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

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

MATTER OF A-F- LLC

DATE: SEPT. 28, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a retail sales establishment operating furniture stores under the name of [REDACTED] seeks to employ the Beneficiary as its president 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. 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 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.

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;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

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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. Section 101(a)(44)(C) of the Act.

## II. U.S. EMPLOYMENT

The first issue to be addressed is whether the Petitioner established that the Beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

### A. Facts

Established in [REDACTED] the Petitioner filed the Form I-140 on May 6, 2014 and described its business as “retail sales.”

In an April 22, 2014 introductory letter submitted with the petition, [REDACTED] vice president of the petitioning company (and the beneficiary’s spouse), asserted that the petitioner “is the successor to [REDACTED] and that the beneficiary filled the same position at both companies, with the following duties:

[The beneficiary] has broad discretion in overseeing [the petitioner’s] operations in the United States. He has overarching personnel decision-making power and has supervised and will supervise the personnel of the company either directly or through intermediate management. Specifically, [the beneficiary] has been and will continue to be tasked with formulating the company’s goals and objectives; directing promotions, advertising and marketing; directing store management on the operations of each location; and all personnel decision-making. . . .

A summary of [the petitioner’s] staffing follows:

- Vice President . . . : I assist [the beneficiary] in the operation of the company including store management. I am also tasked with overseeing supplier relations and export operations.
- Office Manager . . . provides administrative support for the company as well as customer service and delivery scheduling.
- Accounts & Finance . . . provides payroll and tax preparation, inventory control, and financial management.
- Sales Associates [six named] . . . are tasked with retail sales to customers.
- Deliveryman . . . is responsible for home deliveries.

. . . In addition to the above employees, [the beneficiary] also manages [the petitioner’s] contractors, including deliveries from suppliers, advertising, information technology, and counsel.

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The petitioner submitted a copy of [REDACTED] organizational chart, but did not submit an organizational chart for the Petitioner.

The director issued a request for evidence (RFE) on October 3, 2014, instructing the petitioner to provide more specific details about the beneficiary's duties and his subordinate employees in the United States. In response, in a letter dated December 10, 2014, [REDACTED] stated that the beneficiary "has overall responsibility for the following" with his time divided as indicated:

- (i) formulating the company's goals and objectives, including such things as managing and directing key marketing and sales functions (30%),
- (ii) establishing the company's overall policies, including the set-up of a Corporate Office & Retail Store facility (12%),
- (iii) staffing the company and working with managerial personnel to ensure that the company is operated in accordance with established goals and policies (13%),
- (iv) devising strategies to ensure that goals and objectives with respect to the company's infrastructure are met (15%),
- (v) ensuring key performance indicators are met with respect to customer satisfaction (10%), and
- (vi) steering the foreign, parent company toward operational success (20%).

In another letter dated December 10, 2014, [REDACTED] stated that the beneficiary would also be responsible for formulating the overall business plan, issuing annual performance evaluations to subordinate employees, and be responsible for all hiring, firing, and promotion decisions. [REDACTED] also indicated that the beneficiary's full-time subordinates consisted of herself as a full time vice president; a part time certified public accountant; a part time office manager; one part time and two full time sales associates; a part time delivery man; and a list of outsourced contractors, including a graphic artist, a website designer, an IT and web management firm, an attorney, and a shipping and logistics company. The petitioner also submitted an organizational chart in response to the RFE, which showed the beneficiary, then [REDACTED] and then eight departments all on the same, third tier. The internal departments are accounts and finance; administration; sales and marketing; and delivery.

The Petitioner's response to the RFE also included copies of its 2013 Form W-3 reflecting total wages paid of \$15,062.91 to eight employees, and IRS Form 941 for the last quarter of 2013, reflecting wages paid of \$15,064.91 paid to eight employees.

The Petitioner also provided Forms W-2 for 2013 for its eight employees. The Petitioner paid the following wages to employees identified by name on its organizational chart:

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- [REDACTED] (delivery man) - \$497.50
- [REDACTED] (office manager) - \$2,619.00
- [REDACTED] (sales associate) - \$2,643.08
- [REDACTED] (vice president) - \$3,000.00

The remaining four W-2 forms reflected wages paid ranging from \$131.31 to \$4,812.89 to employees not identified on the Petitioner's organizational chart.

The Director denied the petition on January 22, 2015, concluding that the Petitioner did not establish that the Beneficiary would be employed in a qualifying managerial or executive capacity.

B. Analysis

Upon review, and for the reasons discussed herein, the Petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

When determining whether a beneficiary will be employed in a managerial or executive capacity, we look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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 either in an executive or managerial capacity. *Id.* A detailed job description is crucial, as 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 will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual duties and role in a petitioner's organizational hierarchy.

Here, the Petitioner has established that the Beneficiary is the senior employee of the company and spends part of his time performing qualifying managerial or executive duties in his role as president with responsibility for the overall operation of the company. However, 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 establish 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).

Therefore, the fact that a beneficiary manages or directs a business does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the Beneficiary may exercise discretion over the petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the Petitioner has not submitted a complete and detailed position description

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sufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

The Beneficiary's duty description is comprised of vague responsibilities such as "formulating the company's goals and objectives," "establishing the company's overall policies," "staffing the company," and devising strategies to ensure that goals and objectives with respect to the company's infrastructure are met" that are too broad to categorize as managerial or executive in nature. 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).

On appeal, the petitioner asserts that the director should have looked beyond the general percentage breakdowns in [REDACTED] letter regarding the beneficiary's intended work in the United States, because other parts of the letter with the headings "[The Beneficiary's] Proposed Managerial Decision-Making Role" and "Executive/Managerial and Technical Skills Required to Perform the Position Duties" describe the beneficiary's positions "in great detail." The petitioner asserts: "When all three sections of [REDACTED] letter are examined together, it is clear that [the petitioner] provided an extremely detailed description of [the beneficiary's] duties." While the letter in its entirety was considered, the additional details do not support this characterization of the letter.

Specifically, the "Skills Required" section, as its heading implies, is not a list of duties, but rather a list of traits that the petitioner deems necessary for the position, such as "discretionary decision-making skills" and "marketing knowledge." In addition, the "Proposed Managerial Decision-Making Role" section of the letter consists of three paragraphs that provide more information on the Beneficiary's job duties, but lack specific details.

Based on the statements provided in the record, we are unable to determine whether the claimed managerial and executive duties constitute the Beneficiary's primary duties, or whether the Beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the Petitioner's descriptions of the Beneficiary's job duties does not provide sufficient detail such that we can determine whether the Beneficiary will act in a primarily managerial or executive capacity.

As noted, beyond the required description of the job duties, we review the totality of the record when examining a beneficiary's claimed managerial or executive capacity, including such factors as the petitioner's organizational structure, the duties of a 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 will contribute to understanding the beneficiary's role and actual responsibilities.

As a threshold matter, we note that the petitioner is a Limited Liability Company registered and active in the state of Ohio with [REDACTED]. [REDACTED] is a corporation registered and active in Pennsylvania with [REDACTED]. As [REDACTED] is a distinct entity from the Petitioner, we will only consider evidence submitted that pertains to the Petitioner.

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Here, the Petitioner indicates that the Beneficiary's duties include supervision of a subordinate vice president,<sup>1</sup> who in turn supervises a CPA, and office manager, three sales associates, and a delivery man. The CPA and office manager also appear on [REDACTED] organizational chart. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The Petitioner has documented part time employment of the vice president, office manager, one sales associate, and the delivery man at the time of filing. The Petitioner did not demonstrate that the vice president is employed on a full time basis, as she also claims to be employed by the foreign entity and [REDACTED] and therefore, the evidence of record is sufficient to show that the Beneficiary more likely than not acts as a first-line supervisor to the office manager, sales associate, and delivery man. In addition, the record does not reflect any evidence demonstrating that the Petitioner has contracts with or has paid invoices to the outsourced companies indicated on the organizational chart. 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. Comm'r 1972)).

While the Beneficiary allocates some portion of his time to qualifying supervisory duties, the record does not establish that the Beneficiary is primarily managing a subordinate staff of supervisor, managers or professionals. Accordingly, the record does not establish that the Beneficiary qualifies for the benefit sought as a personnel manager.

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. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). 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 the beneficiary to direct and the 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

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<sup>1</sup> The record reflects that the vice president also serves as the executive director for the foreign entity and as the vice president for [REDACTED]

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as the owner or sole managerial employee. The 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.” *Id.*

Here, the Petitioner emphasizes that Beneficiary’s role as president as evidence of his performance of qualifying executive duties. As discussed, the Petitioner’s description of the Beneficiary’s duties, considered within the totality of the evidence, does not support a finding that the Beneficiary primarily focuses on the broad goals and policies of the organization rather than on its day-to-day operations.

A company’s size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The Petitioner claimed to have 10 employees at the time of filing and seven employees at the time it responded to the RFE; however, a review of its tax documents and quarterly reports shows that many of its employees, even if employed only for the reporting period of the fourth quarter of 2013, earn minimal wages and are not full time employees. The record supports a finding that the Petitioner maintains a part time staff of a vice president, an office manager, a sales associate, and a delivery man only. The record does not demonstrate that the Petitioner uses contractors for its claimed outsourced activities.

Here, given the overly broad breakdown of the Beneficiary’s duties, the prevalence of vague job duties in his position description, and the lack of subordinate staff to perform many essential day-to-day functions of the company, the Petitioner has not established by a preponderance of the evidence that the Beneficiary would be employed in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

### III. FOREIGN EMPLOYMENT

The remaining issue to be addressed is whether the Petitioner established that the Beneficiary was employed by its Malaysian parent in a qualifying managerial or executive capacity for one year in the three years preceding his admission to the United States.

#### A. Facts

In her introductory letter, [REDACTED] stated that the beneficiary is the founder and owner of [REDACTED] the petitioner’s parent company in Malaysia, and that the beneficiary continues to serve as the parent company’s managing director. [REDACTED] stated that the

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beneficiary's duties at [REDACTED] "are comparable to those of the permanent position offered in the United States."

An organizational chart for [REDACTED] showed the beneficiary at the top as managing director; then [REDACTED] as the executive director; then a general manager. Below the general manager were five departments: accounts and finance; administration; operation; sales and marketing; and advertising. Each of these departments included one to three individuals with titles such as "senior executive," "manager," "designer," or "controller," and the operations and sales departments also listed lower-level employees.

The petitioner submitted copies of promotional materials and other documentation relating to [REDACTED] as well as a copy of [REDACTED] 2012 annual report, identifying the beneficiary and [REDACTED] as directors of the company.

The Beneficiary stated on his concurrently filed Form G-325A, Biographic Information that he has resided in Ohio since June 2013, and in Pennsylvania from September 2012 to May 2013. USCIS records show that he was initially approved for L-1A status in December 2012. The Beneficiary indicated on the Form G-325A signed in April 2014 that he had worked for the Malaysian parent from September 2002 until the present time.

The director, in the RFE, requested additional details about the beneficiary's employment abroad. In response, [REDACTED] provided a list of duties and percentage breakdown that closely matched the one provided for his current position, as described above, except that the final item indicated that the beneficiary devoted 20% of his time to "steering the company toward operational success and expansion in the US market." [REDACTED] also provided a list of the subordinate employees, including names, titles, education level, salaries, and job duties.

In the denial notice, the director stated that the submitted job description "states broad job responsibilities and fails to reveal what the beneficiary actually did on a daily basis."

On appeal, the petitioner asserts that USCIS must consider the totality of the evidence. The petitioner contends that the director "erred in reading [the percentage breakdown] in isolation," because the petitioner "elaborate[d] in great detail" in other sections of submitted letters and "provided countless documents" regarding the petitioning entity and [REDACTED]. The petitioner states that it has established eligibility by a preponderance of the evidence.

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<sup>2</sup> Many documents relating to the foreign entity refer to [REDACTED] as [REDACTED] in that regard, but the record shows that [REDACTED] and [REDACTED] are the same person. Some documents in the record also refer to the beneficiary with the given name "Stanley." There is no evidence that either the beneficiary or his spouse formally or legally changed names.

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## B. Analysis

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

The Petitioner has consistently stated that the Beneficiary performs the same duties in the United States as he did in Malaysia and that the Petitioner and the Malaysian company operate the same type of business with similar staffing levels and a similar organizational structure.

As with the U.S. position, the Petitioner's description of the Beneficiary's duties lacked specifics as to the Beneficiary's day-to-day duties. This lack of specificity is important because several of the Beneficiary's daily tasks were vague and we are unable to determine whether they fall under traditional managerial duties or executive duties as defined in the statute. For this reason, we cannot determine whether the Beneficiary was primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, the petitioner asserts that the Beneficiary's "Decision-Making Authority" should have been considered by the Director, stating:

He developed the concept for the business, then invested his finances and efforts into setting up and directing the business and to its continued growth. He has overall authority for all major company decisions which have included formulating the initial plans for the business, including products/product lines, target markets, office and store locations, sales and financial goals, identifying and negotiating with suppliers, marketing and promotional goals and strategies, staffing needed to implement operations and performance policies and goals.

This paragraph indicates that the beneficiary was ultimately responsible for all important decisions at [REDACTED] but does not describe his actual duties in sufficient detail to show that he was primarily engaged in managerial or executive-level tasks.

Again, the fact that a beneficiary manages or directs a business does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Moreover, we are unable to review the position description for the Beneficiary's position in Malaysia within the context of the totality of the evidence because the Petitioner provided evidence related to the Malaysian entity's current operations only. In order to determine whether the Beneficiary qualifies for the benefit sought, we need to review evidence of his duties, and documentation of the foreign entity's staffing levels and organizational structure, during the three year period preceding his admission to the United States in 2012. While the Petitioner states that the foreign entity currently employs an executive director, a general manager, a manager, four

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executives, an operation manager, an operation executive, and operation supervisor, two controllers, and a designer, it has not provided any evidence pertaining to the relevant time period. 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. Comm'r 1972)).

As the record does not contain evidence of the foreign entity's staffing levels and organizational structure during the relevant time period, and as the Petitioner's description of the Beneficiary's duties with the foreign entity alone is insufficient to establish his eligibility, the Petitioner has not established by a preponderance of the evidence that the Beneficiary was employed in a managerial or executive capacity in Malaysia. For this additional reason, the appeal will be dismissed.

#### IV. Additional Issues

Beyond the issues cited in the director's decision, review of the record reveals two additional issues that preclude approval of the petition. Because we review the record on a *de novo* basis, we may identify additional grounds for denial beyond what the Service Center identified in the initial decision. See *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

##### A. Doing Business

The petitioner must establish that the prospective United States employer (*i.e.*, the petitioner) has been doing business for at least one year. See 8 C.F.R. § 204.5(j)(3)(i)(D). *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

The record shows that the petitioning entity filed its articles of organization as a limited liability company on [REDACTED] less than one year before the petition's May 6, 2014 filing date. Therefore, the petitioner cannot have been doing business for at least one year before the filing date.

In her first letter, dated May 2, 2014, [REDACTED] asserted that the petitioner "is the successor to [REDACTED] [REDACTED] which had existed for more than a year, having filed articles of incorporation in Pennsylvania on [REDACTED] and had been doing business since 2012.

A successor in interest has assumed all of its predecessor's rights, duties, and obligations. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986). The petitioner has not established that it has done so with [REDACTED]. The record does not rule out the continued existence of [REDACTED] as a corporation, and an existing corporation can have no successor in interest. Following the issuance of the RFE, on December 10, 2014, [REDACTED] referred to [REDACTED] as the petitioner's "sister company," thereby contradicting the claim that the petitioner is [REDACTED] "successor." Because the petitioner no longer claims to be [REDACTED] successor, we need not address the question of whether the petitioner can vicariously satisfy the "doing business" requirement through successorship in interest.

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The petitioner and [REDACTED] are separate, active, legal entities, organized in different states and holding different Employer Identification Numbers. The petitioning employer did not exist one year prior to the petition's filing date, and therefore the petitioner cannot satisfy the requirement that it has been doing business for at least one year before the petition's filing date. For this additional reason, USCIS cannot properly approve the petition.

#### B. Ability to Pay

Also beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary's proffered salary of \$36,000 per year. 8 C.F.R. § 204.5(g)(2) provides:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner submitted a copy of [REDACTED] 2012 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, but [REDACTED] is not the petitioner and its tax return cannot satisfy the requirements of 8 C.F.R. § 204.5(g)(2).

The petitioner submitted a profit and loss statement for each of three consecutive months from December 2013 through February 2014. This document is not an annual report, federal tax return, or audited financial statement, and therefore it does not meet the requirements of 8 C.F.R.

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<sup>3</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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§ 204.5(g)(2). The Petitioner also did not submit any evidence of wages paid to the Beneficiary as of the date of filing.

Accordingly, after considering the totality of the circumstances, the documentation in the record does not establish that the petitioner has sufficient income or assets to cover the beneficiary's full salary of \$36,000 per year. For this additional reason, USCIS cannot approve this petition.

#### V. Conclusion

We will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-F- LLC*, ID# 13736 (AAO Sept. 28, 2015)