



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

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

MATTER OF R-V-, INC.

DATE: OCT. 19, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a retail store, seeks to permanently employ the Beneficiary as its president under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) 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, initially approved the petition but later revoked that approval after an investigation cast doubt on evidence and information relating to: (1) the Petitioner's qualifying relationship with the Beneficiary's foreign employer; and (2) the Beneficiary's intended managerial or executive capacity in the United States. The Director further found that the Petitioner had willfully misrepresented material facts relating to the Petitioner's finances.

The matter is now before us on appeal. In its appeal, the Petitioner submits photographs of the foreign company's premises and asserts that the Director erred by "substituting supposition and speculation for actual facts."

Upon *de novo* review, we will dismiss the appeal and withdraw the finding of willful misrepresentation of a material fact.

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.

Section 205 of the Act, 8 U.S.C. 1155, states: “The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.¹ Such revocation shall be effective as of the date of approval of any such petition.”

¹ This refers to section 204 of the Act, 8 U.S.C. § 1154, “Procedure for Granting Immigrant Visas.”

Matter of R-V-, Inc.

The regulation at 8 C.F.R. § 205.2 grants the Director the authority to revoke the approval of a petition after first issuing a notice of intent to revoke (NOIR).

II. QUALIFYING RELATIONSHIP

The Director based the revocation, in part, on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. The Director found that the Petitioner had not established the existence of the foreign company, and had submitted inconsistent information about the ownership of the petitioning U.S. entity.

To establish a "qualifying relationship" under the Act and the regulations, a petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates."²

The pertinent regulation at 8 C.F.R. § 204.5(j)(2) defines a "subsidiary" as:

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.

A. Existence of the Foreign Company

1. Evidence of Record

The Petitioner filed Form I-140 on September 4, 2007. The Petitioner's director, [REDACTED] stated that the petitioning entity "is majority owned and controlled by [REDACTED] a chemical manufacturer in India." Documentation from and relating to [REDACTED] showed no street address, but indicated that the company was in the village of [REDACTED] which is in the [REDACTED] of [REDACTED] in the district of [REDACTED] in the state of [REDACTED] in India.

In the NOIR, the Director stated: "On May 18, 2011, [REDACTED] conducted a site visit to the foreign company [REDACTED] at the registered office at [REDACTED] India. The foreign company could not physically be located and no forwarding address was left behind." The Petitioner responded by stating that [REDACTED] visited the wrong address. In the revocation notice, the Director acknowledged the Petitioner's statement but found that the Petitioner had not overcome the derogatory information regarding [REDACTED] location. On appeal, the Petitioner again asserts that the [REDACTED] address is not the correct address. The Petitioner submits several interior and exterior photographs of [REDACTED]

² See generally section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

Matter of R-V-, Inc.

facilities, including a large sign bearing [REDACTED] name and the address [REDACTED]
[REDACTED]

2. Analysis

We have examined the May 24, 2011 [REDACTED] Business Information Report, and it shows that the Director misread the document. The [REDACTED] report indicates that the site visit occurred not in [REDACTED] but in [REDACTED] in [REDACTED]. The record identifies no source for the [REDACTED] address and does not explain why [REDACTED] went there instead of the address that the Petitioner provided. The [REDACTED] report does not reflect any follow-up visit to the address in [REDACTED]. As the Petitioner has observed, the [REDACTED] address in the [REDACTED] report is incorrect; [REDACTED] appears to be a corruption of [REDACTED]
[REDACTED]

The Director's finding that [REDACTED] was unable to locate the foreign entity relied on flawed evidence. The record reflects no attempt to verify the existence of [REDACTED] at the address that the Petitioner provided. Therefore, we withdraw the Director's finding with respect to this issue.

B. Ownership

1. Evidence of Record

In his introductory letter, [REDACTED] asserted that [REDACTED] and the Petitioner are affiliates, owing to [REDACTED] majority ownership and control of the petitioning entity. The Petitioner submitted a copy of a document, dated October 24, 2001 and marked "Stock Certificate Number One (1)," indicating that [REDACTED] owns 510 shares of the Petitioner's common stock out of an authorized issue of 1,000 shares. Copies of the Petitioner's 2006 and 2007 IRS Forms 1120, U.S. Corporation Income Tax Returns, identified [REDACTED] as 51% owner of the petitioning entity.

The Director issued a request for evidence (RFE), instructing the Petitioner to provide additional evidence regarding the ownership of the petitioning entity. The Director specifically requested "documentation of the exchange of monies, property, or other consideration for the issuance of stock; or . . . for the acquisition of its stock ownership" and "a copy of the stock ledger or share register for the U.S. company, or . . . any other evidence which shows the total amount of stock shares issued to the U.S. company and the individuals or entities that own such stock shares." The Director also recommended submission of "copies of stock purchase agreements" or other documentation "citing controlling interest or ownership."

In response, the Beneficiary, in his capacity as a "director" of the petitioning entity, stated: "At the time of filing the I-140 petition, [REDACTED] owned 51% [of the] shares of Petitioner. However, [REDACTED] now own[s] 100% [of the] shares. . . . We are attaching [copies of the Petitioner's] tax returns . . . as evidence." The Petitioner submitted copies of IRS Form 1120 returns for 2007 through 2010. The 2010 return contains more detail than the earlier returns, but each return indicated that the Petitioner had only one shareholder, identified as [REDACTED]

Matter of R-V-, Inc.

In the NOIR, the Director stated: “the petitioning company . . . was found not to be a foreign owned corporation according to the Texas Secretary of State records. Please submit a certified copy from the Texas Secretary of State which shows that the petitioner is foreign owned.” In response, the Petitioner asserted: “The Texas Secretary of State does not keep or maintain documents with regards to Ownership of a Texas Corporation. A Texas Corporation is required to file a Texas Franchise Tax Public Information Report” (PIR). The Petitioner submitted copies of its PIRs for 2010 through 2013. The 2010 PIR indicated that [REDACTED] owned an unspecified percentage of the petitioning company. The 2011-2013 returns specified that percentage as 100%.

In the revocation notice, the Director repeated the finding that “Texas Secretary of State records” did not show that the Petitioner is “a foreign owned corporation.” On appeal, the Petitioner repeats the assertion that the Texas Secretary of State does not keep ownership records, and that the Petitioner’s “2007 and 2008 tax returns . . . [establish] foreign ownership.”

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 it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that we must consider ownership and control when determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification.³ 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.⁴

As general evidence of a petitioner’s claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. We must also examine the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity.⁵ Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

³ See *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).

⁴ *Matter of Church Scientology International*, 19 I&N Dec. at 595.

⁵ See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 1632.

Matter of R-V-, Inc.

The regulations specifically allow USCIS to request additional evidence in appropriate cases.⁶ As ownership is a critical element of this visa classification, USCIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the Director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In the 2011 RFE, the Director specifically requested evidence of the transaction(s) by which the foreign entity acquired the Petitioner's stock. The Petitioner's response did not submit the requested evidence or any explanation for its omission. This omission, by itself, constituted sufficient grounds to deny the petition by precluding a material line of inquiry.⁷

Income tax returns are not *prima facie* evidence of share ownership, and the Director did not state that the Petitioner could meet its burden of proof solely with uncertified copies of income tax returns. Rather, the Director listed specific documents in the RFE, which the Petitioner did not submit in response to that notice.

Furthermore, the 2007-2010 tax returns in the RFE response all show the same untimely preparation date, August 2, 2011. Like a delayed birth certificate, these untimely tax returns, prepared four weeks after the issuance of the RFE on July 5, 2011, raise serious questions regarding the truth of the facts asserted.⁸ Because the copies are not IRS-certified, there is no evidence to show that the Petitioner actually filed the returns, or that the returns filed with the IRS match the copies submitted with the RFE response.

Furthermore, the Petitioner's earlier tax returns are not consistent with the claimed chronology. On Schedule K, line 10 of its 2005 return (submitted with the petition), the Petitioner claimed two shareholders at the end of the tax year, reduced to one shareholder on the 2006 return (prepared on March 14, 2007). This information contradicts the Petitioner's claim that [REDACTED] held only 51% of the Petitioner's stock as of the September 2007 filing date.

When the Director stated that "Texas Secretary of State records" did not reflect foreign ownership of the petitioning entity, the Director did not specify the source of that information, but appeared to refer to copies of Texas Franchise Tax PIRs that the Petitioner filed between 2004 and 2010. Section C of each report asked the entity to identify "each corporation or limited liability company, if any, that owns an interest of ten percent (10%) or more" in the company filing the report. The

⁶ See 8 C.F.R. § 204.5(j)(3)(ii).

⁷ See 8 C.F.R. § 103.2(b)(14).

⁸ Cf. *Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

Matter of R-V-, Inc.

Petitioner answered "None" on the PIRs for 2002 through 2005 and 2007. On the 2006 report, the Petitioner stated "see statement 1." The copy provided to USCIS does not include that statement and therefore the 2006 PIR is inconclusive. On the 2008 report, the Petitioner identified [REDACTED] as the 51% owner. USCIS received no 2009 report. The 2010 PIR again named [REDACTED] but did not specify how much of the petitioning entity that [REDACTED] owned.

The above information shows that the Petitioner has provided inconsistent information regarding [REDACTED] ownership of the petitioning entity, but it does not fully support the Director's assertion regarding "Texas Secretary of State records." The Petitioner's Public Information Reports denied significant foreign ownership prior to 2008, but not afterward. Nevertheless, it is significant that these denials continued for several years after the purported issuance of the stock certificate on October 24, 2001. Also, the president of the petitioning entity signed the Texas report for 2007 on March 15, 2007, the day after the preparation date of the Petitioner's 2006 tax return. The Petitioner asserted no foreign ownership on the Texas PIR, but (through submission of IRS Form 5472) at least 25% foreign ownership on Schedule K of the tax return. These assertions are incompatible.

It is the petitioner's responsibility to resolve any inconsistencies in the record with independent, objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice, unless the Petitioner provides competent objective evidence pointing to where the truth, in fact, lies.⁹

Neither the PIRs nor the tax returns are primary evidence that [REDACTED] owns the petitioning entity. Also, given the inconsistencies described above, they are not reliable secondary evidence of ownership. The Director requested "documentation of the exchange of monies, property, or other consideration for the issuance of stock; or . . . for the acquisition of its stock ownership" and "a copy of the stock ledger or share register for the U.S. company, or . . . any other evidence which shows the total amount of stock shares issued to the U.S. company and the individuals or entities that own such stock shares," along with "copies of stock purchase agreements." The Petitioner has not submitted this requested evidence, and this omission is grounds for denial of the petition.¹⁰

We find that the sparse and conflicting evidence submitted by the Petitioner does not adequately document the foreign entity's claimed ownership of the petitioning entity.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it has a qualifying relationship with the foreign entity.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director revoked the approval of the petition based, in part, on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity.

⁹ *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

¹⁰ See 8 C.F.R. § 103.2(b)(14).

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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.¹¹

¹¹ See section 101(a)(44)(C) of the Act.

Matter of R-V-, Inc.

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.

A. Evidence of Record

On the Form I-140, the Petitioner indicated that it had “7 plus” current employees in the United States. [REDACTED] in his letter submitted with the petition, provided a one-paragraph description of the Beneficiary’s proposed duties. The Petitioner stated that the “Beneficiary has been performing these duties as a temporary President under L-1 visa.”

The Petitioner’s initial submission contained no other information or evidence relating to the Beneficiary’s claimed role at the petitioning company. In the RFE, the Director requested information about the Beneficiary’s daily duties and the percentage of time spent on each. In response, the Beneficiary quoted and expanded upon [REDACTED] earlier description (note: errors in the original text have not been changed):

The Beneficiary will be employed as the President of the Petitioner; He has been responsible for performing these duties as the temporary president of the Petitioner under L-1 visa. The Beneficiary will continue to be responsible for hiring and firing managers; supervising subordinate employees 20%; overseeing preparation of sales and inventory reports 5%; reviewing and analyzing sales data 15%; establishing and implementing policies to manage and achieve marketing goals 15%; review financial reports 5%; review budgets and expense reports prepared by subordinate employees 5%; managing the company 20%; and overseeing marketing campaign developed by subordinate managers 5%.

The Beneficiary will be responsible for not only overseeing the management and operation of the retail location, but also for reviewing additional retail locations, which will utilize 10% of the beneficiary’s time. The Beneficiary’s position will be solely executive or managerial and will not include doing day-to-day work of the business. He will be the final authority of all business activities and will receive minimum supervision from the Board of Directors, and will exercise wide discretion and latitude in the performance of her duties.

Elaborating on some of the above points, the Beneficiary stated that he will analyze competitors’ prices and “effectively compare customer’s needs and wants to competitor’s weaknesses.” The Beneficiary stated that he would determine “the number of employees required during each shift,” and “review[] new business locations by studying geographic locations and analyzing market needs.” The Beneficiary stated that he “will also be responsible for managing and supervising three (3) workers,” specifically “one Manager, and two Cashiers.” An organizational chart showed a manager (identified as [REDACTED] and three named cashiers.

Matter of R-V-, Inc.

The Petitioner submitted copies of the Beneficiary's IRS Forms 1040, U.S. Individual Income Tax Returns for 2007 through 2010, all with a preparation date of July 19, 2011 (after the issuance of the RFE). A second copy of the Beneficiary's 2007 return is identical to the first except for the preparation date of March 23, 2010. All four returns list the Beneficiary's occupation as "cashier."

In the NOIR, the Director informed the Petitioner that the company's Texas PIRs did not identify the Beneficiary as the company's president until 2010; prior filings identified [REDACTED] by that title. (The Petitioner's IRS Form 1120 returns from 2009 and earlier likewise called [REDACTED] the president.) This conflicts with the Petitioner's assertion in 2007 that the Beneficiary had already assumed presidential duties.

The Director also cited "Texas Secretary of State records [which] show that [REDACTED] has become involved in three additional companies since February 28, 2008," which would limit [REDACTED] availability to manage cashiers at the Petitioner's store. The Director concluded: "It seems more than likely that the Beneficiary is directly supervising the cashiers and may be involved in the day-to-day activities and not just performing management or executive duties."

In response, the Petitioner attributed the discrepancy in the president's name to "a clerical error" that was not corrected until 2010. The Petitioner asserted that, while [REDACTED] has other business interests, "he remained as the Manager of the Petitioner and continued to perform his managerial duties at the Petitioner."

In the December 2014 revocation notice, the Director found that the Petitioner had not overcome the concerns stated in the NOIR. On appeal, the Petitioner contends that "the Director is substituting supposition and speculation for actual facts. The director fails to point to any evidence or derogatory information" to support the conclusion stated in the revocation notice. The brief includes the observation that the standard of proof in this proceeding is a preponderance of evidence, rather than clear and convincing evidence or evidence beyond a reasonable doubt. The brief restates the job description submitted previously, and repeats the claim that the Petitioner's apparently conflicting assertions resulted from "a clerical error" that the Petitioner corrected after its discovery.

B. Analysis

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

As asserted on appeal, the standard of proof in this proceeding is a preponderance of evidence, in which the Petitioner need only show that its claims are probably true. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In this instance, however, the Petitioner has not met that standard.

The Petitioner has submitted evidence dated between 2007 and 2010 that names someone other than the Beneficiary as the president of the petitioning entity. No contemporaneous evidence supports the

(b)(6)

Matter of R-V-, Inc.

Petitioner's claim that the Beneficiary was already serving as president in 2007. Counsel, on appeal, has attributed the discrepancy to a "clerical error," but the record contains no evidence to support this claim. The accountant who prepared the various tax returns has not acknowledged the claimed error, and no official of the petitioning entity has substantiated counsel's claims. The unsupported assertions of counsel do not constitute evidence.¹²

signature, as president, appears on post-2007 documents such as some copies of tax returns in the record. By signing those documents, took responsibility for their contents and, by implication, took responsibility for the accuracy of their contents.¹³

Furthermore, the Beneficiary's own income tax returns stated his occupation as "cashier." This is not derogatory information introduced into the record at the appellate stage. Rather, this information appears on documents that the Petitioner provided to USCIS, having attested under penalty of perjury that, to the best of its knowledge, the evidence submitted is true and correct.

To qualify for the benefit sought, the Beneficiary need not have previously served as president; he need only have an offer to serve in that capacity. The only evidence that he will do so, however, comes from individuals who claim he has been "temporary President" since 2007. Because the claim of past service lacks credibility, the same witnesses' assertions regarding the Beneficiary's future role are also in doubt.¹⁴ The preponderance of the evidence does not favor approval of the petition.

Furthermore, the Petitioner has provided minimal details about the nature of the Beneficiary's claimed executive or managerial duties. When examining the executive or managerial capacity of a given beneficiary, we will look first to the petitioner's description of the job duties.¹⁵ 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.¹⁶

The duties described are either very broad (such as "managing the company") or lack corroboration. The Petitioner states that the Beneficiary will spend 30% of his time on various reports, but the record contains no reports and no evidence that the petitioning store generates a significant volume of such reports. The Petitioner states that the Beneficiary spends 10% of his time "reviewing additional retail locations," but the record does not document any expansion by the Petitioner or even preliminary inquiries in that direction. The job description to which the Beneficiary himself has attested contains very little detail about the Beneficiary's specific day-to-day activities.

¹² See *Matter of Obaigbena*, 19 I&N Dec. 534 n.2.

¹³ Cf. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) (Represented party who signs his or her name to documents filed in court bears personal, nondelegable responsibility to certify truth and reasonableness of document and failure to meet that duty subject signor to Rule 11 sanctions).

¹⁴ 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. 591.

¹⁵ See 8 C.F.R. § 204.5(j)(5).

¹⁶ *Id.*

(b)(6)

Matter of R-V-, Inc.

Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations.¹⁷ Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment.¹⁸ The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of her/his daily routine.

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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers."¹⁹ 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."²⁰ 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.²¹

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.²²

The Beneficiary stated that he will spend 20% of his time "supervising subordinate employees," specifically "one Manager, and two Cashiers." Being a cashier is not a professional occupation, and the Beneficiary's stated responsibility to supervise cashiers is not a managerial duty. The Petitioner has identified [REDACTED] as a manager and stated that [REDACTED] involvement in other businesses is limited to investment. The Petitioner did not submit evidence to explain [REDACTED] role in the other businesses.

¹⁷ *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).

¹⁸ *Id.*

¹⁹ See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii).

²⁰ Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i).

²¹ 8 C.F.R. § 204.5(j)(2).

²² *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."

(b)(6)

Matter of R-V, Inc.

Regarding [REDACTED] claimed role with the petitioning company, the Beneficiary's statement in the RFE response included this description:

Duties include Manage retail store in compliance with company policies and local, state and federal safety, health, food, and environmental regulations; prepare daily sales report; ensure store profitability by implementing pricing policies, inventory control systems, cost reduction programs, sales promotions, marketing and merchandising activities; reconcile cash with sales slips and credit card charges; conduct weekly store inventory; prepare bank deposits; process payments to vendors; prepare purchase orders for supplies; receive inventory; prepare work schedule; report to owner/president.²³

The above description lacks detail and includes several non-managerial tasks such as handling payments and conducting inventory. The description indicates that the manager is in charge of "implementing . . . sales promotions, marketing and merchandising activities," but the record identifies no subordinates whose duties include marketing or promotional functions. If the manager performs these activities himself, then they constitute further non-managerial tasks. The Petitioner has not shown that [REDACTED] qualifies as a manager through his supervision of a small number of cashiers. Furthermore, the Petitioner has not shown that [REDACTED] duties are primarily supervisory. The Petitioner has not shown that the Beneficiary's supervision of a supervisor occupies more than a small fraction of the Beneficiary's overall duties with the company.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary's managerial role arises not from supervising or controlling the work of a subordinate staff but instead from responsibility for managing an "essential function" within the organization.²⁴ The statute and regulations do not define the term "essential function." If a petitioner claims that a beneficiary will manage an essential function, that petitioner must clearly describe the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties dedicated to managing the essential function.²⁵ In addition, a petitioner's description of a beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the duties related to the function.

In this instance, the Petitioner has provided only a very general job description, asserting that the Beneficiary will be responsible for running the petitioning business but providing few details other than reviewing an undetermined number of reports and supervising a staff mostly comprising cashiers. Being in charge of a company, or an essential function of that company, does not qualify the Beneficiary as a function manager if he is not primarily performing managerial tasks. The Petitioner

²³ The reference to the "owner/president" is unexplained, given the Petitioner's assertion that [REDACTED] is now the sole owner of the petitioning U.S. company.

²⁴ See section 101(a)(44)(A)(ii) of the Act.

²⁵ See 8 C.F.R. § 204.5(j)(5).

(b)(6)

Matter of R-V-, Inc.

has provided insufficient details about the Beneficiary's claimed duties to show that they are primarily managerial rather than operational tasks. Also, as detailed above, the record is inconsistent with respect to the Beneficiary's actual level of authority within the company, such as when he called himself a "cashier" on his own tax returns at a time when he was purportedly the company's acting president.

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.²⁶ Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for 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 does not qualify as 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."²⁷

As discussed above, the Petitioner has provided a minimal description of the Beneficiary's duties, some of which essentially repeat the language of the statutory definition of executive capacity. The Petitioner has not established that its variety store has a level of organizational complexity and layers of management that would warrant executive leadership, or that the Beneficiary's stated supervision of a manager and two to three cashiers would rise to the level of executive authority. The Beneficiary's stated duties, including supervisory responsibility and hiring of front-line employees, are not executive functions.

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.²⁸ 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.

Between the lack of significant, corroborated details regarding the Beneficiary's claimed duties and his claimed subordinates, and the tax documents identifying [REDACTED] as "president" and the Beneficiary as a "cashier," we must find that the Petitioner has not met its burden of proof to establish, by a preponderance of evidence, that the Beneficiary's duties have been, or will be, executive or managerial in nature.

²⁶ Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

²⁷ *Id.*

²⁸ Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B).

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

IV. FRAUD OR WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The remaining issue in this proceeding concerns a finding of fraud that the Director included in the notice of revocation. Any foreign person who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act is inadmissible.²⁹

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled.³⁰ The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.³¹ To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded."³²

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material.³³ To establish fraud in addition to the misrepresentation, there must also be an intent to deceive,³⁴ and a U.S. government official believed and acted upon the false representation by granting the benefit.³⁵

While the record contains a number of doubtful or uncorroborated documents, the Director only specifically identified two documents as fraudulent, stating:

[T]he petitioner has plainly submitted false evidence in the form of the 2007 and 2008 U.S. Corporation Income Tax Returns regarding the wages/salaries stated of its employees and officers, which do not match up with petitioner's Quarterly Federal Tax Returns for 2007 and 2008, which misrepresents a material fact.

²⁹ See section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

³⁰ *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

³¹ See *Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

³² *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

³³ See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

³⁴ See *Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998).

³⁵ See *Matter of G- G-*, 7 I&N Dec. 161 (BIA 1956).

Matter of R-V, Inc.

More specifically, the Petitioner submitted copies of IRS Form 941 Employer's Quarterly Federal Tax Returns; IRS Form 940 Employer's Annual Federal Unemployment Tax Returns; and printouts of information that the Petitioner had filed quarterly with the Texas Workforce Commission. These documents indicate that the Petitioner paid salaries and wages totaling \$99,340.15 in 2007, and \$80,009.99 in 2008. These totals are not consistent with the Petitioner's IRS Form 1120 returns, which show payments totaling \$53,700 in 2007 and \$27,900 in 2008.

In the NOIR, the Director informed the Petitioner that there were discrepancies in the 2007 and 2008 tax documents. In order to resolve the issue, the Director instructed the Petitioner to submit IRS-certified copies of its 2007 and 2008 tax returns. In response, the Petitioner asserted that the discrepancies resulted from "an innocent mistake." The Petitioner speculated that the returns omitted "the salary received by the Petitioner's Officers," and asserted that it was seeking "clarification" from the accountant on this point. The Petitioner submitted copies of its IRS Form 941 quarterly returns, stamped "Apr 23 2014 / Received" by the IRS, but not IRS-certified copies of its IRS Form 1120 returns.

The Petitioner acknowledged the Director's request for certified copies of the IRS Form 1120 tax returns, but the Petitioner did not submit those copies or explain their absence. Instead, the Petitioner submitted uncertified copies of IRS Forms 1120 for 2007 and 2008. These documents appear to be identical to the copies submitted previously, except that they show different preparation dates. The copies submitted previously, in response to the RFE, both showed preparation dates of August 2, 2011 (after the RFE's issuance). The copies submitted in response to the NOIR show are dated March 10, 2008 and March 5, 2009, respectively. Another difference is that the newly submitted copies bear the signature of [REDACTED] identified as president of the petitioning company on both forms.

In the revocation notice, the Director found that the Petitioner had not resolved the discrepancies, and concluded that "the petitioner has plainly submitted false evidence in the form of the 2007 and 2008 U.S. Corporation Income Tax Returns."

On appeal, the Petitioner states that it has submitted documentation, such as "Beneficiary's 2013 W-2 and Petitioner's bank statements for 2014," establishing that "the Petitioner . . . does have the ability to pay the proffered wage of \$23,999.56 per year to the Beneficiary." The issue, however, was not the Petitioner's ability to pay the Beneficiary's salary. Rather, the Director found that the Petitioner had submitted 2007 and 2008 tax returns that contained falsified information.

Elsewhere in the appellate brief, the Petitioner states: "It does not make sense for the Petitioner to pay salaries of \$99,705.00 and \$80,010.00, respectively and then not claim those [expenses] on the tax return, unless it was an innocent mistake."

The IRS Form 1120 returns from 2007-2008 have negligible weight as evidence, because they are uncertified, do not match other IRS documents in the record, and might have been prepared years after the fact. There is, however, no indication that the Petitioner intentionally misstated the salary

Matter of R-V-, Inc.

amounts in order to influence the outcome of the proceeding. As the Petitioner observes on appeal, the Petitioner did not stand to gain by underreporting salaries paid in 2007 and 2008, after already reporting higher amounts to state and federal tax authorities. Therefore, the lower salary amounts do not appear to be “material” in the sense that they would tend to support approval of the petition, and the record does not show that the discrepancy was “willful,” resulting from the Petitioner’s intentional effort to deceive USCIS with respect to the salaries the Petitioner paid in 2007-2008.

Given these facts, it is reasonable that the discrepant figures resulted from “an innocent mistake” as the Petitioner claimed. We note that the NOIR itself contains inaccuracies when describing the tax returns. The NOIR indicated, for instance, that the Petitioner reported \$60,200 in salaries on its IRS Form 1120 return for 2008. That figure, however, is the amount reported under “Rent,” not “Salaries and wages” (for which the figure is \$27,900). The available evidence does not support a finding that the Petitioner willfully misrepresented the salary figures on the tax returns in order to secure immigration benefits for the Beneficiary.

When the Director found that [REDACTED] could not locate the claimed location of the foreign entity, the Petitioner has responded with a substantial quantity of probative first-hand evidence, including photographs of the foreign entity and copious documentation generated by that business. In contrast, the Petitioner has submitted sparse and sometimes conflicting evidence of the entity’s ownership of the petitioning U.S. entity, and of the Beneficiary’s role with the petitioning company. The Petitioner has not met its burden of proof with regard to these factors, but the record does not affirmatively demonstrate (or rule out) deliberate falsification of evidence by the Petitioner or the Beneficiary. The doubts arising from omissions and contradictions in the record warrant revocation of the approval of the petition, but in this case they do not rise to the level of taking the very serious step of making a formal finding of fraud and/or willful misrepresentation. We hereby withdraw that finding by the Director.

V. CONCLUSION

The approval of the petition is revoked, 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, the burden of proving eligibility for the benefit sought remains with the petitioner.³⁶ Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of R-V-, Inc.*, ID# 98037 (AAO Oct. 19, 2016)

³⁶ Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013).