIR Form 1701 Annual Income Tax Return, filed June 19, 2015.

The Director denied the petition, stating that, like the U.S. job description, the foreign job description was "vague and generalized" and lacked "the percentage of time spent on each duty."

On appeal, the Petitioner submits a new job description, on [REDACTED] letterhead, signed by her spouse, identified here as "Secretary." The Beneficiary's spouse states:

This certifies that [the Beneficiary] has performed the following managerial duties at [REDACTED] for the period of February 18, 2013 to August 28, 2014:

- Responsible for managing and advising the operations manager, supply manager, butcher and delivery staff.
- Makes decision and approval on hiring, termination of employees for the general operation of the entire business.
- Decides on pricing of all merchandise and services.
- Decides and approves the salaries or wages of all employees in the entire business organization.
- Represents the company on business licensing application and community representation.
- Directs, manages and controls the entire business organization.
- Performs this on a full-time basis, minimum of 40 hours per week from the period of February 18, 2013 to August 28, 2014.
- Makes final decision, approval and settlements on customers and employees disputes.

Matter of BCDCH-A-W- LLC

- Plans annual and monthly budget for the entire business operation.
- Implements disciplinary action among all employees of the entire business.

2. Analysis

The new job description contains more details than the first version, but it does not overcome the Director's concerns. Like the U.S. job description, the foreign job description does not say how much time the Beneficiary devoted to individual duties and tasks. Further, the Petitioner has submitted very little documentation to show that the Beneficiary has actually performed the duties described. The Petitioner has not submitted first-hand documentary evidence to show that, during the three years preceding the Beneficiary's entry into the United States, the foreign store actually employed the staff listed on the organizational chart, who would therefore have relieved the Beneficiary from performing operational tasks such as placing orders, running the sales counter, and cleaning.

The Petitioner has not established that the Beneficiary's spouse, who signed the new job description, has the standing or the personal knowledge to reliably attest to the nature of the Beneficiary's past work for [REDACTED]. The store's organizational chart does not include the name of the Beneficiary's spouse or the title "secretary." The Beneficiary's spouse claimed no involvement with the company until he signed the job description submitted on appeal.

For the reasons stated above, the Petitioner has not established that the Beneficiary worked in a qualifying managerial or executive capacity for [REDACTED].

V. ABILITY TO PAY

The Director also 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.

(b)(6)

Matter of BCDCH-A-W- LLC

A. Evidence of Record

On Form I-140, the Petitioner indicated that it would pay the Beneficiary \$2,000 per month, equivalent to \$24,000 per year. As stated above, the Petitioner also stated its 2014 gross annual income as \$81.96, with a net annual loss of \$1,828.04.

In the RFE, the Director stated that the Petitioner had not submitted evidence of its ability to pay the Beneficiary's salary. The Director asked the Petitioner to submit its 2014 income tax return, annual report, or audited financial statement.

In response, as noted previously, the Petitioner submitted a copy of [REDACTED] personal income tax return for 2014, including Schedule C, which showed the same figures (rounded to the nearest dollar) shown on Form I-140. The Petitioner also submitted budgets for June 2015 through May 2016, and income projections for March 2015 through February 2016.

In addition, the Petitioner submitted a statement from [REDACTED] indicating that the Petitioner had paid the Beneficiary a gross salary of \$2,000 for June 2015, with net pay of \$1,847.00 after deductions. The Petitioner also submitted a copy of a check for \$1,847.00, dated June 30, 2015, from the Petitioner, payable to the Beneficiary.

In the denial notice, the Director stated that the submitted evidence did not establish the Petitioner's ability to pay the Beneficiary's salary from the filing date onward.

On appeal, the Petitioner submits copies of monthly \$1,847 checks issued to the Beneficiary from June 2015 to September 2015, and a "Treasurer's Statement" signed by [REDACTED]

B. Analysis

The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of ability to pay to take certain forms. The Petitioner has not submitted audited financial statements or annual reports. The only income tax document in the record relating to the Petitioner shows that the Petitioner made only \$82 in 2014.

[REDACTED] "Treasurer's Statement" attests that the Petitioner has been paying the Beneficiary's salary every month since June 2015. The regulation at 8 C.F.R. § 204.5(g)(2) allows USCIS to accept a financial officer's statement in lieu of other documentation of ability to pay, but only for companies with at least 100 employees. The Petitioner's organizational chart shows only four employees.

The Petitioner has submitted copies of checks from June through September 2015 in an effort to show that the Petitioner has paid the Beneficiary since she began working for the company in June 2015. The photocopied checks show no sign of processing for payment. Furthermore, the checks do not show that the Petitioner was able to pay the proffered wage as of the February 25, 2015 filing date, and will be able to continue paying that wage until the Beneficiary becomes a lawful permanent resident.

(b)(6)

Matter of BCDCH-A-W- LLC

Budget documents cannot establish ability to pay. From June 2015 through October 2015, the monthly budget shows a deficit relative to the projection. The Beneficiary, her spouse, and [REDACTED] all signed a joint statement, saying: “We certify that we commit ourselves to deposit such proposed amount of budget [on] a monthly basis to the checking account” held by the company. Even if this agreement were binding, it would not show that the company’s income or assets are sufficient to support the Beneficiary’s salary. Rather, it suggests that the company is dependent on infusions of capital from its members. The Beneficiary’s promise to deposit her own funds into the Petitioner’s bank account does not establish that the Petitioner can afford to pay the Beneficiary’s salary.

The income projections from March 2015 through July 2015 predicted that the Petitioner’s nursing and personal care services division would take in less than the Beneficiary’s \$2,000 monthly salary until August 2015. The Petitioner’s monthly budgets all show \$5,000 for salary expenses, but the Petitioner did not project enough earnings to cover those costs until September 2015. The Petitioner has not submitted any documentation to show income from any source, in any amount.

For the above stated reasons, the Petitioner has not established its ability to pay the Beneficiary’s proffered wage beginning on the petition’s filing date.

VI. 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 BCDCH-A-W- LLC*, ID# 16592 (AAO May 5, 2016)