



U.S. Citizenship
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FILE:

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Office: TEXAS SERVICE CENTER

Date:

AUG 14 2007

SRC 05 167 51443

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION:

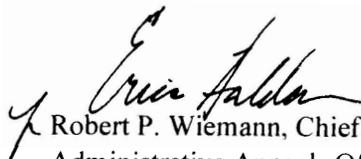
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, 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 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 Florida that is engaged in the import, sale, and trade of general merchandise. The petitioner represents itself as the subsidiary of the beneficiary's foreign employer, and seeks to employ the beneficiary as its chief executive officer.

The director denied the petition concluding that the petitioner had not established that the beneficiary had been employed by the foreign entity or would be employed by the United States entity in a primarily managerial or executive capacity.¹

On appeal, counsel contends that the beneficiary is eligible for the requested visa classification. Counsel submits a letter and additional documentary evidence 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 While both the director and counsel for the petitioner reference the present revocation of the approval of the immigrant visa petition, the record indicates that Citizenship and Immigration Services did not previously approve the petition. The instant appeal will be considered an appeal of the director's denial of the immigrant visa petition.

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 first issue in this 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 May 18, 2005, noting the beneficiary's proposed employment as its chief executive officer, during which he would be responsible for the formulation of marketing strategies, and

would hire, train, and supervise employees. In an appended letter, dated May 13, 2005, the petitioner identified the following additional job responsibilities of the beneficiary:

- Directs, plans, and implements policies and objectives of [the] organization andr [sic] business;
- Directs activities of [the] organization to plan procedures, establish responsibilities, and coordinate functions among departments and sites;
- Analyzes operations to evaluate [the] performance of [the] company and [its] staff and to determine areas of cost reduction and program improvement;
- Reviews financial statements and sales and activity reports to ensure that [the] organization's objectives are achieved;
- Assigns or delegates responsibilities to subordinates;
- Directs and coordinates activities of business involved with buying and selling the Company's products; and
- Establishes internal control procedures[.]

The beneficiary was identified on the Form I-140 as the petitioner's sole employee. In the attached documentation, the petitioner noted its use of both office and warehouse space in the United States for the import of general merchandise and the sale of small motorcycles. The petitioner also submitted evidence of a business lease for space to be used for party supplies and the import and export of general merchandise.

On June 21, 2005, the director issued a request for evidence directing the petitioner to submit a definitive statement of the beneficiary's employment in the United States entity, including the following: (1) position title; (2) a list of job duties and the percentage of time to be spent performing each; (3) the subordinate managers, supervisors, and employees to be supervised by the beneficiary; (4) a brief description of the positions held by the beneficiary's subordinates; (5) the qualifications necessary to perform in the beneficiary's proposed position; and (6) the level of authority held by the beneficiary and whether the beneficiary would occupy a senior level position. The director also requested that the petitioner submit documentary evidence of its staffing levels, such as copies of its 2004 Internal Revenue Service (IRS) Form W-2, and an explanation of the services or products offered by the petitioning entity.

Counsel for the petitioner responded in a letter dated September 16, 2005. In an appended undated letter, the petitioner explained its business operations in the United States, stating that the company initially planned to import and market lingerie in the United States, but subsequently altered its business goal to locating "mer[c]handise in the US which could be replicated in China and thereafter sold in Argentina and Latin America." The petitioner identified the beneficiary as holding the position of function manager of this "special project," which included "coordinating the new enterprise in the United States, China and Argentina." The petitioner noted the following additional job responsibilities to be held by the beneficiary as a function manager:

- Direct and coordinate the activities of the business consultant in China with the management in Argentina;
- Monitor the business activities of the new enterprise;
- Determine the goods to be sold;
- Manage the production of the mer[c]handise manufacture[d] in China;
- Manage the movement of the mer[c]handise manufacture[d] in China; and

- Manage the new enterprise to be inside budget[.]

In his September 16, 2005 letter, counsel suggested that the above job description was sufficient to establish the beneficiary's employment as a "functional manager of a special project having an essential function within the organization he manages." With respect to the petitioner's staffing levels, counsel again stated that the United States company employed only the beneficiary.

In a September 27, 2005 decision, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Following a review of the job duties provided by the petitioner in response to her request for evidence, the director concluded that the beneficiary would devote his time to primarily performing "the business marketing, staff recruitment and supervision, and other duties comprising the daily productive tasks of the company" The director further noted that the specific job assignment of the beneficiary in the United States is not clear from the offered evidence. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on October 28, 2005. In a November 25, 2005 letter, counsel submits a copy of the beneficiary's job offer from the petitioner, which counsel claims "persuasively establishes that the beneficiary has been and will be employed primarily as an executive." Counsel outlines the statutory criteria for "executive capacity," contending that the beneficiary's proposed position "comprises the aforementioned criteria." Counsel claims that the number of employees supervised by the beneficiary is not determinative of the beneficiary's employment as an executive.

In the above-referenced May 5, 2005 employment letter to the beneficiary, the petitioner described the beneficiary's proposed position of chief executive officer as follows:

[Y]ou will determine and formulate the policies and business strategies of our corporation and provide overall direction of the United States enterprise. You will plan, direct, and coordinate the operational activities. You will direct, plans [sic], and implement the policies and objectives of the corporation's business. You will review the financial statements and sales statements and the activity reports to ensure that our corporation's objectives are achieved. You may, if you need to, assign or delegate responsibilities to subordinates. You will direct and coordinate the activities of our business. You will have full power to hire and dismiss employees.

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

The record, as presently constituted, fails to clarify the capacity in which the beneficiary would be employed in the United States entity. The petitioner has not explained whether the beneficiary would be performing primarily managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The beneficiary was initially represented as the company's chief executive officer. Yet, in its subsequent response to the director's request for evidence, the petitioner suggested that despite the title of chief executive officer, the beneficiary would be performing as a function manager of the organization. Conversely, on appeal, counsel asserted the petitioner's original claim of employing the beneficiary in a primarily executive capacity. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The

petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. 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).

Similarly, throughout this proceeding, the petitioner submitted differing job descriptions for the beneficiary. In its response to the director's request for further evidence, the petitioner changed the beneficiary's position to that of a function manager, adding such job duties as: directing the activities of a business consultant in China; determining the goods sold by the petitioner; and, managing the production and distribution of merchandise manufactured in China. In sum, the initial job description vaguely addressed primarily *executive* responsibilities purportedly held by the beneficiary, while the second job description suggested the beneficiary's *management* of the petitioner's "search for mer[c]handise in the US market." Moreover, as noted above, on appeal, the beneficiary's proposed employment was identified as being primarily executive in nature, as opposed to that of a function manager.

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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new responsibilities to the original position. 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). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The offered job descriptions are comprised primarily of vague and overly broad statements of the beneficiary's proposed employment in an executive capacity, without identifying his specific executive job duties. For example, the petitioner identified the beneficiary as: directing the company's policies, objectives, and activities; analyzing operations; reviewing financial and sales reports; assigning responsibilities to subordinates; directing the petitioner's purchases and sales; and establishing "internal control procedures." The named job responsibilities fall significantly short of identifying what executive tasks the beneficiary would primarily perform on a daily basis. Similarly, the beneficiary's May 5, 2005 employment letter, which, incidentally was not submitted until the appeal, provides only a limited description of broad job responsibilities held by the beneficiary. 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 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).

Counsel's additional claims on appeal are equally insufficient in establishing the beneficiary as an executive of the United States entity. In his November 25, 2005 letter, counsel merely recited the statutory criteria of "executive capacity," and asserts that "[t]he assignment to be performed in the United States by the beneficiary . . . comprises the aforementioned duties." 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. *Id.* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The AAO notes that this claim was made by counsel after he represented on the Form I-290B, Notice of Appeal, that the beneficiary was employed as a function manager. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The AAO further questions the credibility of the offered job descriptions. Among other tasks, the beneficiary would evaluate the staff's performance, coordinate functions among departments, and assign job duties to subordinates. The beneficiary's additional responsibilities of reviewing financial, sales, and activity statements and directing activities of the business also suggest the employment of a lower-level staff. Yet, the AAO notes that the petitioner has conceded that the beneficiary is its sole employee, thereby undermining its claim of the beneficiary's supervisory authority over subordinates. Moreover, the petitioner has not provided a depiction of its organizational hierarchy demonstrating the existence of lower-level departments purportedly managed by the beneficiary. It appears that the petitioner is merely reiterating the criteria outlined in the statutory definition of "executive capacity" to establish the beneficiary's qualifying employment. 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)). 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 notes 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.*

At the time of filing, the petitioner was a three-year-old company engaged in the import and sale of general merchandise that employed a company president, as well as the beneficiary as its chief executive officer. The petitioner conceded that it did not employ a subordinate staff that would perform the actual day-to-day, non-managerial operations of the company, including its importing, warehousing, and sales functions. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary. Regardless, 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 second issue in this proceeding is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In the May 13, 2005 letter, the petitioner identified the beneficiary as having occupied the positions of president and general manager of the foreign entity, during which he performed by the following job duties:

- Plan, direct and coordinate the operations of the company;
- Plan, direct and coordinate the distribution and sale of the Company's products;
- Formulate the policies of the company;
- Manage daily operations;
- Manage the staff and independent contractors;
- Review financial statement[s];
- Review performance data, sales activity and reports;
- Plan the use of materials and human resources;
- Hire and terminate employees;
- Establish and implement goals, objectives and procedures;
- Conferre [sic] with the board members and management;
- Oversee personnel;
- Oversee activities directly related to the sale of the Company's products;
- Direct and coordinate financial and budget activities to maximize investments and increase efficiency;
- Determine the products to be offered, set prices and credit terms, based on forecasts of customer demand.

In her June 21, 2005 request for evidence, the director asked that the petitioner submit a description of the beneficiary's employment in the foreign entity, similar to and including the items addressed in the beneficiary's United States employment. The director also requested evidence of the foreign entity's staffing levels.

With his September 16, 2005 response, counsel submitted what appears to be a current organizational chart of the foreign entity, which fails to depict the beneficiary. Counsel also provided a list of the foreign entity's ten employees and a brief description of their related job duties. The AAO notes that the petitioner did not provide the requested "definitive statement" of the beneficiary's former employment in the foreign entity. 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).

In her September 27, 2005 decision, the director concluded that the beneficiary had not been employed by the foreign entity in a primarily managerial or executive capacity. The director found that the offered job description indicated that the beneficiary's "duties abroad were composed primarily of the daily productive

tasks and first-line supervision of non[-]managerial, non[-]professional employees of the firm." Consequently, the director denied the petition.

On appeal, counsel submits a November 1, 2005 letter, in which the foreign entity identified the beneficiary as occupying the position of president of the foreign corporation from 1996 through 2001 and the position of general manager from 2001 through 2002, at which time he was transferred to the United States. The foreign entity stated:

[The beneficiary] had the following duties: he directed and coordinated the pricing, sales and distribution of our products. He develop[ed] and maintain[ed] client relationship[s]. He oversaw the company's financial and budgetary activities. He represented our corporation in international trade shows in Asia and in Europe. He also develop[ed] new products and strategies.

The foreign entity noted the beneficiary's supervision of ten subordinate sales representatives during his employment in the overseas company.

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The offered job descriptions fail to identify the specific managerial or executive tasks performed by the beneficiary during his employment with the foreign entity. For example, the petitioner stated that the beneficiary: directed the foreign entity's operations, distributions, sales, finances and budget; formulated policies; managed the company's daily operations and staff; reviewed financial statements, "performance data, sales activity and reports"; oversaw the company's sales activities; and determined products, prices, and customer demand. These statements offer limited evidence of the beneficiary's particular day-to-day managerial or executive job duties. The petitioner did not define the "operations" or "activities" directed by the beneficiary or identify the "goals, objectives and procedures" established by the beneficiary with respect to the business conducted by the foreign organization. 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.

Also, several of the petitioner's statements paraphrase the statutory definitions of "managerial capacity" and "executive capacity." Specifically, the beneficiary is identified as hiring and terminating employees of the foreign entity, establishing "goals, objectives and procedures," and conferring with board members and management. As restatements of the statutory definitions, these representations are not sufficient to describe the specific managerial or executive job duties performed by the beneficiary. 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.* at 1108.

Moreover, in the employment letter offered on appeal, the foreign entity expanded the beneficiary's former job duties to include such responsibilities as developing and maintaining client relationships, representing the foreign company at international trade shows, and developing new products. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The modifications made to the beneficiary's job description are material in that they include non-managerial and non-executive tasks. Additionally, the revised job description does not offer clarification of whether the beneficiary's prior overseas employment was in a managerial or executive capacity.

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner was doing business in the United States for at least one year prior to the instant filing as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D).

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

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

The petitioner submitted documentary evidence that it was established in the State of Florida on January 11, 2002. In its May 13, 2005 letter submitted with the Form I-140, the petitioner claimed that it had been doing business in the United States since its incorporation, initially importing toys and women's lingerie, and presently importing small motorcycles. The record contains limited evidence, however, establishing that the petitioner was performing the "regular, systematic, and continuous provision of goods" since January 2002, or for the requisite one-year period prior to this filing.

The AAO recognizes that since the year 2002, the petitioner has leased property for use as an office and warehouse. Additionally, the petitioner offered copies of its 2002 through 2004 federal income tax returns, May, July, and December 2004 and February 2005 bank statements, and receipts for advertising during December 2004 and February 2005. The AAO notes, however, that the record does not contain documentary evidence, such as sales invoices, billing receipts, or shipping and customs documents, demonstrating the petitioner's continuous operations as an importer and wholesaler prior to May 2004. The limited documentation of actual sales performed by the petitioner is dated in December 2004 and in the year 2005.

Moreover, in response to the director's request for evidence that the petitioner had been doing business for at least one year, the petitioner submitted: a copy of a July 19, 2005 certificate of trademark registration; a copy of the beneficiary's nametag identifying him as a "Buyer" at a Summer 2005 trade show; a copy of the petitioner's 2004-2005 occupational license and 2005 annual resale certificate; a copy of an certificate of title

issued on February 11, 2005; utilities bills for varying dates between February and July 2005; and, funds transfer requests dated in January 2003 and September 2004.

The record suggests that while the petitioner may have been taking steps to organize its operations in the United States, it was not importing or selling products on a "regular, systematic, and continuous" basis for at least one year prior to this filing. The majority of evidence submitted indicates that the petitioner commenced its operations on or around December 2004, or six months prior to the instant filing date. The AAO notes that the ambiguity in the petitioner's operations and its products further undermines the petitioner's claim of doing business for at least one year prior to the date that the instant petition was filed. 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. Absent documentation, such as sales invoices or receipts, the AAO cannot determine whether the petitioner was doing business in the United States for the requisite one-year period prior to the instant filing. For this additional reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner established its ability to pay the beneficiary's proffered wages at the time of filing.

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.

On the Form I-140, the petitioner noted the beneficiary's proffered weekly wages of \$765, or \$39,780 per year. Documentation, such as the petitioner's 2004 federal income tax return and quarterly tax returns, demonstrate that the beneficiary received an annual salary of \$12,000 the year prior to the instant filing.

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 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 had previously employed the beneficiary for an amount equal to or greater than the proposed weekly wages of \$765.

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 both the immigrant visa petition and appeal were filed during 2005, it is reasonable that the record does not contain a copy of the company's 2005 federal income tax return for review. Nonetheless, based on the wages reflected on the petitioner's first quarter wage report, the beneficiary was receiving wages in the amount of \$1,000 per month during 2005, or \$2,000 less than the proffered monthly wages. Similarly, the company's June 30, 2005 balance sheet and profit and loss statement, which were submitted by counsel in response to the director's request for evidence of the petitioner's ability to pay, also demonstrate that the beneficiary was receiving \$3,000 per quarter, or an annual salary of \$12,000, which is \$27,780 less than the proffered salary.

The AAO recognizes that the petitioner's bank statements reflect ending monthly balances in the amounts of approximately \$8,500 and \$6,500 for May and July 2005, respectively. However, bank statements, alone, are not deemed to be sufficient to establish the petitioner's ability to pay the beneficiary's proffered wages. *See* 8 C.F.R. § 204.5(g)(2)(stating that evidence of the petitioner's ability to pay shall be in the form of annual reports, federal tax returns, or audited financial statements). The record as presently constituted fails to establish that at the time of filing the petitioner had the ability to pay the beneficiary's proffered weekly wages of \$765. The petition will be denied for this additional reason.

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 visa 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. *See* 8 C.F.R. § 103.8(d). 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.