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U.S. Citizenship
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Services

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Office: NEBRASKA SERVICE CENTER

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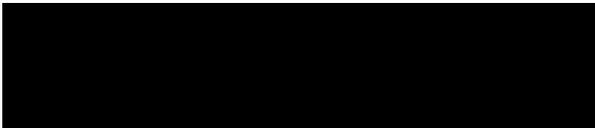
IN RE:

Petitioner:
Beneficiary:



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:



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, Nebraska Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Illinois that claims to be operating as an import and export company. The petitioner seeks to employ the beneficiary as its president-chief executive officer.¹

The director denied the petition concluding that the petitioner had not demonstrated that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) the petitioning entity had been doing business in the United States for at least one year prior to the filing of the instant petition.

On appeal, counsel claims that when determining the beneficiary's employment capacity in the United States, Citizenship and Immigration Services (CIS) failed to consider the petitioner's position as a "start-up company." Counsel contends that the petitioner submitted "sufficient documentation" to establish that the beneficiary's employment would be in a primarily managerial and executive capacity, as well as the petitioner's "regular [and] systematic" business operations in the United States.

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 or 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

¹ The AAO notes that the petitioner certified under the penalty of perjury the information provided on Form I-140, yet failed to identify a previous immigrant petition, LIN-00-058-52488, filed on behalf of the instant beneficiary, which was denied on June 28, 2000.

classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The AAO will first address the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

Counsel filed the instant petition on August 20, 2003, noting that the beneficiary would be employed as the petitioner's president-chief executive officer. On Form I-140, counsel referenced an attached addendum

describing the beneficiary's proposed position, yet it does not appear that a supplement was submitted for the record.²

With regard to the beneficiary's employment as the company's president-chief executive officer, the record contains a letter from the petitioner, dated October 19, 1998, filed in support of an L-1A nonimmigrant visa for the benefit of the present beneficiary, in which the proposed position is described. The petitioner stated:

[The beneficiary], vested with all the power by [the foreign entity's] board of directors, will function at a senior level with [the petitioning entity] being its President and Chief Executive Officer. He will direct and manage [the petitioning entity's] overall business operation with an eye towards [the petitioner's] optimum efficiency, economy of operations and maximization of profits. He will exercise full discretionary authority on corporate policies and daily operations of the corporation. He will develop corporate policies for business operations to achieve [the petitioner's] developmental goals. If necessary, he will revise long and short-term company strategies upon review of corporate activity reports, financial statements and economic forecasts to comply with changing economic situations. Moreover, [the beneficiary] will plan and direct marketing and promotional activities to develop new markets nationwide using the internet, sales aids, advertising in commercial journals, promotional programs, trade shows and personal networking. He will confer with customers and representatives of associated industries to evaluate, promote and expand existing sales, [and] review the operations of competitors. Finally, he will manage the investigation and determine the eligibility of prospective buyers, [and] negotiate and execute sales contracts with buyers. He will revise long and short term business plans upon review of company activity reports, financial statements and economic forecasts.

The petitioner submitted an employment agreement, dated September 10, 1999, between the petitioning entity and [REDACTED] "addressing [REDACTED] services as a salesperson for the petitioner from September 16, 1999 through September 15, 2000.

The director issued a request for evidence on October 29, 2003 requesting the following documentation pertaining to the beneficiary's employment capacity: (1) the number of workers employed by the petitioner; (2) a written statement from an authorized official of the petitioning entity describing the intended employment of the beneficiary as a manager or executive, including the dates of employment, the job titles of all employees supervised by the beneficiary and the title and level of authority of the beneficiary's supervisor; (3) a detailed description of the routine, daily tasks performed by the beneficiary and the percentage of weekly hours the beneficiary would devote to each task; (4) a description of how the beneficiary would plan, organize, direct and control the petitioner's operations through other individuals either employed by the petitioner or utilized as contractors; (5) an organizational chart identifying the positions and job titles of the beneficiary and all employees; (6) detailed job descriptions of the beneficiary's subordinates, including their specific job duties and level of education; and (7) a statement identifying which employees handle the daily, routine tasks of the petitioning entity, including processing and filling orders and monitoring inventory.

² The AAO notes that it is unclear from the record which, if any, documents were submitted with the Form I-140 petition. Reference will be made to those documents that appear to have been submitted with the filing of the petition and those subsequently submitted in response to the director's request for evidence.

The petitioner responded on January 21, 2004 and submitted a list of exhibits addressing the requests made by the director. With regard to the beneficiary's proposed employment, the petitioner provided the beneficiary's 1998 employment offer from the foreign entity, which outlined the following job description:

[The beneficiary] will receive only general guidance from our main office in Shanghai, China and will report directly to the board of directors of [the foreign entity]. [The beneficiary] will direct and manage [the petitioner's] overall business operations and maximum [sic] of profits. He will exercise full discretionary authority on corporate policies and daily operations of the corporation. He will develop corporate policies for business operations to achieve developmental goals.

He is authorized to revise long and short-term company strategies upon review of corporate activity reports, financial statements and economic forecasts to comply with changing market trends. Moreover, [the beneficiary] will plan and direct marketing and promotional activities to develop new markets nationwide using the internet, sales aids, advertising in commercial journals, promotional programs, trade shows and personal networking. He will confer with customers and representatives of associated industries to evaluate, promote and expand existing sales, review the operations of competitors.

Finally, he will manage the investigation and determine the eligibility of prospective buyers, negotiate and execute sales and requirement contracts with buyers. [The beneficiary] is authorized to hire professional personnel(s) [sic] and/or independent contractor(s). Personnel training, supervision, promotion, salary and benefits are all delegated to [the beneficiary].

As evidence of its staffing levels, the petitioner submitted an organizational chart that identified the beneficiary as the supervisor of the corporation's business department, which is comprised of three employees, as well as the supervisor of the company's "overseas program" and a contracted financial controller. The petitioner again submitted the contract to employ [redacted] as its salesperson. The agreement, however, was dated October 15, 2003 and identified the employee's period of service from November 1, 2003 through October 31, 2004. The AAO further notes that the petitioner did not identify [redacted] as an employee on its organizational chart. The petitioner submitted Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, and Form W-4, Employee's Withholding Allowance Certificate for the year 2000 for its "shipment" employee and a second employee, [redacted].³

In a decision dated March 25, 2004, the director concluded that the petitioner had not established the employment of the beneficiary in a primarily managerial or executive capacity. The director stated that the description of the beneficiary's proposed position demonstrated that the beneficiary would be "the primary operator of the U.S. organization," performing many of the day-to-day functions of the organization. The director noted that the petitioner did not employ a staff sufficient to support the beneficiary in a primarily qualifying capacity, as the petitioner's three employees, whose positions were not described by the petitioner, worked part-time. The director instructed that absent a description of the job duties performed by the lower-level employees, the beneficiary's employment as a manager or executive could not be determined. The director further noted that the petitioner did not describe its "Overseas Program," which was identified on its

³ The petitioner has not addressed the employment of an individual named "[redacted]" It is unclear whether this was a typographical error of the name [redacted]

organizational chart, nor did it explain the beneficiary's responsibilities with regard to the program. Consequently, the director denied the petition.

Counsel filed an appeal on April 23, 2004. In an attached statement, counsel challenges the director's denial of the petition, claiming that the director failed to consider the petitioner's position as a start-up company. Counsel notes that the petitioner submitted with the instant petition the same documents as those provided with its previously approved L-1A nonimmigrant petition. While counsel claims on Form I-290B that an appellate brief and evidence would be submitted within thirty days of the appeal, as of this date, the AAO has received nothing further.⁴ As a result, the record will be considered complete.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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).

Rather than providing a specific description of the beneficiary's job duties, as required in the regulation at 8 C.F.R. § 204.5(j)(5), the petitioner generally paraphrased the statutory definitions of managerial capacity and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). Specifically, the petitioner depicted the beneficiary as "function[ing] at a senior level" within the petitioning entity, "managing the petitioner's business operations, "exercis[ing] full discretionary authority on corporate policies, receiving "only general guidance" from the overseas office, and reporting directly to the foreign company's board of directors. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Additionally, the petitioner's general descriptions of the beneficiary's duties fail to identify the specific, day-to-day tasks to be performed by the beneficiary. For example, the petitioner stated that the beneficiary would direct "overall business operations," "develop corporate policies for business operations to achieve developmental goals," revise long and short-term strategies, and direct marketing and promotional activities. The petitioner, however, did not explain the daily managerial or executive tasks associated with these responsibilities, or identify the specific goals and strategies of the company to be achieved by the beneficiary in his managerial or executive position. 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. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, the petitioner's job description indicates that the beneficiary would be responsible for performing non-qualifying functions of the business. Whether the beneficiary is a managerial or executive employee

⁴ On September 27, 2005, the AAO sent a request to counsel at the facsimile number provided on Forms I-140 and G-28 providing counsel an additional opportunity to submit a brief on appeal. A recording indicated that counsel's facsimile number had been disconnected or changed. The AAO subsequently attempted to contact counsel by telephone, but the number provided was incorrect.

turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This information is relevant as the petitioner represented that the beneficiary would perform such non-qualifying tasks as personally meeting with customers and corporate representatives to maintain and promote the petitioner's sales, negotiating and executing sales contracts, and monitoring the petitioner's competitors. Based on the petitioner's representations, the beneficiary would devote a portion of his time to personally performing the company's sales. 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 Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner has not accounted for a subordinate staff that would allow the beneficiary to primarily "direct" and "manage" the operations of the organization, as claimed by the petitioner, rather than performing its non-qualifying operations. 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The petitioner represented its staff at the time of filing the petition as including the beneficiary and five workers, each of whom was responsible for shipment, contract, sales, engineering, and communications. The petitioner also submitted an employment contract for a salesperson hired after the filing of the petition. The AAO questions the petitioner's true staffing levels, as the petitioner did not offer any documentary evidence in the form of state quarterly tax returns, employee records, pay slips, or Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, confirming the workers employed at the time the petition was filed.⁵ More importantly, the petitioner submitted an altered employment contract, which reflects a change in employment dates that would correspond to the date of filing. While the petitioner represents that the beneficiary would manage and direct the petitioning entity, the petitioner has not accounted for a subordinate staff that would actually perform the lower-level functions of the company. Contrary to counsel's claim on appeal, the petitioner's stage of development as a "start-up company" is irrelevant, as the petitioner has not demonstrated the essential requirement that the beneficiary would be relieved from performing the non-managerial and non-executive tasks of the organization. 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. *Id.* at 604.

Counsel notes on appeal that CIS previously approved a nonimmigrant L-1A petition filed on behalf of the beneficiary based on the same job description as the job duties provided herein.⁶ It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted,

⁵ The AAO recognizes that the petitioner submitted two Forms W-2 for two workers employed during the year 2000, three years prior to the filing of the petition.

⁶ CIS records indicate that the petitioner previously filed three L-1A nonimmigrant petitions requesting employment of the beneficiary, of which two were approved. The approval of one of the visa petitions was subsequently revoked in September 1999.

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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the petitioner had been doing business in the United States for at least one year prior to the filing of the immigrant petition.

The regulation at 8 C.F.R. § 204.5(j)(2) defines the phrase "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other legal entity and does not include the mere presence of an agent or office.

As evidence of its business operations in the United States, the petitioner submitted the following documents with the immigrant petition: (1) articles of incorporation and by-laws; (2) a September 29, 1998 service agreement with "HQ Overbrook" for telephone answering services, the use of a business address, facsimile and telephone numbers, and mail receipt and handling; (3) a month-to-month service and office space agreement with "HQ Overbrook" dated September 22, 1999; (4) a business card identifying the petitioner's agent with "HQ Overbrook"; (5) a "financial recap" bank statement for the period of September 23, 1998 through September 30, 1998 evidencing a zero checking account balance; (6) copies of two envelopes addressed to the petitioning entity; (7) the petitioner's letterhead; (8) an undated agreement to provide advisory services to Kaiser Permanente; and (9) several agreements of sale and purchase dated between January through August 1999.

In his October 29, 2003 request for evidence, the director asked that the petitioner submit evidence of its "regular, systematic, and continuous" business operations in the United States, such as invoices, purchase agreements, rental receipts, tax returns, contracts, utility receipts, or vendor receipts. The director requested a copy of the petitioner's signed lease or rental agreement for all office and warehouse space utilized by the petitioner, as well as photographs of the petitioner's interior and exterior office space. The director asked that the petitioner describe how its identified buildings and warehouses are utilized.

In response, the petitioner submitted: (1) photographs of its office space; (2) a rental agreement dated March 1, 2003; (3) a March 2000 agreement for project development with "Shanghai United Industrial Trading Co., Ltd."; and (4) several commercial invoices and agreements of sale.

In his March 25, 2004 decision, the director determined that the petitioner had not been doing business in the United States for at least one year prior to filing the petition. The director noted that the petitioner's office lease identifies space located in the State of Illinois, while the beneficiary's residential lease is for property in the State of Oregon. The director concluded that the petitioner's leased premises is merely a mailing address and not used to conduct business in the United States. The director also addressed "apparent alterations" in

the invoices submitted in response to the director's request for evidence. After comparing them with the statements submitted with the immigrant petition, the director determined that these invoices and contracts had been altered to reflect a more recent date. The director concluded that the petitioner had not demonstrated its regular, systematic and continuous provision of services in the United States. Consequently, the director denied the petition.

On appeal, counsel claims that the petitioner demonstrated through "sufficient documentation" that it has been doing business in the United States. Counsel addresses the "reliability" of the submitted invoices, stating the second contracts are "renewal[s] of the first one due to the postponement of the project," as a result of changes in trade between China and the United States. Counsel also explains that, with regard to the petitioner's office lease, the petitioner was forced to relocate its office because its agent, "HQ Overlook," went bankrupt. Again, although counsel indicated on Form I-290B that he would provide an appellate brief and evidence, none has been submitted.

Upon review, the petitioner has not demonstrated that it has been doing business for at least one year prior to the filing of the immigrant petition. While the record contains sales invoices and agreements from 1998, the AAO notes that the dates of at least eleven have been altered to reflect transactions in the year 2003.⁷ If, as counsel suggests, these are "renewal[s]" of the previous contracts, it would seem that the contracts would be renewed from the time of expiration, rather than depicting what appears to be an arbitrary date. Additionally, it is reasonable to suspect that a "renewed" contract, executed four years after the previous contract, would account for a possible increase in product prices. Despite counsel's claim on appeal, these invoices may not be considered "reliable." The AAO notes that pursuant to section 274C of the Act, 8 U.S.C. § 1324c, it is unlawful for any person or entity to forge, alter, or falsely make any document in order to satisfy a requirement of the Act or obtain a benefit under the Act.

Additionally, as an import and export company, it is reasonable to expect the petitioner to produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm. The petitioner did not provide documentary evidence to support its operations as an import and export company.

⁷ The dates on the sales invoices and agreements submitted in response to the director's request for evidence are printed in a different font and smaller size than the rest of the document. In comparison with the original invoices and agreements submitted with Form I-140, the information, including contract numbers, products purchased and sales prices, are the same. It appears that all dates and references to the dates, such as the number of days from the date of shipping, have been changed.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine 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). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

The petitioner has not provided reliable documentation to substantiate its claim that it had been doing business in the United States for at least one year prior to filing the immigrant petition. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner noted in its October 19, 1998 letter that the beneficiary was employed as the executive vice general manager of the overseas company and provided a description of the beneficiary's job responsibilities. The director subsequently requested a detailed description of the routine and daily tasks performed by the beneficiary while employed overseas, the percentage of time spent on each task, as well as an outline of the lower-level employees supervised by the beneficiary and the job duties performed by each. The petitioner failed to submit a description of the beneficiary's specific managerial or executive job duties. In addition, although the petitioner is identified on the foreign entity's organizational chart as the manager of three departments, the chart does not specifically identify the positions of the lower-level employees or describe the tasks performed by each. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)). Absent additional evidence specifically describing the beneficiary's position abroad as a manager or an executive, the AAO cannot conclude that the beneficiary occupied a primarily managerial or executive position in the overseas company. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities. The petitioner indicated in its October 19, 1998 letter that it is a wholly owned subsidiary of the foreign organization. As evidence of the parent-subsidary relationship, the petitioner submitted a stock certificate identifying the foreign organization as the owner of 10,000 shares of stock, its stock transfer ledger, and by-laws. The petitioner also provided a bank transfer statement, which is purportedly evidence of the foreign entity's purchase of the petitioner's stock. There is no evidence, however, that the foreign entity actually transferred the monies, as the bank transfer statement identifies the beneficiary as the originator of the funds and lists an address that appears to be different from the address of the foreign entity. In addition, the petitioner did not indicate its purported foreign ownership on Schedule K of its 2002 federal income tax return, nor did the petitioner explain the inconsistent reference to its \$1,000 of common stock rather than the \$10,000 purchase price. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As the petitioner has not resolved the inconsistencies, the AAO

cannot conclude that a qualifying relationship exists between the foreign and United States companies. The petition will be denied for this additional reason.

Also, although not addressed by the director, the record does not establish that the petitioner has the ability to pay the beneficiary's proffered annual salary of \$31,600. In 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, such as pay statements or IRS Form W-2, 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 did not provide documentary evidence that it had previously employed the beneficiary.

As an alternate means of determining the petitioner's ability to pay, the AAO will 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); *Ubada 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.

The petitioner has not provided its tax return for the year 2003, the appropriate tax return to consider as the immigrant petition was filed on August 20, 2003. The AAO therefore cannot determine whether the petitioner had a net taxable income sufficient to pay the beneficiary's salary. Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is obligated to demonstrate through annual reports, federal tax returns or audited statements that it has the ability to pay the beneficiary's proffered wage at the time of filing the petition. The petitioner has not satisfied this essential requirement. Accordingly, the petition will be denied.

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).

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.