



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

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

MATTER OF C-, INC.

DATE: OCT. 19, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software developer, seeks to employ the Beneficiary as its president and chief executive officer (CEO) under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. THE LAW

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.

The language of the statute is specific in limiting this provision only to those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

II. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The only stated ground for denial concerns the question of whether the Petitioner has established that it seeks to employ the Beneficiary in a qualifying managerial or executive capacity. Section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), provides:

(A) The term “managerial capacity” means 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.

(B) The term “executive capacity” means 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;

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- (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.

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

A. Facts

The Petitioner filed the Form I-140 on May 13, 2014. On that form, the Petitioner claimed five employees, and indicated that the Beneficiary's salary would be \$77,000 per year.

The Petitioner submitted an introductory letter, dated May 9, 2014, from [REDACTED] the Petitioner's director of finance. [REDACTED] stated that the Petitioner employs the Beneficiary in a "managerial role," and also that his "position would certainly qualify as executive." [REDACTED] listed the Beneficiary's "proposed duties and responsibilities" as follows:

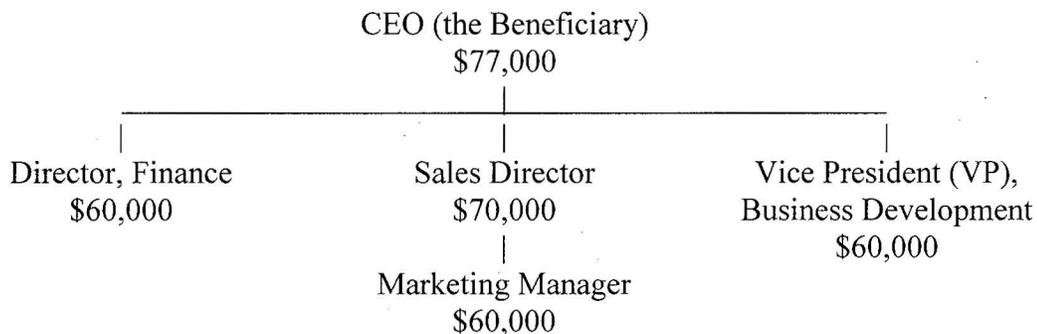
- Serves as the senior managerial employee for the company.
- Establish the company's U.S. operations, including the hiring of subordinate staff.
- Responsible for overseeing marketing plans for [the Petitioner's] entry into the U.S. marketplace.
- Exercises wide discretion for all U.S. operations on behalf of [the Petitioner] and its subsidiary corporation . . . in Russia.
- Create annual operating plans to [submit to] the board for approval.
- Develop and monitor strategies for [the] organization.
- Develop future leadership within the organization.
- Ensure the staff and board have up-to-date information.
- Develop and find solutions for management systems.
- Develop annual budget for the organization.
- Serve as the primary spokesperson and representative for the organization.
- Collect and analyze evaluation information that measures the success of the organization's program efforts.
- Develop fundraising strategies with the board.
- Travel to meet the investors.
- Build business partnerships.
- Analyze the results of the projects.
- Support motivation of employees in organization products/programs and operations.
- Look to the future for change opportunities.
- Decide or guide courses of action in operations by staff.
- Elaborate business development plans.

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- Build and maintain high-level contacts with current and prospective customer[s] and other business and project partners.
- Develop marketing strategy.
- Analyze reports of the projects.
- Develop reports for the investors.
- Promote, hire, and fire employees.
- Responsible for employee development and training.
- Solve issues related to the projects and the employees.
- Develop a corporate culture.

█ stated that the Beneficiary would supervise four subordinates. The Petitioner provided an organizational chart which identifies those employees by job title and annual salary as follows:



The Director issued a request for evidence (RFE) on October 7, 2014. The Director requested a “[d]etailed description of the [Beneficiary’s] specific daily tasks . . . and the percentage of time to be spent on each duty.” The Director also requested payroll documentation relating to the Beneficiary and his subordinates.

In response, the Petitioner submitted a November 12, 2014 letter in which █ repeated the list of duties from his earlier letter, and provided a second list of duties. The Director, in the RFE, instructed the Petitioner to specify “the percentage of time spent on each duty; please do not group individual tasks together.” Nevertheless, the Petitioner grouped all of the Beneficiary’s tasks into four categories: “Manages the organization” (40%); “Board of Directors” (10%); “Management of the Sales and Marketing Department” (40%); and “Hiring and staff management” (10%). This second list of duties focuses mostly on areas of responsibility rather than specifically described tasks. Examples include “Estimate financial risks,” “Develop Board agendas” and “Review sales pipeline.”

The Petitioner submitted copies of two email messages from the Beneficiary in which he referenced his decision to eliminate two positions and terminate the employment of those who held them. Specifically, the Beneficiary eliminated the marketing manager position on June 12, 2014, and the VP of business development position on July 18, 2014. On November 10, 2014, the Beneficiary issued an offer of employment to a new VP of business development.

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A new organizational chart reflected the changed organizational structure, and showed the Beneficiary's salary as \$120,000 per year. [REDACTED] November 12, 2014 letter included job descriptions for the three subordinates:

Director of finance
\$60,000 per year

- Determines annual and gross-profit plans by forecasting and developing annual sales quotas[.]
- Projecting expected sales volume and profit for existing and new products[.]
- Analyzing trends and results; establishing pricing strategies; recommending selling prices; monitoring costs, competition, supply, and demand.
- Fund raising and related initiatives.
- Building the licensing infrastructure[.]
- Develop corporate policies for accounting and authorizes their implementation.
- Assess intangible variables, identify and evaluate fundamental issues, providing strategy and direction for major functional areas.

Sales director
\$80,000 per year

- Sells products by implementing national sales plans; supervising sales managers.
- Developing and negotiating strategic agreements with portfolio companies and managed relationships. . . .
- Sustains rapport with key accounts by exploring specific needs; anticipating new opportunities.
- Determines annual unit and gross-profit plans by implementing marketing strategies; analyzing trends and results.
- Implements national sales programs by developing field sales action plans.
- Establishes and adjusts selling prices by monitoring costs, competition, and supply and demand.
- Completes national sales operational requirements by scheduling and assigning employees; following up on work results.
- Maintains national sales staff by recruiting, selecting, orienting, and training employees.
- Maintains sales staff job results by counseling and disciplining employees; planning, monitoring, and appraising job results.

VP of business development
\$90,000 per year

- Developing and evaluating new business opportunities. . . .

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- Developing and negotiating strategic agreements with portfolio companies and managed relationships. . . .
- Sustains rapport with key accounts by exploring specific needs; anticipating new opportunities.
- Identifies marketing opportunities by identifying consumer requirements; defining market, competitor's share, and competitor's strengths and weaknesses; forecasting projected business; establishing targeted market share.
- Completes business development operational requirements by scheduling and assigning employees; following up on work results.

██████████ listed various projects undertaken by development teams overseas, and indicated that the CEO supervised the project manager and game producer in those projects. ██████████ also listed "[t]asks by [the] Sales and marketing department," performed by the "VP of Sales" or by subordinates including the "Marketing Specialist," "Sales Specialist," "Account Manager" and "Copywriter, Designer."

The Director denied the petition on December 18, 2014, concluding that the Petitioner had not established that the Beneficiary will serve in a qualifying managerial or executive capacity. The Director cited a number of inconsistencies and discrepancies in the Petitioner's evidence:

- The Petitioner hired a VP of business development several months after the Petitioner eliminated that position;
- The sales director's claimed duties overlap those of the Beneficiary with regard to employee recruiting and training, and those duties are said to occupy 40% of the Beneficiary's time even though the Petitioner has only four employees;
- The Beneficiary's list of duties refers to several employee titles not found on the Petitioner's organizational chart.

On appeal, the Petitioner submits a legal brief, asserting that the perceived discrepancies have simple explanations. The Petitioner also asserts that USCIS should defer to prior approvals of nonimmigrant petitions that granted the Beneficiary status as an L-1A intracompany transferee.

Upon review, and for the reasons stated below, we find that the Petitioner did not establish that it intends to employ the Beneficiary in a qualifying managerial or executive capacity.

B. Analysis

The Petitioner, on appeal, states: "USCIS did not deny the I-140 petition because it determined that Beneficiary's U.S. job duties did not rise to the level of an Executive. . . . Thus, Beneficiary's credentials as an Executive are not at issue." In the decision notice, however, the Director found "the authenticity of the evidence submitted in support of the beneficiary's executive position is questionable." The Director questioned the credibility and consistency of the Beneficiary's job description, and stated:

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USCIS cannot conclude that the beneficiary will be primarily performing non-qualifying [*sic*] duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making and setting company goals and policies constitute significant components of the duties perform [*sic*] on a day-to-day basis.

Omissions and grammatical errors somewhat obscure the clarity of the above paragraph, but when taken in context, it is evident that the Director did not find that the Petitioner has shown that the organization's structure and activities warrant a position in which the Beneficiary would primarily perform qualifying executive functions.

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 other relevant factors, such as the Petitioner's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the Petitioner's business, and any other factors that may contribute to a comprehensive understanding of a Beneficiary's actual duties and role within the petitioning entity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Turning to the Beneficiary's job description, we note that the Petitioner did not comply with the Director's express instructions, which asked the Petitioner to list the Beneficiary's specific daily tasks and to assign a percentage of time to each item. While the record shows that the Petitioner did provide a percentage breakdown in response to the RFE, the time allocations related to broad categories of responsibilities rather than specific daily tasks. This breakdown cannot establish that the Beneficiary would spend his time primarily performing tasks in a qualifying capacity. For instance, when ██████ stated that the Beneficiary spends 40% of his time "manag[ing] the organization," there was no further breakdown of time devoted to specific tasks. Rather, ██████ stated that the Beneficiary "[c]onducts internal weekly status meeting[s], supervises the work of the director of finance and the VP of business development, and "decides on" nine listed subjects such as "[n]egotiating new partnerships," "[e]stimate financial risks," and "gathering knowledge," all of which, collectively, consume 40% of the Beneficiary's time. The lack of more detailed information does not permit us to narrow down the Beneficiary's specific tasks or determine whether those tasks are managerial or executive in nature.

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Next, we consider the proposed position in light of the level of complexity of the Petitioner's organizational hierarchy and available staff to carry out the Petitioner's daily operational tasks. Federal courts have generally agreed that in reviewing the relevance of the number of employees a petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the Petitioner has indicated that it performs sales and marketing functions while the overseas affiliate develops the products to be sold. The Petitioner has not documented the existence of any front-line sales or marketing staff, which suggests that this responsibility falls on the Petitioner's four employees, including the Beneficiary. Counsel contends that an organization "with only four employees" requires the Beneficiary to perform full-time executive duties because "bringing on new clients is a slow and arduous process that requires a high level of expertise and a very high attention to detail. Beneficiary's employees are primarily focused on the managerial aspects of ensuring that the details are in order and that the company is meeting client expectations." This statement amounts to an unsupported, conclusory assertion from counsel. The unsupported assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The position descriptions provided by the Petitioner show a number of overlapping functions.

The Petitioner, on appeal, states: "USCIS has focused on the perceived overlap between the Sales Director position and Beneficiary's CEO role. This focus is misguided." This was not a "focus" of the decision; the discussion occupied one sentence of a four-page decision. That sentence reads: "It is also noted that [the] Sales Director is performing some of the same managerial duties as recruiting, selecting, orienting, and training employees also being claimed under the duties of the CEO/President."

The Petitioner submits a new letter from [REDACTED] dated December 30, 2014, in which he elaborates on the job duties provided in his November 12, 2014 letter. [REDACTED] breaks down the hiring process into several steps, with different officials responsible for different steps. The Petitioner contends that, therefore, there is no true overlap. The first stated step in the hiring process is "[d]efine a necessity of a role/position in the Sales and Marketing Department." The Petitioner, however, has not shown that any such positions exist. [REDACTED] November 12, 2014 letter indicated that the CEO directly supervised the "VP of Sales," who, in turn, oversaw the "Marketing Specialist," "Sales Specialist," "Account Manager," and "Copywriter, Designer." Also, the position

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descriptions indicate that the Beneficiary and/or his subordinates have authority over subordinate employees such as “sales managers” and “national sales staff,” but the record does not show that the Petitioner has employees in those roles. The Petitioner has consistently indicated that it has had five or fewer employees in the United States throughout this proceeding.

Portions of [REDACTED] latest letter cite to supporting exhibits, such as contracts and policy documents, but the assertions regarding the Petitioner’s hiring process with several layers of management are not documented with any evidence that this process makes ongoing demands on the Beneficiary’s time or that of his subordinates. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The Petitioner asserts that the “Beneficiary continues to play an executive role with [the affiliated company] in Russia,” but the foreign entity’s organizational charts, including a new one submitted on appeal, show project managers, developers, engineers, and artists, but no sales staff. [REDACTED] new elaboration contains further references to marketing specialists and other workers whom the Petitioner does not employ. The record does not show that the petitioning U.S. employer or its overseas affiliate employs anyone in those positions. Therefore, the record provides no basis for the claim that several layers of management, and ten percent of the Beneficiary’s time, are required to handle an ongoing hiring process in sales and marketing. The Petitioner has indicated that the Beneficiary devotes 80% of his time to supervising his U.S. subordinates in their tasks which relate to sales and marketing, and therefore there is no indication that the Beneficiary primarily performs executive functions with respect to the foreign affiliate, which engages in product development rather than sales or marketing.

Furthermore, the overlapping position descriptions are not limited to hiring in sales and marketing. The descriptions for the sales director and the VP of business development overlap by several items, for example: “Developing and negotiating strategic agreements with portfolio companies and managed relationships,” and “[s]ustains rapport with key accounts by exploring specific needs.” The use of identical terms suggests that the functions of individual employees are not as rigidly compartmented or delegated as the Petitioner asserts on appeal.

Regarding the dismissal of the VP of business development and the marketing manager, counsel for the Petitioner states:

USCIS appears to be misinterpreting the termination of these employees as a wholesale elimination of these positions within the organization. This is an overstatement; Beneficiary made the executive decision to combine the duties of the two former employees into one position and named that position VP of Business Development.

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Counsel adds that changing economic conditions allowed the Petitioner to fill the position several months after the previous terminations. We agree that this sequence of events does not represent a discrepancy or a contradiction as such. Nevertheless, we also note that the Beneficiary's own email messages to the terminated employees both read, in part: "We decided to eliminate this position." The Director did not err by taking this sentence at face value. It may be that the Petitioner reinstated the position when circumstances permitted, but counsel provides no evidence to support the claim that, when the Beneficiary stated "eliminate this position," he meant "consolidate." Again, the unsupported assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Petitioner, on appeal, observes that the Beneficiary currently holds L-1A nonimmigrant status, which USCIS extended after his initial entry. The Petitioner cites two USCIS memoranda regarding deference to prior agency determinations. The Petitioner acknowledges that neither of the cited memoranda concern the immigrant classification that the Petitioner seeks on the Beneficiary's behalf, but it contends that, nevertheless, the general principle remains the same.

The Petitioner cites USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy*, May 30, 2013, [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Assessed%20as%20final%205-30-13\).pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Assessed%20as%20final%205-30-13).pdf). Pages 23-24 of that memorandum include a section headed "Deference to Previous Agency Determination." The memorandum concerns the multi-stage EB-5 process for intending immigrants seeking classification under the "Employment Creation" provisions of section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5). The "Deference to Previous Agency Determination" section does not establish or imply an agency-wide policy of deference to prior decisions in all classifications. Rather, the memorandum sets forth reasons for the policy, which are specific to that classification:

Distinct EB-5 eligibility requirements must be met at each stage of the EB-5 immigration process. Where USCIS has evaluated and approved certain aspects of an EB-5 investment, that favorable determination should generally be given deference at a subsequent stage in the EB-5 process. This policy of deference is an important part of ensuring predictability for EB-5 investors and commercial enterprises (and the persons they employ), and also conserves scarce agency resources, which should not ordinarily be used to duplicate previous adjudicative efforts.

Id. at 23. Furthermore, that same section of the memorandum makes it clear that deference is not universal; it states that "prior determinations will be presumed to have been properly decided . . . [u]nless there is reason to believe that a prior adjudication involved an objective mistake of fact or law." *Id.* at 24.

The approval of the earlier petitions does not create an automatic entitlement to the approval of a subsequent petition. *Cf. Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a

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separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The Director's decision does not indicate whether the Director reviewed the prior approvals of the earlier nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same evidence found in the current record, the approval would constitute material and gross error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. at 597.

The Petitioner contends that a second memorandum from 2006¹ illustrates "the basic concept of deference to prior objective factual determinations." The Petitioner does not quote from the memorandum, cite any specific passage, or otherwise elaborate on this point. Reviewing the memorandum (which largely concerns third-party employment of H-1B nonimmigrant researchers), we see nothing in its text that relates to the Petitioner's claim. The 2006 memorandum does not discuss new adjudications in the context of prior approvals (such as extensions of status). The Petitioner has not explained its relevance to the matter at hand.

Taking all of the above factors into account, we find that the Petitioner has established the Beneficiary's authority over the company, but not that the Beneficiary primarily performs qualifying functions. Accordingly, we find that the Petitioner did not provide reliable, probative evidence sufficient to establish that it will employ the Beneficiary in a qualifying managerial or executive capacity. For this reason, the petition cannot be approved.

III. CONCLUSION

We will dismiss the appeal for the above stated reasons. 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, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-, Inc.*, ID# 14058 (AAO Oct. 19, 2015)

¹ Memorandum from Michael Aytes, Associate Director for Domestic Operations, USCIS, HQPRD 70/23.12, Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), (June 6, 2006), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/ac21c060606.pdf.