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U.S. Citizenship  
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[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 12 2005**  
SRC 03 101 53855

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to  
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Texas on February 26, 2002. It distributes and sells cosmetic and petroleum products. The petitioner seeks to employ the beneficiary as its sales and marketing director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On September 23, 2004, the director determined that the petitioner had not established: (1) that it had been doing business for one year prior to filing the petition on February 24, 2003; or (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also observed that the petitioner had not established its ability to pay the beneficiary the proffered annual wage of \$35,000, although the director acknowledged that she had not requested additional evidence on this issue. The director also questioned the petitioner's actual location and the corporate structure of the foreign entity. The director noted that the questionable evidence cast doubt on the evidence as a whole.

On appeal, counsel for the petitioner submits a brief, the petitioner's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, and resubmits evidence already in the record.

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 who 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 to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

As a preliminary comment, the AAO finds that the record and the petitioner adequately disclose the location of the petitioner's warehouse and office suite. The AAO notes that the pictures of the petitioner's office suite suggest the petitioner's office is in an apartment building. The AAO also recognizes that the directors of the foreign entity may have changed over time and accepts the corporate structure of the foreign entity's directors in this matter. As the record clearly demonstrates the petitioner and beneficiary's ineligibility for this visa classification when the petition was filed, the AAO finds it unnecessary to draw adverse conclusions regarding the petitioner's location and foreign corporate structure.

The first issue in this proceeding is whether the petitioner has established that it has been doing business for one year prior to filing the petition, as required by the regulations. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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." The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires that the petitioner provide evidence showing it has been doing business for one year when submitting the Form I-140 petition. The petition was filed February 24, 2003; thus, the petitioner must establish that it was doing business as of February 24, 2002.

The record contains: (1) the petitioner's Certificate of Incorporation dated February 26, 2002; (2) the petitioner's Application for Employer Identification Number acknowledging that the business started February 26, 2002; (3) the petitioner's bank statement for the period beginning March 8, 2002 through March 31, 2002 showing a beginning balance of \$0.00 and an ending balance of \$37,703.50; (4) the petitioner's warehouse lease dated April 1, 2002; (5) the foreign entity's July 15, 2002 resolution to send the beneficiary to the United States to "establish a subsidiary." and, (6) copies of ten of the petitioner's invoices dated June 12, 2002 through December 27, 2002. The petitioner also provided numerous invoices showing the foreign entity importing products from the United States. The invoices covered various time periods including a time period beginning in April 2001 and ending in March 2002.

The director listed the pertinent evidence submitted and properly concluded that the petitioner had not been doing business for one year when the petition was filed.

On appeal, counsel for the petitioner references the invoices showing the foreign entity's "millions of dollars worth of imports" from the United States from April 2001 through March 2002. Counsel seems to assert that the foreign entity's doing business should transfer to the petitioner because of the global nature of import and export transactions.

Counsel's response to the director's decision is not persuasive. First, the record clearly shows that the petitioner was not incorporated until February 26, 2002; thus was not established and could not have been doing business prior to that date. Second, the petitioner has only submitted evidence that it began marketing or selling products in June 2002, seven months prior to filing the petition. Counsel's reference to the foreign entity's importation of products from unrelated companies located in the United States does not establish that

the petitioner was conducting business. This visa classification requires that both entities engage in doing business, thus establishing the multinational character of the petitioner. Third, the record contains statements by both the petitioner and counsel that acknowledge that when the petition was filed the petitioner was just beginning its operations. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record in this matter does not establish that the petitioner conducted business for one year prior to filing the petition. The petitioner and thus the beneficiary are ineligible for this visa classification. The director's decision on this issue will be affirmed.

The second issue in this proceeding is whether the petitioner established that the beneficiary's proposed position would be managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

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.

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

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.

In a February 20, 2003 letter appended to the petition, the petitioner listed the beneficiary's key duties:

- Direct and coordinate activities of the parent and subsidiary corporations along with the President to obtain optimum efficiency and economy of operations and maximize profits; [sic]
- Plan and develop corporation policies and goals, and implement goals through subordinate administrative personnel.
- Coordinate activities of the Finance, Operations and Personnel departments to develop operational efficiency and economy.
- Direct and coordinate promotion of products to develop new markets, increase share of market, and obtain competitive position in the trade.
- Research market conditions in local, regional, or national area to determine potential sales of product or service: [sic]
- Gather data on competitors and analyze prices, sales, and methods of marketing and distribution.
- Collect data on customer preferences and buying habits.
- Analyze department budget requests of each corporation to identify areas in which reductions can be made, and allocate operating budget.
- Confer with the Systems Analysts, Accountants and Sales personnel and review activity, operating, and sales reports to determine changes in programs or operations required in each corporation.
- Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives.
- Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company.
- Direct preparation of directives to each corporation and store outlining policy, program, or operations changes to be implemented.
- Promote the group in trade associations and trade shows.

The petitioner stated on the Form I-140 petition that it currently employed two individuals.

On June 28, 2004, the director requested evidence of the business activities performed by the beneficiary, and a definitive statement describing the beneficiary's proposed duties. The director indicated the description should include the percentage of time spent on each duty, the number of subordinate managers, supervisors, or other

employees who would report directly to the beneficiary, a brief description of their job titles, duties, and educational level, or if the beneficiary would not supervise other employees, the essential function she would manage, the beneficiary's position within the organizational hierarchy, and who would provide the sales and services or produce the product of the business. The director further requested evidence of the staffing level in the United States, the position titles, duties, and educational level of all employees and the IRS Forms W-2, Wage and Tax Statement for all employees.

In a September 16, 2004 response, counsel for the petitioner indicated the beneficiary would negotiate international contracts, receive funds in the United States, and then coordinate the procurement and shipping of the purchased oils. Counsel also indicated that the beneficiary would oversee remotely located (India) labor pools as well as subcontractors, apparently located in the United States. Counsel claimed that the beneficiary as director of sales and marketing would manage that respective function of the petitioner's organization, would have multiple layers of personnel below her who would relieve her from performing non-qualifying duties, would exercise direction over the day-to-day activity of the lower level personnel, and would also direct the overall management of sales and marketing, exercise discretionary decision-making, set goals and policies and do all this with little supervision, thus also qualifying the position as an executive position. Counsel noted that the petitioner's new business focus relied on global/foreign-based personnel and that U.S. staffing levels were contingent upon approval of the beneficiary as director of sales and marketing.

Counsel referenced the petitioner's organizational chart that showed the beneficiary in the proposed position of marketing and sales director over a proposed position of business development manager as well as subcontractors. The chart also depicted the business development manager position over a number of foreign-based personnel including the beneficiary as marketing manager. The petitioner included descriptions of the duties of several of the foreign-based personnel.<sup>1</sup>

The petitioner also restated the beneficiary's duties as initially provided with minor changes and added percentages of time the beneficiary would spend on each listed duty as follows:

- From a marketing perspective, directs and coordinates activities of the parent and subsidiary corporations along with the President to obtain optimum efficiency and economy of operations and maximize profits. [10%]
- Plans and develops corporation policies and goals, and implement goals through subordinate administrative personnel-particularly the goal of expansion and globalization. [15%]
- Coordinates activities of the Finance, Operations and Personnel departments to develop operational efficiency and economy. [10%]
- Directs and coordinates promotion of products to develop new markets, increase share of market, and obtain competitive position in the trade. [10%]
- Researches market conditions in local, regional, or national area to determine potential sales of product or service. [10%]

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<sup>1</sup> The descriptions will not be recited here as the descriptions are not probative.

- Gathers data on competitors and analyze [sic] prices, sales, and methods of marketing and distribution. [10%]
- Collects data on customer preferences and buying habits. [5%]
- Analyzes department budget requests of each operation to identify areas in which reductions can be made, and allocate operating budget. [5%]
- Confers with the personnel (who serve the functions of Systems Analysts, Accountants and Sales) and reviews activity, operating, and sales reports to determine changes in programs or operations required in each corporation. [5%]
- Reviews and analyzes activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. [5%]
- Discusses with management and employees to review achievements and discuss required changes in goals or objectives of the company.[5%]
- Directs preparation of directives to each corporation and store outlining policy, program, or operations changes to be implemented. [5%]
- Promotes the group in trade associations and trade shows. [5%]

On September 23, 2004, the director denied the petition. The director determined that the description of the beneficiary's proposed duties for the petitioner suggested that the beneficiary would be performing the majority of routine sales activities and those activities not assigned to the president. The director also observed that the petitioner's organizational chart showed that the beneficiary would continue to perform the position of marketing manager for the foreign entity in her position as director of sales and marketing for the petitioner. The director further observed that the subcontractors subordinate to the beneficiary's position for the petitioner were suppliers of raw materials and were not sales employees.

On appeal, counsel for the petitioner asserts that the petitioner is "globally connected" and the beneficiary has 14 low-level employees located in India at her disposal. Counsel notes that as U.S. operations increase, U.S. based personnel will also increase. Counsel also claims that subcontractors will schedule and load petroleum products onto shipping vessels. Counsel contends that the director did not address the petitioner's claim that the beneficiary managed "the essential function of Directorship of Sales and Marketing" for the petitioner. Counsel also asserts that the director made legal error when focusing on the petitioner's staffing levels and that even with an absence of subordinate employees, the beneficiary could still be considered an executive. Counsel cites an unpublished decision as well as district court decisions and a December 20, 2002 memorandum<sup>2</sup> relating to L-1A intracompany transferee petitions in support of his contention that staffing levels should be considered only if also taking into consideration the reasonable needs and stage of development of the petitioner. Counsel concludes by acknowledging that the record clearly shows that when the petition was filed, the petitioner was just commencing operations, relied on offshore labor, and required few U.S. based employees.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

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<sup>2</sup> Counsel indicates that the December 20, 2002 memorandum was authored by the Associate Commissioner, Service Center Operations, but does not further identify the memorandum and does not provide a copy of the memorandum.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[f]rom a marketing perspective, direct[ing] and coordinate[ing] activities of the parent and subsidiary corporations along with the President," and "[p]lan[ing] and develop[ing] corporation policies and goals, and implement[ing] goals through subordinate administrative personnel," and "[c]oordinate[ing] activities of the Finance, Operations and Personnel departments," and "[d]irect[ing] and coordinate[ing] promotion of products to develop new markets. The petitioner does not, however, define the goals, policies, or clarify who actually will be selling or marketing the petitioner's product. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, even though the petitioner claims that the beneficiary directs and coordinates activities and plans and develops goals, implemented by subordinate administrative staff, it does not establish that anyone on its staff actually performs the sales, marketing, or promotion functions. In fact, portions of the remaining description suggests that the beneficiary is the individual who "[r]esearches market conditions in local, regional, or national area[s]," and "[g]athers data on competitors and analyze [sic] prices, sales, and methods of marketing and distribution," and "[c]ollects data on customer preferences and buying habits," and "[p]romotes the group in trade associations and trade shows." Thus, either the beneficiary herself is performing these functions or she does not actually manage the sales and marketing functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the sales, marketing, or promotion function, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's reliance on overseas personnel to conduct the petitioner's business is not sufficiently substantiated in the record. First, the record does not contain evidence that the petitioner or the foreign entity actually employ the "fourteen lower-level employees." Second, the record does not describe the duties of the beneficiary or the lower-level employees sufficiently to establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Third, neither the petitioner nor the record suggest that the foreign-located employees relieve the beneficiary from promoting, marketing, and selling the petitioner's services or product in the United States. Finally, the petitioner does not explain the necessity of the beneficiary's permanent position in the United States if she will be, at least initially, primarily a supervisor of the foreign-based employees.

The AAO observes that the beneficiary was sent to the United States to explore business opportunities and to expand the business and that it plans to hire additional U.S. based personnel in the future. However, as noted

above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. The petitioner fails to provide evidence that the petitioner was sufficiently established when the petition was filed to support an executive or managerial position. The petitioner did not provide evidence that it employed the two personnel claimed and did not explain how U.S. subcontractors who supply raw materials to the foreign entity would relieve the beneficiary from negotiating contracts and performing sales and marketing duties.

The AAO acknowledges that the director did not specifically address the petitioner's claim that the beneficiary would manage the sales and marketing function, an essential function of the petitioner. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages, rather than performs the petitioner's sales and marketing function.

Counsel correctly observes that 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS 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 size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Again, 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. at 165. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act,

8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel's assertion that the beneficiary should also be considered an executive is not persuasive. Counsel recites the definition of executive capacity and concludes that the beneficiary's position satisfies the criteria detailed in the definition. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel's reference to an unpublished decision and to district court decisions relating to L-1A intracompany transferees is not probative. First, counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished matter. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Second, the district court decisions cited do not arise in this district. Further, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Finally the district court decisions concern nonimmigrant L-1A intracompany transferee petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). However, even though the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

The petitioner in this matter has not established that the beneficiary's proposed position would be primarily managerial or executive. The director's decision on this issue will be affirmed.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered annual wage of \$35,000. Although the director did not base her decision on this issue, the director noted that the petitioner had not provided annual reports, audits, or tax forms to substantiate its ability to pay the proffered wage.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

*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. [Emphasis added.]

On appeal, counsel for the petitioner submits the petitioner's 2002 IRS Form 1120, showing net income of negative \$3,629 and negative net assets when considering the petitioner's liability of its loan from shareholders. Counsel also asserts that the petitioner's net current assets exceed the proffered wage and that the foreign entity is sufficiently strong financially to pay the proffered wage.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner has not provided evidence that it, not the foreign entity, has employed the beneficiary.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on February 24, 2003, the most pertinent tax return is for calendar year 2003. Although the petitioner filed this appeal on October 21, 2004, the petitioner did not provide the most current and pertinent tax form. 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. at 165. The AAO observes that the petitioner's IRS Form 1120 for calendar year 2002 presents a net taxable income of negative \$3,629 and that the petitioner could not pay a proffered wage of \$35,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO reviews the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. In this matter the petitioner's 2002 IRS Form 1120, when considering the petitioner's liabilities, does not show that the petitioner had sufficient net current assets to pay the proffered wage in that year.

Counsel's reference to the financial strength of the foreign entity and its ability to pay the beneficiary the proffered wage is not persuasive. Counsel submits bank letters and statements to substantiate that the foreign entity is financially strong enough to pay the \$35,000 year wage obligation. However, the financial ability of the foreign entity is not the concern in this issue rather the viability of the petitioner, including its ability to pay the proffered wage, is the necessary component to maintain the petitioner's multinational character. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

A second issue, beyond the decision of the director, is the petitioner's claimed qualifying relationship with the foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint

venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In this matter, the petitioner claims that the foreign entity owns 510 shares or 51 percent of its issued stock. The petitioner provides stock certificate number 2 to substantiate this claim. However, the petitioner does not provide stock certificate number 1 and does not provide evidence that the foreign entity paid for its percentage of the petitioner's stock. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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. Stock certificates and stock ledgers are easily manipulated, often times requiring the scrutiny of the actual capitalization of the petitioner and any other documentation that would support a petitioner's claim regarding its status. 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. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The petitioner has not provided sufficient evidence that it has a qualifying relationship with the beneficiary's foreign employer.

Finally, a third issue not addressed by the director is the beneficiary's managerial or executive position with the foreign entity. The petitioner in this matter provided the same description of the beneficiary's duties for the foreign entity as provided for the petitioner. As observed above, this description is not sufficient to establish that the beneficiary performed primarily executive or managerial duties, including managing an essential function. Although the petitioner listed the personnel subordinate to the beneficiary's foreign position, the record does not contain sufficient evidence of their actual duties or substantive evidence of their employment. Again, 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. at 165.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For these additional reasons, the petition will not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.