



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

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

MATTER OF P.O.B-, LLC

DATE: OCT. 13, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

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

The Director, Texas Service Center, denied the petition, concluding that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred by “overlook[ing] substantial evidence” of eligibility.

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, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

The regulation at 8 C.F.R. § 204.5(j)(3) states:

(3) Initial evidence—

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
 - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
 - (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
 - (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
 - (D) The prospective United States employer has been doing business for at least one year.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that: (1) the Beneficiary will be employed in a managerial or executive capacity; and (2) the Beneficiary has been employed abroad in a managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.¹

¹ See section 101(a)(44)(C) of the Act.

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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

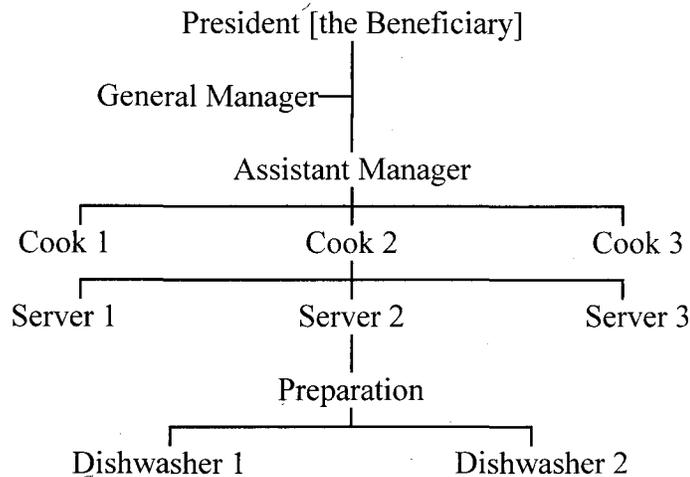
The Petitioner filed Form I-140 on September 26, 2014. On the Form I-140, the Petitioner indicated that it had 12 current employees in the United States.

The Beneficiary, in his capacity as the Petitioner's president and CEO, listed his duties and the approximate percentage of time devoted to each:

- Develop a strategic plan to advance the company's mission and objectives and to promote revenue, profitability, and growth as an organization. . . . 12%
- Oversee [the Petitioner's] operations to [e]nsure cost-effective management of resources and review reports of daily sales activities and provide necessary recommendations for improvement. 8%
- Attends through [REDACTED] the annual and extraordinary meetings and board meetings held by the shareholders. . . . 10%
- Recommends yearly budget and prudently manages organization's resources within those budget guidelines. . . . 9%
- Approve the hiring, firing or promotion of the employees. 10%
- Review activity reports and financial statements . . . and revise objectives and plans in accordance with current conditions. 8%
- Evaluate performance of General Manager. . . . 8%
- Identify new opportunities and ideas for the company's expansion and implement them to increase overall sales and profitability. 15%
- Execute contracts on behalf of the company. 3%
- Oversee the promotion of the business through advertising and marketing. . . . 2%
- Meet with manager once a month to discuss past 30 days activities/sales, review goals and objectives and encourage feedback and ideas from manager for future growth and productivity. 2%
- Set vacation periods and salary scales. 3%
- Perform any other executive job function as necessary, and delegate responsibilities as necessary to ensure smooth operation of the business. 10%

The Beneficiary stated that he directly supervises the general manager, who "[m]anage[s] the entire U.S. organization," "[o]verse[s] all financial aspects of the company and set[s] strategic policies and objectives."

The Petitioner's organizational chart shows the company's 12 employees:



The Petitioner submitted copies of tax and payroll documents for 2013 and the first quarter of 2014. These documents showed that the Petitioner employed 18 people during 2013, 16 of whom earned less than \$20,000 in 2013. The Petitioner employed 10 people during the pay period that included March 12, 2014. The Beneficiary earned \$8640.00 during the first quarter of 2014, while each of the nine other employees earned between \$1231.72 and \$4629.60. The name of the general manager shown on the organizational chart does not appear on the quarterly returns.

The Director issued a request for evidence (RFE), stating that “the petitioner submitted very little documentation to show that the beneficiary will act in a qualifying capacity as a multinational manager.” The Director asked for a more detailed job description.

In response to the RFE, the Petitioner stated that “in 2015, [the Petitioner] began to expand their investments into other businesses” and that the Beneficiary “was given sole authority to manage those investments from the United States.” The Petitioner must establish eligibility as of the petition’s filing date. Subsequent developments cannot retroactively establish eligibility.² We will not consider the Petitioner’s later business ventures unless the Petitioner establishes that the Beneficiary qualified for the benefit sought under the conditions in effect at the time of filing, when the diner was the Petitioner’s only active business operation.

The Beneficiary stated that he devotes 36% of his time to “financial duties”; 28% to “developing annual and long-term operational plans”; 24% to “develop[ing] and implement[ing] human resources initiatives”; and 12% to personnel matters such as “hiring, firing or promotion.” Most of these categories included a breakdown of more specific tasks.

² See 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

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The Petitioner submitted a letter from [REDACTED] professor at [REDACTED] who expressed the “expert opinion . . . that [the Beneficiary] performed in a managerial capacity” abroad, and will also do so for the Petitioner.

The Petitioner submitted a new organizational chart showing that the company had grown from 12 to 14 employees by adding another cook and another dishwasher. State and federal quarterly tax documents in the record, however, show that the Petitioner’s number of employees varied between 8 and 12 during 2015.

The Director denied the petition, concluding, in part, that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director stated that only a small number of the Beneficiary’s stated duties appeared to be “performed on a daily basis.” The Director also found that “the petitioner has a limited number of employees,” many of them working part-time, and therefore it was likely that the Beneficiary must perform non-qualifying tasks himself.

On appeal, the Petitioner maintains that the Beneficiary’s position has all the necessary elements of a managerial capacity.

2. Analysis

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

When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner’s description of the job duties.³ The Petitioner’s description of the job duties must clearly describe the duties to be performed by the Beneficiary and indicate whether such duties are in a managerial or executive capacity.⁴

The Petitioner initially asserted that the Beneficiary’s position meets all the statutory elements of executive capacity. To show that the Beneficiary “establishes the goals and policies of the organization,” the Petitioner stated: “As soon as [a] decision is made by the Board of Directors of the company, [the Beneficiary] is in charge of the organization of the company financially and internally to reach that goal.” This statement, however, indicates that the Beneficiary’s role is to implement the board’s goals rather than to establish them himself. In response to the RFE, the Petitioner referred to the Beneficiary’s role as “a senior managerial position,” indicating a shift in the Petitioner’s claim from executive to managerial capacity.

On appeal, the Petitioner states that the Beneficiary may perform certain duties occasionally rather than daily, “but that does not entail that such duties are not managerial or executive in nature and

³ See 8 C.F.R. § 204.5(j)(5).

⁴ *Id.*

function.” Nevertheless, the job description, as provided, provides little information about the Beneficiary’s daily tasks. The elements of the description are so broadly written that, based on the description alone, one could not tell what type of business the Beneficiary oversees. The expanded description submitted in response to the RFE contains one reference to “food product demand.”

The Petitioner states that the Beneficiary spends 36% of his time on “financial duties,” including “recommending, reviewing and implementing financial policies and procedures,” “[o]verseeing the General Manager’s daily auditing of operational accounts,” and approving various financial reports. The record, however, does not contain supporting evidence to show that financial matters demand more than a third of the Beneficiary’s time, or that his subordinates produce a significant volume of financial reports that require his review.

Similarly, the Petitioner has not shown that the Beneficiary spends 28% of his time “developing annual and long-term operational plans.” The breakdown of this claimed function includes six elements, one of which also reads “[d]eveloping annual and long-term operational plans.” This description provides little detail with respect to the Beneficiary’s role within the Petitioner’s business purpose of operating a diner. We also note that the Beneficiary has been working as the Petitioner’s president and CEO since 2011, but the record does not document detailed plans that the Beneficiary has developed during the years since that time.

Furthermore, the Petitioner has indicated that the Beneficiary runs the business through two levels of intermediate management. Most prominently, the job description refers several times to functions that the Beneficiary oversees through the general manager. As discussed further below, the record, casts doubt on this portrayal of the company’s structure, and therefore on the job description that relies on that portrayal.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company’s organizational structure, the duties of a beneficiary’s subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary’s actual duties and role in a business.

Among those factors are the 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.”⁵ Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a

⁵ *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).

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.⁶

The Petitioner stated that the Beneficiary "established that our accountant is directly supervised by the General Manager." The Director, in the denial notice, stated that the Petitioner's "organizational chart fails to identify an accountant under the direct supervision of the general manager." The Petitioner has identified an outside firm that deals with administrative matters, including finances. The Petitioner stated:

[The contracted firm] is in charge of the administration and maintenance of our corporate payroll and the administration of the processing of the payroll and calculation of applicable tax and other withholding. In addition, [the firm] is in charge of the preparation of financial statements, preparation and filing of any tax return . . . for which our company might be responsible. Also, [the firm] is in charge of the filing and renewal of all necessary permits and licenses. . . .

The firm's name appears on tax documents in the record. An invoice included in the RFE response shows that the accounting firm billed the Petitioner \$2545 for "Recording all transactions per month 2015" and for "Payroll Services for 2015." The wording of the invoice implies that the \$2545 sum is for services rendered throughout 2015. The size of that sum appears to be more consistent with occasional projects than with continuous services. The record does not include a contract or other documentation to corroborate the Petitioner's assertions about how many tasks the outside firm handles. The Petitioner's unsupported assertions cannot suffice to meet its burden of proof.⁷

The Petitioner's RFE response included a list of 14 employees, with seven of them marked as full-time. The record, however, does not support the assertion that half of the Petitioner's employees work full-time. Copies of IRS Forms W-2, Wage and Tax Statements, for the Petitioner's employees show the following information:

	2014	2015
Total employees	15	18
Total salaries paid	\$164,607.13	\$162,174.06
The Beneficiary's salary	\$38,120.00	\$36,000.00
Average subordinate's salary	\$9034.80	\$7422.00
Subordinates paid more than \$17,000	1	3
Subordinates paid less than \$8000	6	11

⁶ See, e.g., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

⁷ *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)).

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Even taking employee turnover into account, the above figures do not indicate that the Petitioner has seven full-time employees.

The Petitioner identified its general manager as [REDACTED] and stated that he worked for the Petitioner full-time. The Petitioner's description of the general manager position included the following examples:

- Manage the entire U.S. organization. . . .
- Oversee all financial aspects of the company including daily auditing of operational accounts and implementation of strategic policies and objectives. . . .
- Plan, formulate and implement administrative and operational policies and procedures
- Prepare annual budgets and ensure that the company revenues and expenditures fall within budgeted amounts
-
- Oversee the work and responsibilities of the Assistant Manager
- Supervise and exercise total direction over subordinate employees who perform the day-to-day work [and exercise] authority to hire and fire the employees

The record shows that the Petitioner paid [REDACTED] as a contractor rather than as an employee. IRS Form 1099-MISC, Miscellaneous Income, showed that the Petitioner paid \$16,017.84 in "Nonemployee compensation" to [REDACTED] in 2015. This amount covers approximately 1990 hours' pay at Florida's 2015 minimum wage of \$8.05 per hour.⁸ Therefore, in 2015, [REDACTED] either received minimum wage-level compensation, or worked part-time for a higher rate of pay. The Petitioner did not submit any evidence demonstrating that [REDACTED] was employed at the time of filing in 2014.

The Petitioner asserted that its assistant manager worked full-time, but it paid her only \$13,283.84 in 2014 and \$7519.54 in 2015. In the second quarter of 2015, the Petitioner paid the assistant manager \$121.30, less than 16 hours' pay at minimum wage.

The above information, derived from the Petitioner's own submissions, contradict the Petitioner's assertion that there are two layers of full-time management below the Beneficiary. The Petitioner has not demonstrated that its diner would require such a level of organizational complexity. 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.⁹

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers."¹⁰ Personnel managers are required to primarily supervise and control the work

⁸ Source: <https://www.dol.gov/whd/state/stateminwagehis.htm> (printout added to record September 21, 2016)

⁹ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

¹⁰ See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii).

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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.”¹¹ 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.¹²

To determine whether the Beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor.¹³ In this instance, the only subordinate identified as having a bachelor’s degree is [REDACTED] and the Petitioner has not shown that the position requires that degree.

The Beneficiary has hiring and firing authority over his subordinates, and the Petitioner contends that [REDACTED] is, himself, a manager. The Petitioner also claims that some of the other subordinates are supervisors. As explained above, the record contradicts some of the Petitioner’s fundamental claims about the management structure, and the Petitioner’s remaining claims are not entitled to a presumption of credibility.¹⁴ Further, the Petitioner has not shown that the Beneficiary primarily performs managerial functions with regard to this subordinate staff.

Similarly, the Beneficiary’s authority over the petitioning company is consistent with that of a function manager, but, as discussed above, the Petitioner has not clearly described the nature of the Beneficiary’s duties as the regulations require.¹⁵ 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.¹⁶ 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.

The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization.¹⁷ Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that

¹¹ Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i).

¹² 8 C.F.R. § 204.5(j)(2).

¹³ *Cf.* 8 C.F.R. § 204.5(k)(2) (defining “profession” to mean “any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”

¹⁴ *See Matter of Ho*, 19 I&N Dec. 591.

¹⁵ *See* 8 C.F.R. § 204.5(j)(5).

¹⁶ Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B).

¹⁷ Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

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organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as an owner or sole managerial employee. A beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.”¹⁸

As discussed above, the Petitioner has not shown that it has a subordinate level of management for the Beneficiary to direct. Furthermore, the Beneficiary has not established that the Beneficiary primarily focuses on the Petitioner’s broad goals and policies rather than its day-to-day operations; the Petitioner states that the Beneficiary oversees hiring, marketing, reviewing daily reports, and other day-to-day concerns. The Petitioner has also asserted that the Beneficiary is in charge of the company’s strategic planning and seeking opportunities for growth and expansion, but the record does not corroborate the Petitioner’s assertion that the Beneficiary devotes a significant amount of time to such pursuits.

The Petitioner resubmits a copy of [REDACTED] letter, and states that the Director did not take it into consideration. [REDACTED] did not claim to have personal knowledge of the Beneficiary’s work. Rather, he relied upon documents selected and supplied by the Petitioner. As such, his statements are not primary evidence that can serve to establish facts in this proceeding, and an advisory letter of this kind cannot outweigh the specific concerns discussed above. We may, in our discretion, use opinion statements submitted as expert testimony in an advisory manner. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence.¹⁹

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

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.

The Petitioner identified the Beneficiary’s foreign employer as [REDACTED] a bakery in Venezuela. The Petitioner stated that the Beneficiary was the

¹⁸ *Id.*

¹⁹ See *Matter of Caron International*, 19 I&N Dec. 791 (Comm’r 1988).

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_____ administrative manager from February 1, 2008 to June 28, 2010. _____ president of _____ listed the Beneficiary's responsibilities with the approximate percentage of time devoted to each.

_____ letter included an organizational chart showing the company's structure prior to the Beneficiary's 2010 departure. The Beneficiary directly supervised a general coordinator, who oversaw an administrative assistant, a systems assistant, and a sales supervisor. The sales supervisor, in turn, was in charge of an unspecified number of employees categorized under "Bakery," "Tavern," "Deli," and "Cash Registers." Separately, an operations manager supervised the maintenance chief and the purchasing and operations supervisor. The warehouse manager reported to the latter, while supervising the master bakers and the master pastry chefs.

The Petitioner submitted a second organizational chart for the foreign entity, showing how the company was organized as of the filing date in 2014. The new chart indicated that the administrative manager supervised an administrator, an administrative assistant, and a human resources staff person. The operations manager still supervised the chefs, plus an operations assistant. The 2014 chart did not show a sales supervisor or the baker, tavern, deli, or cash register workers who reported to that person.

In the RFE, the Director asked 13 questions about various specific elements of the foreign job description. In response, the Petitioner submitted an eight-page letter from _____ clarifying particular tasks and elements of the job description submitted previously.

The Director denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary had been employed in a managerial or executive capacity abroad. In denying the petition, the Director found that the foreign company's statement in response to the RFE was not fully consistent with the initial job description. With respect to many of the described duties, the Director found them to be non-qualifying, or that the Petitioner had not established how frequently the Beneficiary performed them. The Director also stated that the Petitioner had not explained the reorganization that resulted in differences between the 2010 and 2014 organizational charts.

On appeal, the Petitioner states that the Director did not give enough consideration to the RFE response, and asserts that a particular function need not take place every day to qualify as managerial. The Petitioner also states that there is no difference between the organizational charts apart from their formatting. The record does contain a reformatted version of the 2010 organizational chart, but the Director was referring not to that reformatted chart, but rather to the 2014 version of the chart that does not show the sales supervisor or subordinates. The Director is correct that the Petitioner has not explained the differences between the foreign company's 2010 and 2014 organizational charts, but the Director did not explain why the change was relevant. The foreign company's reorganization after the Beneficiary's departure is not self-evidently grounds for denial of the petition.

The Director found that the 2010 foreign organizational chart "only identified three specific employees under the beneficiary," and "it is uncertain the exact number of employees working for

the beneficiary.” The chart showed only three specific employees under the general coordinator, but one of those, the sales supervisor, was in charge of four groups of employees.

The Director requested a level of detail rarely seen in an RFE, and the foreign employer appears to have made a good faith effort to address each of the Director’s questions, providing, for instance, a nearly two-page description of the foreign company’s eight-step hiring process.

The Petitioner need not establish its claims beyond all doubt; it must only establish a preponderance of the evidence. The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case.²⁰

In this instance, we find that the Petitioner has established, by a preponderance of the evidence, that the Beneficiary worked overseas in a managerial capacity for at least one year during the three years immediately prior to his 2010 entry into the United States. The earlier stated ground for denial remains, however, and therefore we cannot approve the petition.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner.²¹ Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of P.O.B-, LLC*, ID# 12647 (AAO Oct. 13, 2016)

²⁰ *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989)).

²¹ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).