U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-, INC.

DATE: DEC. 7, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a wholesale grocery merchant and exporter,[1] seeks to permanently employ the Beneficiary as its general 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 of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that: (1) the Petitioner has a qualifying relationship with the Beneficiary's foreign employer; (2) the Beneficiary had been employed abroad in a managerial or executive capacity; (3) the Beneficiary would be employed in the United States in a managerial or executive capacity; (4) the Petitioner had been doing business for one year prior to filing the petition; and (5) the Petitioner had the ability to pay the Beneficiary the proffered wage. The Director also entered a finding that the Petitioner and the Beneficiary had willfully misrepresented material facts.

On appeal, the Petitioner concedes that its previous responses to the Director's request for evidence (RFE) and notice of intent to deny (NOID) the petition were "carelessly handled." The Petitioner asserts that "despite the deficiencies, the case could have been approvable from the start had the [P]etitioner and those acting on the [P]etitioner's behalf been diligent." The Petitioner contends "that at no time did the [B]eneficiary or the company intend to misrepresent the facts of the case." The Petitioner submits "additional evidence to address the material discrepancies on the record."

Upon *de novo* review, we find that the record on appeal includes sufficient evidence to establish that (1) the Beneficiary worked for the foreign entity in an executive capacity, (2) the Petitioner had been doing business for one year prior to filing the petition in February 2013, and (3) the Petitioner has the ability to pay the Beneficiary the proffered wage.[2] However, the record does not establish that

[1] The Petitioner stated on the Form I-140, Immigrant Petition for Alien Worker, that its business is "General Line GroceryMerchant [*sic*] Wholesaler" and that the Beneficiary's work location is in Florida. As will be discussed, the record includes conflicting information regarding the nature and location of the Petitioner's business(es). Specifically, the record includes evidence showing that the Petitioner operates a dry cleaning business.

[2] On appeal, the Petitioner submits evidence that it has corrected its federal and state quarterly wage reports and that the

the Petitioner and the foreign entity have a qualifying relationship or that the Beneficiary will be employed in a managerial or executive capacity for the Petitioner. In addition, we find that the Petitioner willfully misrepresented material facts in order to obtain an immigration benefit. Accordingly, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 203(b)(1)(C) of the Act makes an immigrant visa available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate.

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 petition must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

II. BACKGROUND

The petition was filed on February 15, 2013. The Petitioner stated on the Form I-140, that its business is "General Line GroceryMerchant [*sic*] Wholesaler" and that the Beneficiary's work location is in Florida. The record includes evidence that the Petitioner purchased the assets of a dry cleaning business located in Florida, in April 2011.

The record also includes the Director's RFE and the Petitioner's response signed by its former administrative manager. Less than one week after the Director issued the RFE in April 2013, the Beneficiary provided a sworn statement to U.S. Customs and Border Protection (CBP) regarding the foreign entity, the Petitioner, and his position with the Petitioner. Based on this statement and other inconsistencies and deficiencies in the record, the Director issued a NOID in October 2016. The Petitioner's response to the NOID included a statement signed by in the position of "manager," a revised description of the Beneficiary's proposed duties, a revised organizational chart, and other documentation.

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corrected forms have been filed with the appropriate agencies. This evidence establishes the Petitioner's ability to pay the Beneficiary the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). The Petitioner also submits evidence of its business transactions, as well as its federal tax return for 2012, to demonstrate that it is doing business, and that it was doing business for one year prior to filing the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D). Finally, the Petitioner addresses the deficiencies in the record noted by the Director, provides translations of pertinent documents as necessary, and submits additional evidence to demonstrate that the Beneficiary was employed abroad in an executive capacity by the Petitioner's claimed parent company prior to his entry to the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

The Director denied the petition for the reasons previously noted and entered a finding of willful misrepresentation.

On appeal, the Petitioner acknowledges that the record includes inconsistencies and deficiencies but places blame for those inconsistencies and deficiencies on several people: (1) a "negligent" former employee (2) the Petitioner's former attorney who submitted the Form I-140 and the Petitioner's response to the Director's RFE, (3) another former attorney who submitted a "subpar" response to the Director's NOID, and (4) the Beneficiary who "admits he was not as actively involved in the U.S. operation as he should have been." The Petitioner asserts that "distracted, negligent, and sloppy oversight does not amount to fraud" and "[i]nconsistencies are not sufficient evidence of the intent required for fraud."

III. QUALIFYING RELATIONSHIP

The first issue to be discussed is whether the Petitioner has established that it has a qualifying relationship with the Beneficiary's foreign employer. To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See* section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The Petitioner claims to be a wholly-owned subsidiary of the Beneficiary's last employer abroad. The regulations define "subsidiary" as a firm, corporation, or other legal entity of which a parent (1) owns, directly or indirectly, more than half of the entity and controls the entity, (2) owns, directly or indirectly, half of the entity and controls the entity, (3) owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity, or (4) owns, directly or indirectly, less than half of the entity, but in fact controls the entity. 8 C.F.R. § 204.5(j)(2).

The record contains three different versions of the Petitioner's stock certificate No. "1":

- The first submitted copy is partially illegible and depicts the number "500" in the upper right-hand corner in the box designated "shares," which conflicts with the number of shares (1,000) typed in the body of this stock certificate. The name of the owner of the fully paid shares is typed but is only partially legible and the certificate does not include a date or the signature of the president. The lower left-hand corner of the stock certificate bears the name as secretary.
- A second partially illegible stock certificate, which is clearly in a different type font than the previously submitted certificate, depicts the number "1000" in the upper right-hand corner, does not include a signature for the secretary, and includes the Beneficiary's signature as the president. The name of the owner of the shares is handwritten, not typed, and appears to identify as the owner of the shares issued. The stock certificate is not dated.

- A third stock certificate, submitted on appeal, appears to be the original of the second stock certificate submitted, but now includes the date September 2, 2009.

The record also includes copies of two stock ledgers submitted in response to the RFE and on appeal. The ledgers are not copies of each other but include the same information and indicate that owns 1,000 shares of the Petitioner's stock.

The Petitioner's 2013 IRS Form 1120, U.S. Corporation Income Tax Return, indicated on Schedule G that a foreign entity owned 51 percent of the Petitioner.[3] A draft version of the Petitioner's 2014 Form 1120, at Schedule G shows that a foreign entity owned 50 percent of the Petitioner.[4] The Petitioner's 2015 Form 1120, submitted in response to the Director's NOID, does not include a copy of the schedule G, or any other schedule, indicating foreign ownership.

Although the inconsistencies between the different versions of the Petitioner's stock certificate may appear minor, the inconsistencies demonstrate the ease with which such documents may be manipulated and in this matter may have been manufactured to demonstrate the foreign entity's ownership. The Petitioner has not explained why it has submitted three different versions of stock certificate "1." Additionally, the inconsistent information supplied to the IRS regarding the Petitioner's foreign ownership further undermines the claimed relationship between the Petitioner and the Beneficiary's foreign employer.

In the denial decision, the Director noted that the Petitioner did not provide the underlying evidence establishing that the foreign entity paid for the shares the Petitioner allegedly issued. On appeal, the Petitioner acknowledges that the wire transfers made in 2010 and 2011, as noted by the Director, were not related to the purchase of the Petitioner's stock. The Petitioner does not, however, include evidence of money transfers or other consideration evidencing the foreign entity's payment for an ownership interest in the Petitioner.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. As ownership is a critical element of this visa classification, the Director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence should include

[3] On appeal, the Petitioner submits evidence showing that it has filed an amended IRS Form 1120 for 2013, to show that the foreign entity owned 100 percent of the Petitioner. The Petitioner's certified public accountant (CPA) indicated that he would also file the Petitioner's amended Form 1120 for 2015.

[4] On appeal, the Petitioner submits a statement from the IRS noting that the Petitioner did not file its 2014 federal tax return. The Petitioner's current CPA indicates that a 2014 return will be filed when he can confirm that the accounting for 2014 is accurate. The record does not include a copy of the Petitioner's finalized 2014 tax return.

documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence could include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, the Petitioner has not explained the reason for submitting different versions of its stock certificate number "1" and has not provided evidence of how the foreign entity acquired its claimed ownership interest in the Petitioner. Due to the lack of consistent evidence demonstrating the foreign entity owns and controls the Petitioner and the lack of evidence supporting the Petitioner's claim that the foreign entity purchased a majority or sole interest in the Petitioner, the Petitioner has not satisfied its burden of proof on this issue.

IV. U.S. EMPLOYMENT IN AN EXECUTIVE OR MANAGERIAL CAPACITY

The Director identified numerous inconsistencies in the record regarding the nature of the Petitioner's business, its number of employees, and their positions within the organization, and the Beneficiary job description. The Director, who also considered the Beneficiary's statements to CBP, determined that the record included so much misinformation and distortion that the Petitioner had not established the nature of the Beneficiary's actual proposed position and thus did not establish that he would be employed in a managerial or executive capacity.

On appeal, the Petitioner asserts that "there are no duties in the job description for [the Beneficiary] as President/General Manager that are not executive or managerial in nature." As the Petitioner intermittently identifies the proffered position as an executive position and a managerial position, we will address both definitions. These are two distinct definitions and the Petitioner must satisfy the requirements of one or the other definition to establish that the Beneficiary is primarily a managerial employee or primarily an executive employee.

The term "executive capacity" means an assignment within an organization in which the employee primarily directs the management of the organization or a major component or function thereof; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B).

The term "managerial capacity" is defined as an assignment within an organization in which the employee primarily manages the organization or a department, subdivision, function, or component; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function; if the employee directly supervises other employees, has the authority to take personnel actions, or if no other employee is directly supervised, functions at a senior-level within the organization or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

We also will address both the Petitioner's description of the Beneficiary's intended duties as well as the Petitioner's staffing to determine whether the Petitioner has established this eligibility requirement. We note that when reviewing staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, we 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. Duties

When examining the executive or managerial capacity of a beneficiary, we will review a petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the petitioner must prove that the beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the petitioner's other employees. *See, e.g., Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d at 1533.

The Petitioner initially did not include a description of the Beneficiary's proposed duties, but simply noted on the Form I-140, that the Beneficiary's position "is at the top managerial position into [*sic*] the business." In response to the Director's RFE, the Petitioner provided a lengthy narrative of the Beneficiary's proposed position. In response to the Director's NOID, the Petitioner provided a different iteration of the proposed duties.

On appeal, the Petitioner acknowledges that the Beneficiary's U.S. position description provided in response to the Director's RFE "lacked any specificity to [its] company's lines of business or the [B]eneficiary's actual position" and requests that USCIS rely on the position description provided in response to the NOID. The Petitioner claims that the latter description reflects the Beneficiary's direction of his team of lower-level managers and key employees, who carry out the company's daily operations.[5]

The Petitioner's description of the Beneficiary's proposed duties as described in the NOID and repeated on appeal, is deficient on its face. The Petitioner describes various general areas of responsibility, but provides minimal information about the Beneficiary's specific tasks. The Petitioner stated, for instance, that the Beneficiary formulates strategy for the company, contributes to the overall strategy together with the parent company's management, ensures that the progress

[5] An inherent problem with using the NOID job description is that this description was written in 2016, three years subsequent to filing of the petition in 2013, when the company had both a much greater income and a smaller staff. The only job description relevant to the 2013 time period is the description submitted in the RFE response which the Petitioner asks us to disregard. The Petitioner also does not include evidence of the Beneficiary's job duties in the intervening years.

and results are developing in line with the parent company's plan, and works closely with the parent company to ensure that the overall plans of all the business operations run smoothly and efficiently. This portion of the description does not relate any of these duties specifically to the Petitioner's operation of an import/export business or a dry cleaning business except in the most general way. Similarly, the Petitioner does not tie the Beneficiary's duties of ensuring the formulation and approval of separate annual operational plans for safety, sales, production, finance, and human resources to its claimed business. Moreover, the Petitioner does not include any evidence of the business plans, policies, or annual operational plans prepared by the Beneficiary for implementation. Reciting the Beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. *See* 8 C.F.R. § 204.5(j)(5). This generic overview of the Beneficiary's duties does not describe his actual role within the organization.

Additionally, the Beneficiary's responsibility for budget controls, forecast planning, and financial reporting, is not sufficiently detailed to determine whether the duties will include managerial duties, executive duties, or will include the non-qualifying tasks necessary to operate the business. Similarly, developing and overseeing an efficient health, safety, and environmental protection process does not include specific tasks and does not specifically relate to the Petitioner. Further, the Beneficiary's responsibility for building a high-performance team and engaging in recruitment, staff training, and team building is not corroborated in the record. In fact, the Beneficiary in his statement on appeal refers to his interview with CBP and states: "I was not aware of the other details, such as how many employees it[6] had at the time or the phone number"; "I made careless errors with immigration by not being properly informed on the details of [the Petitioner] and its operations, specifically including the laundry"; and, "I made a mistake in hiring and allowing in [*sic*] [redacted] to handle the accounting."

The Beneficiary's acknowledgment on appeal that he did not know, and thus in reality was not responsible for budget controls and financial reporting, or for building a high-performance team undermines the Petitioner's description of his duties. Moreover, the Beneficiary states in his affidavit that he was "purchasing products from different suppliers and selling to companies in Venezuela" around the time of his interview in early 2013 and those are not managerial or executive duties, nor was this information included in the job descriptions. Even if a beneficiary exercises discretion over his employer's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, doing so does not 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" executive or managerial in nature. Sections 101(A)(44)(A) and (B) of the Act.

The descriptions provided are insufficient and uncorroborated and do not convey an understanding of what the Beneficiary's tasks included when the petition was filed. Specifics are clearly an

[6] The "it" is referring to the laundry and dry cleaning business.

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*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without additional detailed information on the Beneficiary's proposed position, the Petitioner has not established the Beneficiary's actual role within the U.S. company and has not established that he will perform in a managerial or in an executive capacity.

In the Beneficiary's affidavit on appeal, he claims that he "was not sure about the specific information regarding the laundry operations as [he] was involved in the executive decisions" and not the day-to-day operations. The Petitioner claims on appeal that the Beneficiary "is able to stay remotely connected with his team through daily or weekly phone calls, scheduled meetings, scheduled video conferences, internet based communications and e-mail communication with his subordinate key professionals." However, the record does not include any evidence of the Beneficiary's actual involvement in either of the Petitioner's two claimed business lines. Therefore, the record does not include probative evidence that the Beneficiary will be employed in either a managerial or an executive capacity.

B. Staffing

Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial 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.

As noted above, the Petitioner initially claimed to be a "General Line GroceryMerchant [*sic*] Wholesaler," located in Florida. In response to the Director's RFE, the Petitioner added that initially it was "entirely dedicated to the business of import and export" but that it expanded its business to include its April 2011 purchase of the assets of a dry cleaning business located in Florida.

As the Director correctly and carefully pointed out in his decision, the Petitioner's state and federal tax documentation included a number of financial and accounting errors. The errors included inconsistencies among the salaries reported quarterly and annually to the IRS and to the Florida Department of Revenue. Additionally, the Director found inconsistencies between the Petitioner's claimed number of employees as listed on the organizational charts submitted and the number of employees reported to the appropriate agencies.

On appeal, the Petitioner notes that upon receipt of the USCIS denial decision, it retained the services of a CPA to audit its financial statements and records and that the audit revealed serious financial and accounting deficiencies and errors committed by including failure to file the 2013 Forms W-2 and W-3, the 2015 Forms 941 for the first and fourth quarter, and the 2014 federal income tax return for the company. The Petitioner states that it no longer employs

and that it is considering pressing criminal and civil charges against her for tax fraud.[7] The Petitioner asserts that it is taking action to remedy its negligent accounting practices and to reconcile and properly file all necessary state and federal tax reports. The Petitioner provides amended reports and proof of mailing of the employer's quarterly reports for the 2013, 2014, and 2015 years, as well as its CPA's letter identifying the corrections made. The current record does not include evidence that the Petitioner's 2014 federal tax return has been filed.

We have reviewed the corrected filings to analyze the Petitioner's staffing beginning in 2013 and continuing through 2015, as well as the more recent 2016 filings. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). The record shows that the Petitioner employed between four and eight individuals from the time the petition was filed through adjudication. According to the organizational charts submitted in response to the NOID and on appeal, these individuals, except the vice-president hired after the date of filing, were employed at the Petitioner's dry cleaning establishment.[8]

We will look first at the Petitioner's staffing and structure at the time of filing. If the Petitioner did not establish that the Beneficiary was relieved from performing non-qualifying duties associated with the day-to-day operations of the company at the time of filing, it cannot establish eligibility for this classification. The Petitioner stated on the Form I-140 that it had nine employees in February 2013. The Petitioner's amended and filed state quarterly wage report for the first quarter of 2013 indicated that the Petitioner had only five employees. These five employees included the Beneficiary and individuals who were identified on the organizational chart submitted in response to the RFE as administrative manager [redacted] purchase manager [redacted] store manager, and a "washing section" employee in the dry cleaning store.

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. 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. 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. § 204.5(j)(2). The record does

[7] The initial organizational chart submitted depicted [redacted] in the position of administrative manager. The organizational chart submitted in response to the Director's NOID shows [redacted] in the position of "accounting," reporting to the vice president. The Petitioner does not indicate when [redacted] position changed.

[8] The Petitioner also stated in response to the NOID that it no longer was involved in the import/export business. The Petitioner now claims that the employee who made that statement erred, and explains that he was in charge of the dry cleaners only and had no firsthand knowledge of the ongoing import/export business.

[9] On appeal, the Petitioner provides evidence that it filed an Application for Registration of Fictitious Name, on July 2, 2013, to do business under the name [redacted] and not the name [redacted]

not include sufficient probative and consistent evidence to establish that the Beneficiary will perform as a personnel or as a function manager[10] for the Petitioner.

According to the Petitioner's filed 2013 first quarter employer's quarterly report, the Petitioner employed in addition to the Beneficiary: (1) an administrative manager whose position is later described as responsible for the financial management of the company and the administration of the day-to-day activities of the company; (2) a purchase manager position which is described as an "operative and supervisory" position, responsible "for coordinating the activities involved in purchasing materials and products to be sold, and exported, for the company"; (3) a store manager whose position is described as handling the day-to-day burdens and requirements of the dry cleaning business; and (4) an individual in the washing section of the dry cleaning business.

The record does not include evidence corroborating the Petitioner's claims that the administrative manager and the purchase manager supervised others when the petition was filed. According to the Petitioner's organizational chart and the relevant quarterly wage report, the dry cleaning establishment had only two employees in February 2013. The record shows that the dry cleaning business was open 65.5 hours per week. The same store, as of the date of the appeal, is claimed to employ four employees with an additional vacant position. Thus, it appears that the store was understaffed at the time of filing and did not require its manager to perform supervisory duties but rather required him to perform administrative and operational duties.

The record is insufficient to establish that any of the four positions subordinate to the Beneficiary were professional positions.[11] The record does not include consistent, credible evidence establishing that Beneficiary supervised subordinate managers, supervisors, or professionals as of February 2013, and thus does not demonstrate that he was employed as a personnel manager at the time of filing.

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[10] The Petitioner has not claimed that the Beneficiary qualifies as a function manager or articulated a specific function that the Beneficiary will manage. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G- Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

[11] When evaluating whether a beneficiary manages professional employees, we evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining "profession" to mean "any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation"). Section 101(a)(32) of the Act, 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." Therefore, we focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. The record here does not include sufficient evidence to establish that any of the positions subordinate to the Beneficiary require a bachelor's degree to perform the subordinate position.

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. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and they must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The Petitioner has not established that the Beneficiary's subordinates manage the organization, rather than perform the operational and administrative tasks necessary to run the business. The record does not establish that the Beneficiary directed the management of the organization or otherwise performed in an executive capacity when the petition was filed.

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

At the time of filing, the Petitioner had been established for almost four years and had invested in a dry cleaning business two years after it was incorporated. The company employed the Beneficiary as a general manager and four other employees. The record is insufficient to establish that the three individuals subordinate to the Beneficiary and identified as managers performed supervisory or managerial tasks and only one individual performed the actual day-to-day, non-managerial operations of the company. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the Beneficiary as a general manager, an administrative manager, a purchase manager, and a store manager. Regardless, the reasonable needs of the Petitioner serve only as a factor in evaluating the Beneficiary's proposed position. The Petitioner must still establish that the Beneficiary will be primarily employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act.

On appeal, the Petitioner requests that we consider the length of time between the filing of the petition and the Director's denial decision, as well as the Beneficiary's claims that the foreign company experienced financial and political difficulties which contributed to the Petitioner's limited growth. We note that these considerations do not obviate the requirement that the Petitioner establish that the Beneficiary actually performs managerial or executive duties for the Petitioner from the date of filing through adjudication. Moreover, the record does not include consistent representations of the Petitioner's organizational structure.

To demonstrate the Petitioner's inconsistent representations of its organizational structure just since its response to the NOID, we note that the Petitioner limits its employees to positions within the dry cleaning establishment and does not indicate that any of these individuals support the Petitioner's claimed import/export business on the NOID organizational chart. On appeal, the Petitioner submits a third revised organizational chart which includes both its dry cleaning business and claimed import/export department as departments directly subordinate to the vice-president's position. The dry cleaning business now includes four employees, which, as noted above, supports a finding that the business was understaffed at the time of filing. The organizational chart on appeal does not include any employees within the claimed import/export department.

Also, the quarterly reports subsequent to filing the petition show that the Petitioner employed individuals in the same positions as initially noted, as well as an additional three to four staff intermittently until the third quarter of 2014, when the Petitioner hired the Beneficiary's spouse as its vice-president. Subsequent to the third quarter of 2014, the Petitioner employed five to eight staff through the second quarter of 2016. Although the Petitioner inserted an additional position, a vice-president, between the Beneficiary's position and the dry cleaning manager and accounting position, inserting artificial tiers of subordinate employees into the organizational hierarchy is not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The Petitioner must establish that the Beneficiary's duties are primarily managerial or executive, and the record here does not support such a conclusion.

Even considering the fluctuations in employment and the corrected employee records, the duties described and the organizational charts submitted do not establish that the Petitioner ever employed sufficient staff to relieve the Beneficiary from performing first-line supervisory duties of non-managerial, non-supervisory, and non-professional employees. The record does not establish that the Beneficiary would be employed in either a managerial or executive capacity.

V. WILLFUL MISREPRESENTATION OF MATERIAL FACTS

Finally, we will address the Director's finding that the Petitioner and Beneficiary willfully misrepresented materials facts in an attempt to qualify the Beneficiary for an immigrant visa classification for which he is not eligible.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

On the Form I-140 filed in February 2013, the Petitioner stated that the Beneficiary will work at [redacted] in [redacted] Florida. Approximately two months later, the Beneficiary stated in his interview with a CBP officer, that the Petitioner closed the [redacted] office more than a year prior to the interview.[12] On appeal, the Beneficiary, in a June 2017 statement, states that he recalls telling the CBP officer that the physical office in [redacted] Florida, had been closed. The Petitioner submits invoices on appeal to demonstrate it has been and is operating two lines of business. The invoices dated in 2012 and January 2013 show the Petitioner was using the [redacted] Florida, office address; the invoices dated in April 2013 show the [redacted] Florida, (dry cleaner's) address; and three invoices dated in March, May, and August 2017, submitted on appeal, show the [redacted] Florida, address. As the Petitioner and the Beneficiary claim on appeal that the physical [redacted] Florida, office has been closed, we find that the invoices offered on appeal to establish that the Petitioner continues to operate an import/export business in 2017 are not genuine. The creation of documentation to support the Petitioner's claim that it operates two business lines misrepresents the nature of the Petitioner's business in order to establish that the Beneficiary is eligible for an immigration benefit under the multinational executive or manager visa classification.

In addition, the record contains the following information regarding the Petitioner's business:

- On the Form I-140, the Petitioner represented that it is a "General Line Grocery Merchant Wholesaler."
- In response to the Director's RFE, the Petitioner referenced its import/export business and included evidence that it had invested in a dry cleaning business. However, around this time, the Beneficiary was specifically asked by CBP, "[d]oes [the Petitioner] currently have any operation that exports produce and grocery items from America to Venezuela?," to which the Beneficiary replied "[n]o."[13]
- In response to the NOID, the Petitioner stated that shortly after the purchase of the dry cleaning business, the import/export line of business took a downturn and that its "import and export operations ceased to exist and the company's sole business operations became the dry cleaning business."
- In the Beneficiary's statement on appeal, he states that he "misspoke on the operation of [the Petitioner] as we did import and export some products however the volume was so limited (compared to our regular operations)." To clarify its statements made in response to the NOID, the Petitioner claims that the individual who signed the response, the dry cleaner manager, did not have knowledge of its import/export operations.

[12] On April 23, 2013, the Beneficiary provided a sworn statement to CBP regarding the Petitioner and the Beneficiary's role with the Petitioner. In response to the CBP Officer's question "How long have you owned the US business?" the Beneficiary stated "[a]bout four (4) years. Initially I opened an office in [redacted] but I closed this one and opened a laundry." In response to the immediate follow-up question, "[w]hen did you close this office?" the Beneficiary stated "I don't remember but it s [*sic*] been more than a year." The Director provided this information to the Petitioner in the NOID issued in October 2016. If the office had been closed for more than one year as of April 2013, it is unclear why the [redacted] Florida, address appears on the Petitioner's invoices dated in January 2013.

[13] The Director provided this information to the Petitioner in the NOID issued in October 2016.

Additionally, the Petitioner submits three invoices for the 2017 year referenced above to demonstrate that it continues to operate an import/export line of business. The Petitioner's representations regarding its business change each time the Petitioner provides information to the USCIS. These conflicting statements are misrepresentations that appear to have been made to bolster the Petitioner's claim that it is sufficiently complex to support a managerial or executive position.

The Director also informed the Petitioner that the Beneficiary, when asked by the CBP officer to provide more information about the dry cleaning business, the number of employees, phone number, and business location, stated that he just did not know anything about it.

On appeal, the Beneficiary explains his lack of knowledge regarding the laundry business as follows:

> I was not sure about the specific information regarding the laundry business under [the Petitioner] as I was involved in the executive decision. I made the decision to purchase the laundry business and the remodeling of the store as well as what equipment to buy. However, I was not aware of the other details, such as how many employees it had at the time or the phone number.

The Petitioner represents on appeal that the Beneficiary performed and performs duties in a managerial or executive capacity. A beneficiary's employment in a managerial or executive capacity inherently requires involvement and fundamental knowledge regarding the company. The Beneficiary, as an officer of the company with a work-authorized L-1A nonimmigrant visa, is expected to have knowledge of the Petitioner's basic business. His complete lack of knowledge of the dry cleaning business conflicts with the Petitioner's claims on appeal that the Beneficiary was and is actually involved in the business as a manager or executive and that the petition was approvable when filed. The Beneficiary's statement on appeal that he only made the decision to purchase the dry cleaning business and remodel the premises, and thus did not have any knowledge regarding his position, salary, or specific information regarding the dry cleaning business, conflicts with the Petitioner's claims in response to the RFE, the NOID, and on appeal that the Beneficiary's position is a manager or executive position with ongoing responsibility for overseeing its operations and thus he is eligible for an immigration benefit. Additionally, as a claimed official of the Petitioner, the Beneficiary would have knowledge of the company's location, operational status, and nature of the business.

Finally, as noted above, in addition to the numerous inconsistencies regarding the nature of the business, the Beneficiary's role within the business, and its staffing, the record also inexplicably contains three different versions of the same stock certificate, which raises questions as to whether the Petitioner has misrepresented its ownership in order to establish a qualifying relationship with the Beneficiary's foreign employer.

When attempting to resolve the numerous misrepresentations in this matter the Petitioner:

- Blames its former attorney who filed the Form I-140 on its behalf even though the Beneficiary acknowledges on appeal that he went to the attorney's office and met with a paralegal, thereby authorizing the firm to file the petition;[14]
- Denounces the actions of its former employee, [redacted] for her response to the RFE and her actions over the course of multiple years on its behalf, despite giving her authority to act on its behalf; and
- Faults another current employee, the dry cleaning manager, for his response to the NOID on the Petitioner's behalf, despite giving him authority to act on the Petitioner's behalf.

The Petitioner cannot shift responsibility for its changing statements and actions each time it is confronted with a misrepresentation. The Petitioner does not claim or provide evidence that it has filed any complaints against the former counsel or his firm.[15] Similarly, the Petitioner does not submit any evidence that it has filed any complaints, criminal or civil, against [redacted] Further, the Petitioner does not credibly explain how or why it gave its dry cleaner manager authority to act on its behalf, but then restricted his knowledge of the Petitioner's actual business. The Petitioner's assertion that the multiple inconsistencies in the record resulted from the negligence of a previous attorney or employees, or uninformed employees does not release it from responsibility for the misrepresentations noted above.

USCIS will deny a visa petition if a petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enters. Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner does not resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the facts stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Here the Petitioner's responses

[14] The Petitioner has not provided evidence of correspondence with the prior attorney or contracts or agreements between the Petitioner, Beneficiary, and the attorney, specifying their respective duties and obligations, or otherwise discussing the Form I-140 petition or any responses made on the Petitioner and Beneficiary's behalf.

[15] The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). *Lozada* sets forth certain threshold documentary requirements for asserting a claim of ineffective assistance: (1) a written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions; (2) evidence that the petitioner informed former counsel of the allegation of ineffective assistance and the former counsel was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim; (3) if the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the petitioner did not file a complaint. *Id.* at 639. Here, the Petitioner did not meet these minimum threshold documentary requirements to support a claim of ineffective assistance of counsel.

changed each time it was confronted with an inconsistency. Instead of providing truthful statements the Petitioner provided additional falsehoods in an attempt to "fix" a record full of misrepresentations.

Beyond the adjudication of the visa petition, a misrepresentation may lead USCIS to enter a finding that a petitioner or beneficiary sought to procure a visa or other documentation by willful misrepresentation of a material fact.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

To find a willful and material misrepresentation in visa petition proceedings, an immigration officer must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

The Petitioner misrepresented the location(s) of its business on the Form I-140. The Petitioner misrepresented its ownership by manufacturing stock certificates in order to establish a qualifying relationship with the Beneficiary's foreign employer. The Petitioner provided USCIS with questionable invoices in an effort to establish that the Petitioner continues to operate an import/export business in 2017. The Petitioner misrepresented the nature of its business by providing conflicting statements regarding its business operations each time it interacted with USCIS. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the Petitioner provided false information and testimony to government officials of USCIS regarding the nature of the Petitioner's business, its location, and the Beneficiary's employment with the Petitioner both when the Form I-140 was filed and in response to the NOID, and on appeal.

We also find that the Petitioner willfully made the misrepresentation. The Petitioner would have knowledge of the company's location, operational status, ownership, and nature of the business. The number of the Petitioner's inconsistent statements, many coming after confronted with a previous inconsistency, and the manufacturing of documents to fix the inconsistency establish that the Petitioner's conduct was willful.

Finally, the evidence is material to the Beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a

misrepresented fact is material if the misrepresentation cut off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

The Petitioner's misrepresentations cut off potential lines of inquiry regarding the Beneficiary's employment, his role in the business, and the continuation of the business. The Beneficiary's employment with the Petitioner and the nature of the employment are material to the Beneficiary's eligibility for this visa classification. Based on the information referenced above, it is reasonable to find that the Petitioner willfully misrepresented material facts regarding its business, its location, its ownership, and the Beneficiary's type of employment with the Petitioner in order to obtain an immigration benefit for which the Beneficiary was not eligible. The Petitioner was informed of the material misrepresentations in the NOID and denial decision and thus was provided an opportunity to rebut the misrepresentations made. The Petitioner provided conflicting responses each time it addressed a previous misrepresentation. We have reviewed the record and do not find the abdication of responsibility for filing the Form I-140, responding to the RFE, providing different evidence in response to the NOID, and again on appeal, sufficient to excuse the Petitioner from misrepresenting facts to USCIS. In light of the information we described above, we find that the Petitioner's misrepresentations were material to the Beneficiary's eligibility.

Accordingly, we will affirm the Director's finding that the Petitioner willfully misrepresented material facts. This finding of willful material misrepresentation shall be considered in any future proceedings filed by this Petitioner. The record, however, does not support a finding of willful misrepresentation against the Beneficiary. We will therefore withdraw the Director's finding that the Beneficiary willfully misrepresented material facts to qualify for an immigrant visa classification for which he is not eligible.

VI. CONCLUSION

The Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer and has not established the Beneficiary has been, and will be, employed in an executive or managerial capacity for the U.S. entity. The Petitioner willfully misrepresented material facts by providing false statements and documentation in order for the Beneficiary to obtain an immigration benefit.

ORDER: The appeal is dismissed.

Cite as *Matter of V-, Inc.*, ID# 695212 (AAO Dec. 7, 2017)