



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
SRC 05 264 52021

Office: TEXAS SERVICE CENTER

Date: APR 24 2007

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 AAO will dismiss the appeal.

The petitioner filed the instant immigrant visa petition 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 Texas that claims to be engaged in retail trade and investment. The record demonstrates that at the time of filing this petition, the petitioner was operating a gasoline and convenience store¹. The petitioner seeks to employ the beneficiary as its chief executive officer/president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) did not properly review the record or consider the beneficiary's employment as a function manager in its denial of the petition. 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 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 classification. The prospective employer in the United States must furnish a job offer in the form of a

¹ Evidence of the petitioner's operations at the time of filing includes a July 31, 2003 commercial business and family residential contract to purchase property identified as [REDACTED] financial statements and federal income tax returns identifying the petitioner as a gasoline and convenience store, and invoices related to the petitioner's purchase of convenience items and its maintenance of gasoline pumps.

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 issue in the instant proceeding is 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.

The petitioner filed the Form I-140 on September 29, 2005 noting the beneficiary's proposed employment as the company's chief executive officer/president. In an appended letter, dated August 4, 2005, the petitioner identified its operations as a "grocery/convenience store," in which it employed three workers. The petitioner

stated that in his role as chief executive officer/president of the United States organization, the beneficiary is responsible for the company's "overall management and direction." The petitioner provided the following outline of the beneficiary's associated "executive" job duties:

- Direct and coordinate marketing and business development activities of the organization
- Formulate and administer company policies
- In consultation with the management and the parent company in India, develop long-range goals and objectives of the company
- Be responsible for corporate planning, general administration, marketing-sales and purchasing activities for the subsidiary
- Oversee new investment activities, including reviewing proposals and exploring other retail and convenience store businesses
- Direct and coordinate activities of employees in the operations, purchasing and marketing departments for which responsibility is delegated to further attainment of goals and objectives
- Oversee the financial and accounting activities of the organization, including budgeting, tax and regulatory matters
- 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

The petitioner attached a "functional flow chart" depicting the beneficiary as overseeing: marketing and business development; finance and accounting functions; and the goals and policies of both the United States and foreign entities. The petitioner did not address the positions occupied by the additional two workers claimed by the petitioner to be employed on the filing date.

The director issued a request for evidence on December 22, 2005, requesting that the petitioner submit "[a]dditional details" of the beneficiary's proposed position, including his "daily duties" and the percentage of time devoted to each, as well as an organizational chart depicting all employees by name and job title, and the tasks performed by each.

Counsel for the petitioner responded in a letter dated March 13, 2006 contending that the beneficiary's employment in an executive capacity was demonstrated through previously submitted documentation such as the business and property contract, deed of trust, and real estate lien note signed by the beneficiary on behalf of the petitioner and lawfully binding the company. As evidence of the beneficiary's purported executive employment, counsel also pointed out the beneficiary's "executive decision" to replace nonfunctional gasoline pumps at the petitioner's store, which had resulted in decreased sales during 2005. Counsel referenced the beneficiary's decision in March 2006 to expand the petitioner's operations to include overseeing of a second convenience store. The AAO notes that the actions and decisions of the beneficiary subsequent to the instant filing, as well as the petitioner's ensuing business operations, will not be considered in the analysis herein. A petitioner must establish eligibility at the time of filing. The visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In response to the director's request for an additional description of the beneficiary's daily job duties, counsel submitted essentially the same outline of job responsibilities as provided in the original filing, but noted the amount of time the beneficiary would dedicate to each. As the job description is already part of the record, and has been cited above, it will not be entirely repeated herein. As evidence of the petitioner's staffing levels, counsel submitted copies of the petitioner's 2005 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, explaining that the petitioner's staffing "took a slow-down for most of 2005 because of equipment problems."

Counsel offered an organizational chart of the United States entity, in which the beneficiary's subordinate employees were identified as occupying the positions of: finance manager; store manager; finance/account manager; deli manager; cook; cashier; stocker; and independent labor. Counsel stated that the lower-level personnel, such as the cashier and stocker, will perform the "ministerial tasks of the business," while the beneficiary will exercise discretion over their day-to-day activities. The AAO notes that based on counsel's March 13, 2006 letter, the expanded workforce depicts the petitioner's staff at the time of his response rather than on the filing date, and therefore, is not probative of the beneficiary's employment capacity on the date the petition was filed. *See Matter of Katigbak*, 14 I&N Dec. at 49 (finding that 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). While counsel provided quarterly wage reports filed by the petitioner during 2004, he did not submit copies of the company's wage report for the quarter ending September 30, 2005, which would document its workers during the month the petition was filed. 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 Obaigbena*, 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).

Counsel further contended that the beneficiary's discretion over the company's day-to-day activities establishes his role as managing "the essential function of Presidency at the organization." Counsel outlined the statutory requirements of a function manager, and referenced an earlier unpublished AAO decision, in which the AAO recognized as a manager or executive the vice-director of a twelve-year old organization that employed only one other worker. Counsel challenged that the petitioner's three-year-old business, in which it "is still expanding operations" should not be viewed negatively on the beneficiary's role as a function manager. Counsel stated:

[T]he evidence demonstrates that the [b]eneficiary's proposed permanent duties are primarily executive. The real estate decisions, financing, and executive approvals all bear the [b]eneficiary's signatory approval and correspondingly indicate his executive authority and decision-making duties. Furthermore, the [b]eneficiary's subordinates are professionals who function over the day-to-day ministerial tasks of the business operation, while allowing the [b]eneficiary to devote his time to his executive duties and functions.

The director issued a decision dated July 28, 2006, concluding that the petitioner had not demonstrated the beneficiary's proposed employed by the United States entity in a primarily managerial or executive capacity. The director noted that the petitioner's initial filing was insufficient in that it failed to "clearly convey an understanding that the beneficiary would devote the primary part of his assignment to qualifying duties," or that the "firm's staffing will be of sufficient size and composition to support an executive or managerial position," thus resulting in her request for an additional job description. The director noted that following the

petitioner's response, the "description of the beneficiary's assignment and those of his subordinate staff in light of the petitioner's size and operation" did not demonstrate that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. The director also considered the beneficiary's designation as "director" in an accompanying letter, stating that the position of director was not identified on the company's organizational chart. The director further stated that the salaries paid to the workers employed subordinate to the beneficiary were not commensurate with the typical salary paid to a professional. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on August 28, 2006, and subsequently submitted an appellate brief, dated September 21, 2006, in which he claimed that CIS "lacks legal and factual support for its [d]ecision [to deny the immigrant visa petition]." Counsel contends that CIS "[did not] overcome the heavy burden it bears before it can rebut the preponderance of the evidence in favor of the petitioner," stating that the job offer furnished by the petitioner demonstrates that the beneficiary's job duties would be primarily managerial or executive in nature.

Counsel emphasizes the concept of function manager recognized in the statutory definition of "managerial capacity," and cites several unpublished decisions by the AAO, noting its acknowledgement of functional managers in organizations with a small staff or where the beneficiary was the sole employee. Counsel contends:

Petitioner, upon request by [CIS], provided a description of the beneficiary's duties regarding real estate decision, financing, hire/fire authority, goal setting, policy-making and discretionary decision-making authority. As such, all elements of the functional manager have been met. The nature of the business may require the manager or executive to perform additional tasks on a temporary and occasional basis. [CIS] misunderstood the beneficiary's management capacity. [CIS] failed to acknowledge the concept of functional management and disregarded the overall stage of development of petitioner.

Counsel claims that CIS improperly focused on the size and composition of the petitioner's staff in denying the petition, and challenges that CIS "cannot infer the executive nature of the beneficiary on the basis of the number of subordinate payroll and contract employees." Counsel states that the concept of function manager is not based on the employment of a certain number of subordinate employees, and stresses that the position of manager or executive is not restricted to those supervising a large number of employees. Counsel contends that CIS ignored the petitioner's "early stage of development," and the fact that the petitioner "suffered some setbacks in the initial stages of operations." Counsel states that because of these factors, the petitioner did not require large staffing levels. Counsel notes the petitioner's sound business decision to restrict its staff to only those "who are absolutely essential to the operation of the business," and contends that "[CIS] cannot use the staffing of the company as the sole basis for denial."

Counsel addresses additional observations made by the director, such as the fact that the petitioner's address is the same as that of its gasoline and convenience store, claiming that the petitioner's location is not determinative of the nature of its business. Counsel also states that the absence of the position of director on the company's organizational chart is not relevant to determining the nature of the beneficiary's employment. Whereas it appears that the director was merely noting an inconsistency in the beneficiary's job title, his statements with respect to the petitioner's business address will be withdrawn. The location of the petitioner's business premises is not relevant to the analysis of the beneficiary's employment capacity.

Counsel further challenges the director's finding that the compensation paid to the beneficiary's subordinates is not in line with the salaries paid to "professionals." Counsel states that neither the Act nor accompanying regulations require the petitioner "to pay a specific salary to professionals," and rejects the analysis as an improper basis for the petition's denial.

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).

The description offered of the beneficiary's position in the United States company is not sufficient to demonstrate his proposed employment in a primarily managerial or executive capacity. Although provided with two opportunities prior to the instant appeal to supplement the record with specific evidence of the beneficiary's daily managerial or executive job duties, the petitioner twice offered essentially the same broad statements of the beneficiary's job responsibilities. The petitioner's claims that the beneficiary would direct the marketing, corporate planning, general administration, sales, purchasing, and investment activities of the petitioning company, as well as formulate policies and review "activities, costs, [and] operations," fall significantly short of establishing the beneficiary's purported employment as a manager or executive. The petitioner failed to identify the specific managerial or executive tasks that the beneficiary would perform on a daily basis, particularly with respect to the company's "corporate planning, general administration, marketing-sales, and purchasing" functions, for which the beneficiary was merely identified as "be[ing] responsible." 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).

The AAO emphasizes the petitioner's failure to provide a thorough description of the beneficiary's proposed employment following the director's request. If the job description initially offered by the petitioner constituted a sufficient depiction of the beneficiary's employment, the director would not have requested "additional details" of the beneficiary's specific job duties. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). A petitioner's 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).

The fact that the petitioner documented the amount of time the beneficiary would devote to each job responsibility is irrelevant to the instant analysis, as the petitioner's generalized and conclusory claims do not adequately demonstrate the beneficiary's employment in a managerial or executive capacity. The definitions of executive and managerial capacity have two parts. First, the petitioner *must show that the beneficiary performs the high-level responsibilities that are specified in the definitions*. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner has not identified specific high-level managerial or executive job duties to be performed by the beneficiary. The beneficiary's title as chief executive officer-president, by itself, is not sufficient to establish his employment in a qualifying managerial or executive capacity. 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)).

Moreover, the remainder of the record does not support the petitioner's vague claims of the managerial or executive authority held by the beneficiary. For example, the petitioner stated that the beneficiary would oversee the company's financial and accounting activities, and purchasing and marketing departments. Yet, the petitioner has not named any workers employed for the purpose of performing its purchasing or marketing functions, or identified the existence of its purported marketing and purchasing departments on its organizational chart. In addition, while the petitioner noted the employment of finance and account managers on its organizational chart, there is no evidence that these individuals were employed at the time the petition was filed. As mentioned previously, the record is devoid of corporate documentation, such as the petitioner's September 30, 2005 quarterly wage report or payroll records, demonstrating which two workers, other than the beneficiary, were employed on the filing date. The petitioner also suggested its use an outside accountant to perform its monthly accounting functions during 2005.² However, the limited amounts of \$125 for professional fees and approximately \$243 for contract services³ paid by the petitioner in 2005 undermine the petitioner's claim that it received monthly accounting services from an outside source. 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).

Counsel correctly observes on appeal 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.*

Here, at the time of filing, the petitioner claimed to employ the beneficiary and two additional workers, whose positions have not been identified and whose employment has not been documented. The AAO notes, in particular, the IRS Forms W-2 issued by the petitioner for the year 2005. Besides the beneficiary, the company's employees received \$1500 or less in compensation during 2005. The Forms W-2, while not representative of the exact periods during 2005 that each worker was employed, strongly suggest that each worked for the petitioner on a very limited or short-term basis.

Taken as a whole, the record severely undermines counsel's claims that the petitioner employed lower-level workers to perform "the day-to-day ministerial tasks of the business operation, while allowing the [b]eneficiary to devote his time to his executive duties and functions." As a three-year old company operating

The record contains a copy of a March 14, 2006 letter, in which a certified public accountant claimed to render monthly accounting services to the petitioner in 2005 at a fee of \$125.00 per month.

³ As represented on the petitioner's January through December 2005 unaudited Statement of Revenues and Expenses as expenses incurred by company.

a gasoline and convenience store, it is reasonable that the petitioner would both employ and require the services of employees other than the beneficiary. While the petitioner claimed to employ two additional workers on the filing date, it is the responsibility of the petitioner to accurately depict its staffing levels on the date of filing and clearly demonstrate that its reasonable needs are met through the employment of its staff. 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 record as presently constituted, does not establish that someone other than the beneficiary would perform the day-to-day, non-qualifying tasks related to the petitioner's accounting, financial, marketing, sales, inventory, purchasing, and administrative functions. Clearly, the petitioner's reasonable needs are not met through the employment of its purported three-person staff. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As counsel stresses on appeal, the size of the petitioner's staff cannot be the sole basis for denying an immigrant visa petition for a multinational manager or executive. The AAO recognizes that the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the limited and vague claims offered by petitioner fail to satisfy this essential element of eligibility.

Counsel also claims that the beneficiary is managing professionals, and that CIS should not consider the amount of compensation paid to the subordinate employees in determining their positions as professionals. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

In the instant case, the AAO need not consider the above analysis, as the record does not distinguish which employees were even employed at the time of filing. Without additional information as to who the AAO should consider in its analysis, the petitioner's claim of employing subordinate professionals is moot. The AAO notes, however, that the wages paid to subordinate employees, while suggestive of their full-time or part-time employment, is not a consideration in the review of whether the employees are "professionals." The director's comments which respect to the subordinates' salaries are therefore withdrawn.

Moreover, the record does not corroborate counsel's claim that the beneficiary would be employed as a function manager. 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). The term "essential function" is not defined by statute or regulation. 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. 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)).

Here, counsel claims that the beneficiary is managing the "presidency" function. Again, the record is devoid of specific detail of what exact managerial or executive job duties the beneficiary would perform in relation to the presidency function. Counsel references corporate documentation bearing the beneficiary's name on behalf of the organization; however, these documents do not demonstrate that the beneficiary would primarily *manage* a function of the company. Rather, as explained in detail above, the record, as presently constituted substantiates a finding that the beneficiary would be primarily performing the daily non-managerial and non-executive tasks associated with each of the company's functions. The corporate documents signed by the beneficiary are not sufficient to overcome this finding. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The AAO acknowledges counsel's references to several unpublished AAO decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, as the record as whole demonstrates the beneficiary's responsibility to perform primarily non-managerial and non-executive tasks of the organization, the facts in the present case cannot be deemed analogous to those in the cited decisions.

Counsel emphasizes on appeal the petitioner's burden of proof in establishing the beneficiary's eligibility for the requested immigrant visa classification. The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence

or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is not relevant, probative, and credible. The petitioner's claims that the beneficiary would primarily manage subordinate managers and functions are not corroborated by independent and objective evidence demonstrating the employment of a subordinate staff that would relieve the beneficiary from performing the non-qualifying tasks of the gasoline and convenience store. In fact, evidence such as the petitioner's year 2005 IRS Forms W-2 and financial statements undermine and contradict the petitioner's representations of employing a subordinate staff or utilizing independent contractors. 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).

The petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign organization in a primarily managerial or executive capacity for at least one year during the three years preceding his entrance into the United States as a nonimmigrant.

The petitioner claimed in the August 4, 2005 letter submitted with its initial filing that the beneficiary worked for the foreign entity from 1984⁴ through 1987, and following a period of time in the United States, returned to work for the foreign organization. The record indicates that the beneficiary entered the United States in May 2002 as a B-2 visitor. Form G-325A, Biographic Information, submitted in connection with the beneficiary's I-485 application for permanent residence identifies the beneficiary's dates of employment with the foreign entity from January 1999 through December 2001. In light of the conflicting representations of the beneficiary's foreign employment, and without paylips or payroll records documenting the beneficiary's periods of employment overseas, it is questionable whether the beneficiary was employed by the foreign organization for the requisite period of time. 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. at 591-92.

Similarly, the description of the beneficiary's employment in the foreign entity, which essentially mirrors the beneficiary's job responsibilities in the United States, does not identify the specific managerial or executive job duties performed by the beneficiary as the organization's executive officer. The offered job description contains such vague representations as "direct and coordinate overall activities," "administer organizational policies," "[d]evelop long range goals and objectives," and review "activities, costs, operations, and forecasted data." The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, it is not clear whether the March 31, 2005 organizational chart of the foreign partnership is representative of the staffing levels maintained by the organization during the beneficiary's purported overseas employment. As a result, it is questionable whether the beneficiary was

⁴ The AAO notes that according to the March 3, 1999 foreign partnership deed, the overseas partnership was initially formed on December 2, 1985, subsequent to the beneficiary's claimed start date with the foreign organization.

relieved from primarily performing non-managerial or 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 “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The record as presently constituted does not demonstrate that the beneficiary was employed by the foreign organization in a primarily managerial or executive capacity for at least one year during the three years preceding his entrance into the United States as a nonimmigrant. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner demonstrated at the time of filing the immigrant visa petition its ability to pay the beneficiary his proffered annual salary of \$30,000.

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

Any petition filed by or for any 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).

In the instant matter, the petitioner indicated on the Form I-140 and in its August 4, 2005 letter that the beneficiary would receive an annual salary of approximately \$30,000. However, the petitioner's Internal Revenue Service (IRS) Form W-2 for the year 2005 indicates that the beneficiary received an annual salary of \$18,000, or \$12,000 less than his proposed salary. The petitioner presented its 2005 statement of revenue and expenses that reflects net income in the amount of approximately \$35,000. The AAO notes, however, that the petitioner's financial statements are not audited. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner submitted audited financial statements as evidence of its ability to pay the beneficiary's proposed salary. Here, the record is devoid of supplemental documentation, such as the petitioner's 2005 federal income tax return or annual report, demonstrating its ability to pay the beneficiary's proffered wages. 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)). For this additional reason, 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 AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary. 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, 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). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

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.