

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B4

PUBLIC COPY

[REDACTED]

FILE: [REDACTED]
SRC 05 025 51362

Office: TEXAS SERVICE CENTER

Date:

JAN 24 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

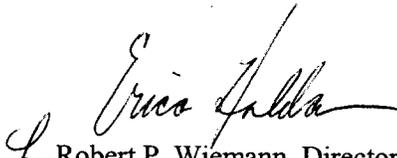
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 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 in February 2002. It is engaged in the import, export, and wholesale of Indian food items and gold and diamond jewelry. It seeks to employ the beneficiary as its president. 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.

The director denied the petition on July 29, 2005, determining that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner; (2) that a qualifying relationship existed between the United States entity and the beneficiary's foreign employer; or, (3) that the petitioner had the ability to pay the beneficiary the proffered annual wage of \$26,000.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) based its decision on erroneous claims. Counsel submits a brief in support of the appeal.

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).

The first issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 an October 28, 2004 letter appended to the petition, the petitioner stated that the beneficiary performed the following "executive functions:"

- Establishes and approve policies and objectives of the parent and subsidiary operations in consultation with the parent company and management.
- Approves company budget and investment projects.
- Appoints the other members of the managing team and other officers.
- Approves public relation policies.
- Approves hiring of professional services.
- Confers with the management team and the company officials to plan business objectives, to develop company policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives.
- Reviews activity reports and financial statements of operations to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions.
- Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of both the companies.
- Plans and develops industrial, labor, and public relations policies designed to improve image of the company and relations with customers, employees, and public.
- Evaluates performance of executives for compliance with established policies and objectives of the company and contributions in attaining objectives.

The petitioner also provided an organizational chart depicting [REDACTED] as the president over three divisions comprising (1) foreign based personnel; (2) [REDACTED] finance; and, [REDACTED] administration. The organizational chart did not show any positions subordinate to the finance and administrative positions. The organizational chart listed [REDACTED] as the partner/owner immediately below the foreign-based personnel division and included 15 positions subordinate to the partner/owner's position. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated it has two employees.

On April 25, 2005, the director requested further evidence, including: (1) evidence that the beneficiary did not primarily perform the tasks necessary to produce the petitioner's products or services; (2) evidence of the beneficiary's high-level responsibilities and the percentage of time performing those tasks; (3) how the beneficiary would direct, control, and oversee the petitioner or a major component or function of the petitioner, would function at a senior level within the organization, and would supervise supervisory,

¹ The petitioner refers to the beneficiary on the Form I-140 as [REDACTED] and in other places as [REDACTED]. The petitioner identifies the finance manager as [REDACTED]. The record suggests that these are two different individuals.

managerial or professional employees; (4) if the beneficiary did not supervise supervisory, managerial, or professional employees, the beneficiary's work in an executive function; and, (5) an organizational chart showing the petitioner's employees, a description of the job duties, responsibilities and education of each of the employees, a list identifying all part-time and full-time employees, and documentary evidence to prove the employment of the listed employees.

In a July 25, 2005 response, counsel for the petitioner indicated that the beneficiary "focuses on business networking, public relations, and finding proper clients for the imported jewelry and other goods." Counsel also indicated that the beneficiary continued to set policy and oversee the foreign sourced manufacturing of gold and diamond jewelry. Counsel submitted a revised organizational chart that adds a customs broker subordinate to the U.S. positions of finance and administration. The petitioner's list of personnel begins with the heading "Foreign Based Personnel" and includes all the positions listed on the organizational chart including the positions of finance and administration. The petitioner provided the same position description for the beneficiary but added an allocation of time to each of the beneficiary's responsibilities.

Counsel claimed that the organizational chart and statement highlights the beneficiary's role as president over people and functions. Counsel indicated that the "organization has numerous levels of employees below the Beneficiary who will carry out the day-to-day low-level operations of the organization with respect to manufacturing, marketing, consolidation of shipments, export, and U.S. distribution." Counsel noted that the beneficiary's immediate subordinates are professionals with years of experience and degrees and that a shipping broker is used to clear goods through customs for delivery to the petitioner's U.S. clients. Counsel concluded by indicating that the beneficiary qualifies as a manager because he is "managing a function of the organization, controlling the work of other supervisors or professionals, authorized to hire and fire subordinates, and exercising direction over the day-to-day operations of his function."

The record also contains: (1) the petitioner's 2004 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showing salaries and wages for the year as \$750; (2) two 2004 IRS Forms W-2, Wage and Tax Statement, issued [REDACTED] the individual in the finance position,² for \$375 [REDACTED] the individual in the administrative position, for \$375; and, (3) the petitioner's Texas-C-3, (Employer's Quarterly Report) Worksheet showing the employment of [REDACTED] in the third quarter of 2004.

The director denied the petition on July 29, 2005, determining that the petitioner had not substantiated: that it employed other managers or subordinate employees and had not provided evidence in the form of a contract or agreement to substantiate that it utilized the services of an outside customs broker; that the beneficiary supervised other employees who would take care of the day-to-day tasks so that the beneficiary could concentrate on managerial duties; or that the petitioner's reasonable needs required three managers. The director concluded that the beneficiary would contribute significantly to the operational duties of the company.

² The organizational chart indicates that the individual in the finance position spells his name [REDACTED]. The information provided, thus is confusing regarding the actual identify of the individual in the finance position and who is the recipient of the petitioner's IRS Form W-2.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) erred when not considering the foreign-based employees who conducted manufacturing and when not considering the law regarding "functional management." Counsel contends that the director did not consider the petitioner's reasonable needs in light of the petitioner's overall purpose and stage of development. Counsel also contends that the director did not consider the concept of functional management and that the "presidency function" required management.

Counsel asserts the director committed legal error: when focusing on the beneficiary's number of subordinate employees or their part-time status; when determining the beneficiary's managerial or executive capacity merely on the basis of the number of subordinate employees and their job titles; when not considering that a sole employee may qualify as an executive if the employee's primary function is to plan, organize, direct, and control the organization's major functions through other people. Counsel cites an unpublished decision as well as a district court decision and precedent decisions to support his assertions on the issue of the beneficiary's managerial or executive capacity for the petitioner.

Counsel's assertions and references to other decisions are not persuasive. Counsel's citation to unpublished matters carries little probative value. When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties and those of his claimed subordinates elevate the beneficiary's position to a primarily managerial or executive position. Further, counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

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). Counsel seems to suggest that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. Counsel suggests as well that the beneficiary may be a "function manager." However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In this matter the petitioner has not established that the beneficiary will perform primarily managerial or primarily executive functions.

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: "[e]stablish[ing] and approv[ing] policies and objectives of the parent and subsidiary operations in consultation with the parent company and management," approving company budget and investment projects, public relations, and hiring professional services, "[c]onfer[ing] with the management team and the company officials to plan business objectives, to develop company policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives,"

and "[e]valuat[ing] performance of executives for compliance with established policies and objectives of the company and contributions in attaining objectives." The petitioner's description of the beneficiary's duties also included general duties such as: "[p]lans and develops industrial, labor, and public relations policies designed to improve image of the company and relations with customers, employees, and public," "[d]irects and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity of both the companies," and "[r]eviews activity reports and financial statements of operations to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions."

The petitioner does not, however, define the goals and policies established and approved by the beneficiary, does not provide documentary evidence of the public relations policies, and does not provide evidence that the petitioner employs executives, a "management team," or other personnel. 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)). 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. *Id.*

Counsel's indication that the foreign entity has levels of employees who carry out the day-to-day operations is not evidence of the beneficiary's managerial or executive capacity for the petitioner. The petitioner provides no evidence that it employs foreign employees or otherwise explains the necessity of the beneficiary to locate in the United States to carry out the supervision of a separate entity's foreign employees. Further, the record does not contain any documentary evidence supporting counsel's claim that the beneficiary's immediate subordinates hold professional positions. Moreover, the petitioner indicates that the beneficiary "focuses on business networking, public relations, and finding proper clients for the imported jewelry and other goods." This statement suggests that the beneficiary will be performing the operational duties associated with selling the petitioner's (or the foreign entity's) products. 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).

The AAO finds that the record does not substantiate that the petitioner employed any individuals in the positions of finance or administrative manager when the petition was filed. 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). Moreover, the record contains no information that demonstrates how the employees in these two positions would relieve the beneficiary from performing the necessary operational tasks of selling products.

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, the totality of the record in this matter raises questions regarding the legitimacy of the beneficiary's position. Upon review, the description of the beneficiary's duties, the petitioner's type of business when the petition was filed, the petitioner's organizational chart, and the absence of evidence confirming the employment of personnel, cast doubt on the legitimacy of the petitioner's offer of employment.

Further, 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.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the AAO finds that the petitioner's description of the beneficiary's duties does not show a realistic relationship with the nature of the petitioner's business that appears to consist of selling the foreign entity's manufactured products.

Furthermore, 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 would justify the beneficiary's performance of the pragmatic duties of networking, public relations and establishing the sale of the foreign entity's products. 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 cannot excuse a beneficiary who spends the majority of his time on non-qualifying duties.

The AAO does not find counsel's specific assertions regarding the director's "legal error" persuasive. Upon review of the totality of the record the petitioner has not provided evidence that it employs individuals or outside contractors to relieve the beneficiary from performing primarily non-qualifying duties. The statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. In this matter, when the petition was filed, the record demonstrates that the beneficiary would be required to perform primarily non-qualifying duties.

Counsel's conclusion that the beneficiary qualifies as a manager because he is "managing a function of the organization, controlling the work of other supervisors or professionals, authorized to hire and fire subordinates, and exercising direction over the day-to-day operations of his function" is not persuasive. This conclusory statement further confuses the record. First, as observed above, the petitioner has not substantiated that it employed any personnel when the petition was filed. Second, 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; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Third, counsel's assertion that the beneficiary's position satisfies the criteria of a functional manager or an executive who directs the management of a function is not persuasive. Neither counsel nor the petitioner identify the particular function the beneficiary directs the management of or purportedly manages. Neither does the petitioner's description of the beneficiary's job duties comport with an individual responsible primarily for managing or directing the management of a function, essential or otherwise. Counsel should note that if a petitioner claims that the beneficiary is managing an essential function or directing the management of a 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 or directing the management of the 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. at 604. In this matter, the petitioner has not provided evidence that establishes that the beneficiary satisfies the criteria of an executive who directs the management of a function or of a manager who manages an essential function.

Counsel's citation to district court decisions and precedent decisions do not support counsel's claim that the beneficiary will perform primarily managerial or executive duties for the petitioner. The record in this matter, including the description of the beneficiary's duties, the lack of evidence substantiating the employment of personnel or outside contractors to relieve the beneficiary from performing operational, sales, and administrative tasks, the description of the beneficiary's subordinates' duties, and the nature of the petitioner's business when the petition was filed do not establish the beneficiary's eligibility for this visa classification.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

The next issue in this proceeding is whether the petitioner established a qualifying relationship with the beneficiary's foreign employer. 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.

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 an October 28, 2004 letter appended to the petition, the petitioner stated: "In August 2000, [REDACTED] (USA), was incorporated in the State of Texas and is the subsidiary company of [REDACTED] (Parent Corporation)."³ The petitioner also indicated that the beneficiary, [REDACTED] was the proprietor/owner of the parent company. The petitioner included a copy of Form of Registration-Cum Membership Certificate for Aarti International in India showing the company was established in 1991, was a merchant exporter, and the name of the "Proprietor/Partners/Directors/Managing Director" [REDACTED]. The record also included a copy of a document filed in the Office of the Harris County, Texas County Clerk showing [REDACTED] as the [REDACTED] International. The petitioner's 2003 IRS Form 1120 on Schedule E, Line 1(d) indicated that [REDACTED] owned 25 percent of the petitioner's common stock.

In an April 25, 2005 request for further evidence, the director requested that the petitioner explain how the U.S. enterprise and the beneficiary's foreign employer are related through common ownership and control. The director specifically requested the corporate stock ledger, stock certificate registry, corporate by-laws, minutes of relevant shareholder meetings, and any other legal documents governing the acquisition of ownership. The director further requested evidence of monies, property, or other consideration used in exchange for stock ownership. Finally, the director requested all agreements relating to the voting of shares, distribution of profit, the management and direction of the subsidiary, as well as the exact number of shares issued, the resulting percentage ownership, and its effect on corporate control.

In a July 25, 2005 response, the petitioner provided its share certificate number 1 issued [REDACTED] (the beneficiary's brother) on February 25, 2002 in the amount of 50 shares and share certificate number

³ The Form I-140 identifies the petitioner [REDACTED] International, Inc. However, throughout the record the petitioner is referred to [REDACTED] International, Inc.

2 issued to [REDACTED] (the beneficiary) on February 25, 2002 in the amount of 50 shares. Both share certificates show that the petitioner is authorized to issue 100 shares common stock at \$10.00 par value. The petitioner also includes an undated letter signed by [REDACTED] (Proprietor) on behalf of the foreign entity. The letter certifies that [REDACTED] has been working with the foreign entity as a general manager since March 1990. Counsel for the petitioner asserts that as the beneficiary is the managing partner of the foreign entity and the 50 percent owner of the petitioner, the beneficiary directly and indirectly controls both entities.

The director denied the petition on July 29, 2005, observing that the petitioner had not submitted evidence of the ownership of the foreign entity. The director determined that the evidence was insufficient to allow a conclusion that the petitioner and the foreign entity enjoyed a qualifying relationship.

On appeal, counsel for the petitioner observes, contrary to the director's observation, that the petitioner had submitted evidence of the foreign entity's ownership. Counsel references Exhibits 1 through 3 attached to the Form I-140 petition, as evidence to support a qualifying relationship. Counsel observes that the exhibits show [REDACTED] brother of the beneficiary, is listed as the foreign entity's proprietor. Counsel notes that [REDACTED] is also a 50 percent owner of the U.S. entity. Counsel contends that a family connection exists between the two entities and that often in Gujarat, India formalized ownership, other than family businesses, are not found.

Counsel's assertions are not persuasive. The AAO acknowledges that the record shows [REDACTED] the proprietor of the foreign entity, despite the petitioner's initial claim that the beneficiary owned 100 percent of the foreign entity and that the petitioner is the subsidiary company [REDACTED] International, India (Parent Corporation). The record regarding the petitioner's ownership, however, is inconsistent and does not establish the petitioner's ownership. The record indicates in a document filed in the Office of the Harris County, Texas County Clerk that [REDACTED] the petitioner's owners. The petitioner's 2003 IRS Form 1120 on Schedule E, Line 1(d) indicates that [REDACTED] owned 25 percent of the petitioner's common stock. The petitioner's share certificates show [REDACTED] (the beneficiary's brother) and the beneficiary each own a 50 percent interest in the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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. at 593; 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). 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. In this matter, the director specifically requested further evidence in the form of the petitioner's corporate stock ledger, stock certificate registry, corporate by-laws, minutes of relevant shareholder meetings, and any other legal documents governing the acquisition of ownership. The director also specifically requested evidence of monies, property, or other consideration used in exchange for stock ownership. The petitioner failed to provide the

requested evidence. 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). Counsel should note that a familial relationship does not constitute a qualifying relationship under the regulations. The petitioner has not substantiated its qualifying relationship with the foreign entity. For this reason, the petition may not be approved

The next issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$26,000.

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.

On appeal counsel for the petitioner cites a May 4, 2004 memorandum outlining CIS guidance when determining the issue of a petitioner's ability to pay. Counsel contends that the petitioner has established that its 2004 gross receipts of \$141,194 and net income of \$34,569 are greater than the proffered wage. However, counsel misunderstands the guidance set out in the May 4, 2004 memorandum and the calculations necessary to establish whether the petitioner has the ability 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 did not establish that it employed the beneficiary when the priority date was established on November 2, 2004. As observed above, the record contains a 2004 IRS Form W-2, Wage and Tax Statement, issued to [REDACTED] the individual listed in the finance position, for \$375 and the petitioner's Texas C-3, (Employer's Quarterly Report) Worksheet showing the employment of only two employees, [REDACTED] in the third quarter of 2004. There is no evidence in the record that the petitioner employed the beneficiary in the fourth quarter of 2004, the quarter in which the petition was filed.

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 November 2, 2004, the AAO must examine the petitioner's tax return for 2004. The petitioner's IRS Form 1120 for calendar year 2004 presents a net taxable income of \$18,237. The petitioner could not pay a proffered wage of \$26,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review 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. The petitioner's IRS Form 1120 for calendar year 2004 does not list any assets or income on Schedule L.⁴ The AAO is unable to conclude that the petitioner had sufficient net current assets to pay the beneficiary the proffered wage of \$26,000.

Counsel argues that the intent of requiring a petitioner to establish its ability to pay the proffered wage is to establish that the petitioner's operations are bona fide. The AAO agrees that when analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). In this matter, the lack of secondary information in the record detailing the petitioner's assets and liabilities and the lack of information regarding the petitioner's employment of personnel, underscores CIS concern that the petitioner in this matter is not making a realistic job offer, that the petitioner's operations are not viable, and that the petitioner has been created as a vehicle to transfer the beneficiary to the United States or to act as an agent on behalf of the foreign entity.

The petitioner has not provided sufficient evidence to establish its ability to pay the beneficiary the proffered annual wage. For this additional reason, 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.

⁴ The AAO acknowledges that the petitioner was not required to complete Schedule L or M because its total receipts was less than \$250,000. However, the record does not provide any secondary evidence identifying the value of the company's assets or liabilities.

ORDER: The appeal is dismissed.