



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

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

MATTER OF A-P-&P- INC.

DATE: DEC. 29, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

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

The Director, Texas Service Center, denied the petition, concluding that the evidence of record did not establish that: (1) the Beneficiary will be employed in the United States in a managerial or executive capacity; (2) the Beneficiary was employed abroad in a managerial or executive capacity; and (3) the Petitioner has been doing business for at least one year prior to the petition's filing date.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the denial rests on "clear errors and abuse of discretion." The Petitioner states that, in addition to the two grounds for denial listed above, the Director "also contends that Petitioner has failed to establish that its Chinese affiliate . . . is continuing doing business." This was not a stated ground for denial, and so it requires no further discussion here.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

....

- (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or

other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

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

(3) Initial evidence—

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

II. EMPLOYMENT IN A MANAGERIAL CAPACITY

The Director denied the petition based, in part, on a finding that the Petitioner did not establish that Beneficiary will be employed in the United States, and was previously employed abroad, in a managerial capacity. The Petitioner has not claimed that the Beneficiary worked, or will work, in an executive capacity, and therefore we need not consider that issue here. Instead, the Petitioner states that the Beneficiary “served our company in managerial capacities.”

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

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, 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. U.S. Employment in a Managerial Capacity

1. Duties

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.

The Petitioner filed Form I-140 on January 20, 2015. The Petitioner described itself as a U.S. entity controlled by a multinational entity called [REDACTED]. The Petitioner described the Beneficiary’s role with the company:

Since [May 2013, the Beneficiary has] provided managerial support and coordinated the operations for our group headquarters in New Jersey. She also oversaw the production units and the associated accounts of our company. [The Beneficiary] is

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responsible to conduct thorough research regarding improvements or investments required in the production process as well as other business considerations, and prepare detailed reports . . . [for] review by the company leadership. . . . [The Beneficiary] has significant authority on operational questions.

....

The detailed job responsibilities of the position are as follows:

- Assessing and improving current production capability of the company in the U.S., in the context of strategic and tactical planning, to meet the interim development objectives and long-term objectives of the group;
- Establishing standards and guidelines to maximize the business' efficiency;
- Planning and directing the manufacturing and maintenance operation utilizing equipment, facilities, and materials imported;
- Assuring attainment of business goals and productions schedules;
- Ensuring secure, efficient, and effective quality of the production to support the global operations of the group;
- Monitoring and supervising production procedures to ensure appropriate and cost-effective measures are applied;
- Developing [and] implementing company policies which enhance business practices and provide quality services and products to customers; and
- Ensuring and maintaining the group's high-volume clientele and securing investments or project funding from China.

The duties listed above do not provide significant information about the Beneficiary's daily tasks with the petitioning company. "Establishing standards and guidelines" and "implementing company policies" are not ongoing tasks. "Assuring attainment of business goals" and "[e]nsuring . . . quality of the production" are objectives rather than tasks; the Petitioner did not explain how the Beneficiary achieves those objectives.

The Director issued a request for evidence (RFE), asking the Petitioner to submit a detailed job description, listing specific duties and the approximate time devoted to each.

In response, the Petitioner stated that it was undergoing a restructuring, involving the recent incorporation of [REDACTED]. The Petitioner stated that "a part of [the Beneficiary's] duties involve the management of production employees and equipments [*sic*] of our affiliates." The Petitioner provided a new list of the Beneficiary's duties, with approximate time spent on each task:

- Supervising the production process, managing and allocating manpower, equipments and other resources in [REDACTED] while also, making sure that quality products are produced on time (30%);
- Monitoring product standards and implementing quality-control programs (15%);

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- Conducting thorough research on the production process to ensure cost efficiency (15%);
- Maintaining production schedule based on the business transactions engaged in by [REDACTED] (10%);
- Communicating with the overseas affiliates of [the Petitioner] to coordinate the production activities of [REDACTED] (10%);
- Participating in the executive/manager meetings of [the Petitioner] and [REDACTED] (10%);
- Updating constantly of the technology developments in the relevant production process, providing appropriate improvement and/or investment proposals to the company executives (5%).

The Petitioner submitted a copy of share certificate number 1 for [REDACTED]. The date on the certificate is February 2, 2015, which was after the petition's January 20, 2015, filing date. A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, the Beneficiary's stated responsibilities with respect to [REDACTED] cannot help to establish eligibility as of the petition's filing date (before the Petitioner established any affiliation with [REDACTED]).

The list of the Beneficiary's duties submitted in response to the RFE is different from the earlier list, but it has the same deficiencies, describing a number of goals (such as "[m]aintaining production schedule" and "implementing quality control programs") rather than the identifiable tasks that the Beneficiary performs to achieve those goals. The new list separates management meetings from "[c]ommunicating with the [Petitioner's] overseas affiliates," and thus indicates that the Beneficiary spends several hours per week in communications other than meetings with executives and managers of the Petitioner and its foreign affiliates. The Petitioner has not documented that this communication actually takes place, or what business the Beneficiary transacts during that communication. Like the first list, this second list of duties amounts to a general assertion that the Beneficiary has authority over the Petitioner's production department, without showing what she actually does to run it.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would serve in a managerial or executive capacity. The Director noted that events after the petition's filing date, such as the Petitioner's acquisition of [REDACTED] cannot establish eligibility as of the petition's filing date. The Director found the Beneficiary's job description to be vague and general, setting forth broad responsibilities without showing exactly what the Beneficiary does, and will do, on a daily basis.

¹ The certificate identifies [REDACTED] as the owner of that company. The Petitioner also identified the same person as the sole owner of the petitioning company. Therefore, the two companies are affiliated through [REDACTED] individual ownership rather than through any direct connection with [REDACTED] as the Petitioner implied.

On appeal, the Petitioner submits several exhibits, but the Petitioner does not link any of them to the issue of the Beneficiary's role with the petitioning company. The Petitioner states:

On the contrary to the Service's decision, the Beneficiary has been providing managerial support to [the Petitioner's] office and will oversee the firms' China-based projects as they relate to the U.S. and international business. . . . [The Beneficiary has] provided managerial support and coordinated the operations for our group headquarters. . . . She also oversaw the production units and the associated accounts of our company. [The Beneficiary] is responsible to conduct thorough research regarding improvements or investments required in the production process as well as other business considerations, and prepare detailed reports on a regular basis, which directly impact the company's logistics and supply chain decisions. [The Beneficiary's] reports and recommendations are subject only to review by the company leadership and [the Beneficiary] has significant authority on operational questions[.]

As before, the above statement is a general assertion of the Beneficiary's discretionary authority without establishing how she exercised that authority. The Petitioner states that the Beneficiary prepares reports based on her research, but the record does not contain those reports or evidence of their existence. Also, the Petitioner has not explained how conducting research of this kind is a managerial function rather than an operational or administrative task to be delegated to a subordinate employee.

The Director denied the petition, in part, because the Petitioner had not provided enough information about what the Beneficiary does to allow USCIS to conclude that her duties are primarily those of a manager or executive. The Petitioner has not remedied this deficiency on appeal.

2. Staffing

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.

We also consider the proposed position in light of the nature of the Petitioner's business, its organizational structure, and the availability of staff to carry out the Petitioner's daily operational tasks. Federal courts have generally agreed that, in reviewing the relevance of the number of employees a Petitioner has, USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager."² Furthermore, it is

² *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., Ltd. v. Sava*, 724 F. Supp. 1103, 1108

appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." 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. *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). 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. *See* 8 C.F.R. § 204.5(j)(5). 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.

Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 204.5(j)(4)(i). To show that the beneficiary manages professional employees, the petitioner must demonstrate that the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor.³ 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. *See* 8 C.F.R. § 204.5(j)(2).

On Form I-140, the Petitioner claimed nine employees, but did not document this figure or indicate the employees' roles within the company. In the RFE, the Director requested job descriptions for the Beneficiary's subordinates and copies of IRS Forms W-2, Wage and Tax Statements, to establish that the Petitioner employs them as claimed.

In response, the Petitioner submitted an organizational chart showing five departments:

(E.D.N.Y. 1989), *aff'd*, 905 F.2d 41, 42 (2d. Cir. 1990); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003).

³ *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."

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- Sales & Marketing
- Financial & Accounting
- Production
- Administrative & Human Resources
- Graphic Design

The chart did not indicate that the Beneficiary had any subordinate employees within the petitioning company. Instead, the chart placed [REDACTED] within the Petitioner's Production Department, and indicated that [REDACTED] has 15 employees, divided into three groups:

- Secured Card
- Non-secure Card
- Paper Card and Packaging

The Petitioner did not submit any information about the Production Department's structure at the time of filing (before the Petitioner established its affiliation with [REDACTED]). The Petitioner provided no other information about the Beneficiary's subordinate employees or their duties. The Petitioner submitted a copy of the Beneficiary's own IRS Forms W-2 for 2014, but did not submit the forms for the company's other employees as the Director had instructed.

In denying the petition, the Director found that the Petitioner had not shown that the Beneficiary supervises professional subordinates in order to qualify as a personnel manager, or that the company has sufficient organizational complexity to warrant executive-level authority.

On appeal, the Petitioner submits copies of IRS Forms 941, Employer's Quarterly Federal Tax Returns, indicating that the Petitioner had 10 or 11 employees at various times in 2014. The returns do not provide any information about the titles, duties, or qualifications of the unnamed employees. Also, the Petitioner has not shown how its post-filing restructuring and acquisition of [REDACTED] have affected the staff that the Beneficiary would oversee at the petitioning company; under 8 C.F.R. § 103.2(b)(2), the Petitioner must establish eligibility at the time of filing, continuing through the adjudication of the petition. The Petitioner has added a new corporation into the organization, while providing no information about that company. The absence of such basic information precludes any finding that the Petitioner has met its burden of proof.

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. *See* sections 101(A)(44)(A) and (B) of the Act. While the Beneficiary may exercise discretion over some of 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 her actual duties, as of the date of filing, would be primarily managerial or executive in nature. The Petitioner has provided minimal information about the company's staffing, and therefore the

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Petitioner has not shown that the Beneficiary's subordinates relieve her from primarily performing non-qualifying operational or administrative functions. The Petitioner has not shown that the Beneficiary is a personnel manager, who primarily manages managerial, supervisory, or professional employees, or a function manager, who primarily manages an essential function of the company rather than performs that function herself.

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

B. Employment Abroad in a Managerial Capacity

If the beneficiary is already in the United States working for the foreign employer or its subsidiary or affiliate, then the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) requires the petitioner to submit a statement from an authorized official of the petitioning United States employer which demonstrates that, in the three years preceding entry as a nonimmigrant, the beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity.

1. Duties

The Petitioner identified the Beneficiary's foreign employer as [REDACTED] d/b/a [REDACTED]. The Petitioner provided the following account of the Beneficiary's employment abroad during the three years preceding the filing of the petition:

In 2005, [the Beneficiary] helped establish our Chinese affiliate, [REDACTED]. In the position of regional manager, [the Beneficiary] supervised four managers and 15 staff members, planned and arranged the investment and management projects of the group in Asia. These projects required all aspects of managerial control including overseeing export and import transactions, production and manufacturing processes, quality control, as well as sourcing our plants and building manufacturing and supply chain partnerships in southern China. . . .

As the leader, [the Beneficiary] directed the entire professional staff of our Asian operational team . . . and developed and implemented a strategic design plan for all of our production centers in the Asian region.

In the RFE, the Director asked for a statement from an official of the foreign company, describing the Beneficiary's duties abroad. In response, the chief executive officer (CEO) of [REDACTED] stated that the Beneficiary divided her time as follows:

- Developing production plans, coordinating production activities and supervising manufacturing methods undertaken by the production centers in Asian region (35%);

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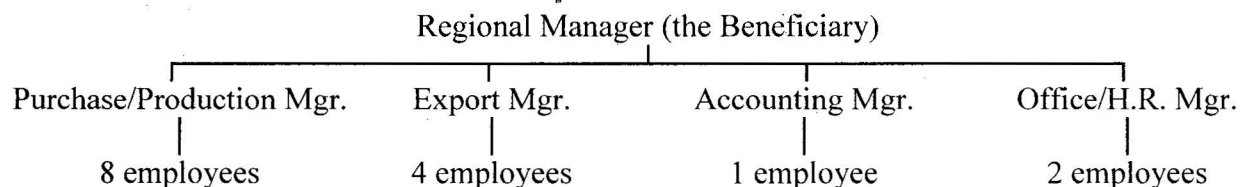
- Planning and managing export and import transactions to ensure that sufficient quantity/quality of semi finished products manufactured in Asia[] are provided to the U.S. branch of [REDACTED] on time (30%);
- Conducting market research in Asian region to locate the economic sources of qualifying raw materials and/or semi finished products to enhance the competitiveness of [REDACTED] in the commercial printing and packaging industry (25%);
- Providing business operation reports of [REDACTED] to the executives of [REDACTED] on a regular basis (10%).

In the denial notice, the Director acknowledged the submission of the above statement but made no further findings about the Beneficiary's duties. The brief job description quoted above lacks crucial details. For instance, the Petitioner did not explain the nature of the market research that the Beneficiary performed and show that the research tasks were compatible with the role of a manager or executive. Also, "[p]lanning and managing export transactions" may involve tasks at the managerial level, but it may also involve logistical and administrative tasks that do not qualify as managerial or executive.

2. Staffing

In the initial submission, the Petitioner stated that the Beneficiary "supervised four managers and 15 staff members, but provided no other details. In the RFE, the Director requested the titles and job descriptions of the Beneficiary's subordinates abroad. The subordinates' job descriptions are necessary to show that those employees relieved the Beneficiary from having to primarily perform non-qualifying operational and/or administrative tasks.

In response, [REDACTED] CEO stated that the Beneficiary "supervised a team of professionals consisting of four managerial personnel and 15 staff members":



In the denial notice, the Director stated that the Petitioner had not submitted "the requested information regarding the beneficiary's subordinates," and therefore the Petitioner had not shown that the Beneficiary worked abroad in a managerial capacity. On appeal, the Petitioner has not addressed or rebutted this finding.

The Petitioner has claimed that the Beneficiary was a personnel manager overseas, with authority over four managers and "a team of professionals." The Petitioner, however, has not provided evidence to confirm the personnel structure claimed in the chart, or evidence to show that the

subordinates did, in fact, qualify as managers, supervisors, or professionals. The Petitioner also did not establish that the Beneficiary had authority to hire or fire her subordinates or to recommend personnel actions. The minimal information in the record is not sufficient to meet the Petitioner's burden of proof to show that the Beneficiary acted as a personnel manager abroad.

Also, because the Petitioner has provided not provided sufficient information about the Beneficiary's former duties abroad or the company's staffing, the Petitioner has not shown that she acted as a function manager. 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. *Fedin Bros. Co., Ltd. v. Sava*, 905 F.2d 41.

III. DOING BUSINESS

The Director denied the petition based on a finding that the Petitioner did not establish that it has been doing business for at least one year prior to the date of filing the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). Specifically, the regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as "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."

The Petitioner claimed a founding date of 2000 and submitted a copy of its 2013 IRS Form 1120, U.S. Corporation Income Tax Return which showed gross receipts of nearly \$5.6 million and taxable income of \$11,739. In the RFE, the Director requested additional evidence, such as receipts and invoices, to show that the Petitioner has regularly, systematically, and continuously provided goods or services for at least one year prior to the petition's filing date.

In response, the Petitioner submitted copies of its 2013 and 2014 tax returns. The 2014 return showed over \$5.7 million in gross receipts, yielding \$2499 in taxable income after expenses and deductions.

In denying the petition, the Director found that all of the Petitioner's submitted business documentation originated less than a year before the filing date, and therefore the Petitioner had not shown that it had been doing business for at least one year before the petition's filing date. On appeal, the Petitioner submits copies of previously submitted tax returns, and copies of invoices from 2014 and bank statements from 2013.

Upon review, we find that the Petitioner's 2013 tax return, showing substantial gross receipts or sales, is *prima facie* evidence that the Petitioner was doing business in 2013, more than a year before filing the petition on January 20, 2015. The Director did not cite any derogatory evidence or otherwise explain why the 2013 tax return did not show business activity before January 20, 2014. Receipts from 2014 show the continuity of services provided during that year.

Taking into consideration all the evidence of record, including the documents discussed above, we find that the Petitioner has established by a preponderance of the evidence that it has been doing business for more than a year prior to the petition's filing date. We withdraw the Director's finding to the contrary.

IV. CONCLUSION

The petition will be denied and the appeal dismissed because the Petitioner has not established that it will employ or has employed the Beneficiary in a managerial capacity. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-P-&P- Inc.*, ID# 116865 (AAO Dec. 29, 2016)