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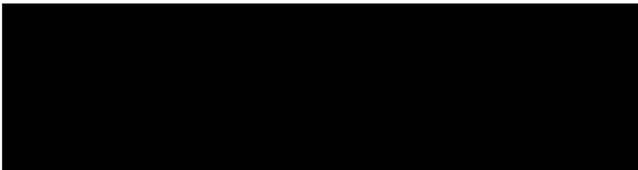
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
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**U.S. Citizenship  
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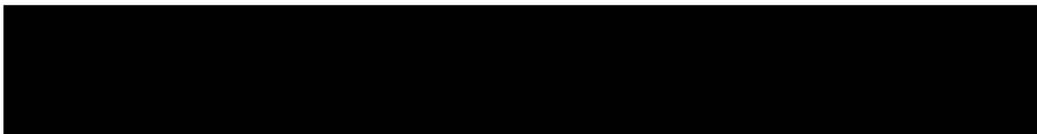
FILE: WAC 05 256 52714 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

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 black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant 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 California in February 1998. It operates a recording studio. The petitioner seeks to employ the beneficiary as its general operations manager. 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 September 4, 2006. The director concluded that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company; or (2) that a qualifying relationship existed between the United States entity and the beneficiary's claimed foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity, and suggests that the director failed to take into account the nature of the petitioner's industry when determining whether the beneficiary would be employed in a qualifying capacity. Counsel further contends that the petitioner's claimed Mexican parent company established and fully financed the U.S. company, thus establishing a qualifying parent-subsidiary relationship. Counsel submits a brief and additional 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 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 to be addressed is whether the petitioner established that 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 immigrant petition was filed on September 23, 2005. The petitioner indicated on Form I-140 that the beneficiary would be employed as the company's general operations manager performing the following duties: "Markets [and] [a]dvertises to Latin [m]arkets [and] [a]rtists such as [REDACTED] to come to the United States [s]tudio to record their albums for release." The petitioner did not indicate the company's current number of employees, or submit a supporting letter further describing the beneficiary's duties, the nature of the U.S. company, or its organizational structure.

Accordingly, on March 6, 2006, the director requested additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity. Specifically, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties, including a description of his "typical day"; (2) an organizational chart for the U.S. company depicting all employees, and including a brief description of job duties for all employees under the beneficiary's supervision; and (3) copies of the petitioner's California Forms DE-6, Quarterly Wage and Withholding Report, for the third and fourth quarters of 2005.

In a response received on July 3, 2006, counsel for the petitioner provided the following information regarding the beneficiary's job duties and the organizational structure of the U.S. company:

There is no organizational chart for [the petitioner]. [T]his enterprise is operated by [the beneficiary].

[The petitioner] does hire sub-contracting workers, which include musicians who may perform for an artist at the studio.

However, in most cases, because [the beneficiary] is a [s]ound [e]ngineer and a [s]ound [m]ixer, the duties of the [s]tudio or [the petitioner] do not include producing. The producers of each of the [a]rtist [sic], or of the [b]and, in the case of a [b]and bring in their own background, lead, or vocal musicians, thus the many other musicians utilized by many of the [a]rtists such as Luis Miguel, and other famous artists are contracted by the [a]rtist or [b]and, and thus not attributed to [the petitioner].

Thus, there is no large staff, and because the way the entertainment business is now operating, there are fewer and fewer full time employees and they are being replaced by sub-contractors.

In connection with an average day related to the duties of the beneficiary. The duties related to the operation take generally three forms of duties. The most important, and the purpose of the enterprise is to record Mexican and Latino artists at [the petitioner's] [s]tudios.

In this capacity, [the beneficiary] sets up the musicians, artist or background singers in the studio; sets up the mics, and the entire musical arrangements, and physically records the music.

[The beneficiary] utilizes vintage recording devices, in such a unique manner that [the beneficiary's] recording and engineering work has won him numerous awards. Attached, please see color copies of two "Latin Grammy Awards" presented to [the beneficiary] for sound engineering work completed at [the petitioner's] studio.

As stated, [the beneficiary] is responsible for [m]arketing, [p]ublic [r]elations, and [e]ngineering.

When [the beneficiary] is no [sic] recording, then he is marketing his studio by making contacts in [the] [m]usic industry, both U.S. and Latin.

[The beneficiary] must also run his own [p]ublic [r]elations department, and is always running from place to place arriving at high rate meetings to meet artists, their representatives, producers, and record executives in order to keep the operation running.

[The beneficiary] utilizes accounting firms, legal firms, as well as numerous sub-contractors.

In support of its response, the petitioner submitted a letter from ██████████ dated June 21, 2006, indicating that the petitioner has continuously retained ██████████ to provide "technical services" for its recording studio. ██████████ stated that he has worked for the beneficiary "essentially full time" for the last three years. The petitioner submitted an IRS Form 1099-MISC, Miscellaneous Income, issued to ██████████ in 2005 in the amount of \$14,886 in 2005. The petitioner provided copies of Forms 1099 issued to three other individuals in 2005 in the amounts of \$2,000, \$1,250, and \$1,645. The petitioner did not identify the nature of services provided by these individuals.

The director denied the petition on September 4, 2006, concluding that the petitioner had not established that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. The director observed that the beneficiary's stated job duties are not typically managerial or executive as defined by the statute, but rather are more indicative of an employee who is performing the necessary tasks to provide a service. The director considered the reasonable needs of the petitioning organization and determined that it is unreasonable to believe that the beneficiary, as the sole employee, would not be assisting with the "day to day non-supervisory duties" of the business. The director found that the beneficiary could not be considered a function manager, as it appears that he is involved in the performance of routine operational activities rather than in the management of a function of the business. The director concluded that the beneficiary cannot be considered a manager or executive based solely on his job title, absent independent, objective evidence that he will truly be performing primarily managerial or executive duties for immigration purposes.

On appeal, counsel for the petitioner asserts that the director mischaracterized the nature of the beneficiary's duties, and erred by comparing the petitioner's business as a recording studio to other types of businesses which may require more time devoted to paperwork and administrative tasks. Counsel asserts that the petitioner's business requires the beneficiary's executive-level skills in marketing and public relations, noting that he "must come in contact and have successful relations with the most professional and elite group of top lawyers, producers, managers, and artists." Counsel emphasizes the industry awards and recognition received

by the petitioner and beneficiary and contends that only an executive "could acquire such a high level of talent and skill in their facility." Counsel states that the petitioner's success is due to the beneficiary's "executive decision in directing the studio to be attractive to these types of high caliber [a]rtists."

Counsel further acknowledges that "in a standard corporate or business setting where paperwork and administrative duties comprise the duties of the work force; then perhaps an executive involving himself in the day-to-day operations would be considered to negate his executive duties." Counsel contends that in the petitioner's business, a production facility requires "a skillful, experienced and refined executive" to determine the overall direction and path of the business." Counsel further states:

It has been the sole determination, and decision of the executive in charge who makes these conscious decisions, as to what kind of reputation the facility will make for itself; what kind of music will the facility be geared to attract; what kind of equipment is best to be utilized for the type of music to be recorded here; These decisions are entirely executive; the fine reputation of the facility, and the style and type of music recorded at the facility are the decisions that have already been made and acted upon.

Counsel emphasizes that the music industry is fragmented "where no one is 'employed' in the traditional sense." Counsel states that when production work begins, studio musicians, singers, sound technicians and engineers work on a sub-contractor basis. Counsel notes that due to the "uniqueness of the recording facility and the recording equipment," the petitioner must utilize the beneficiary as its recording engineer; however, counsel states that the beneficiary "directs all of the activities in and around the studio, including the musicians, background singers, sound assistants, producers, managers, and computer technicians." Counsel asserts that the denial "was based largely upon a comparison of non-artistic industries to the music industry."

In support of the appeal, the petitioner submits a number of reference letters, including: a letter from U.S. Representative [REDACTED], noting that the beneficiary's efforts have attracted high caliber artists to record in the United States; a letter from recording artist [REDACTED], who has recorded with the beneficiary and "Watersound Studios"<sup>1</sup> and cites the beneficiary's reputation as "a top notch engineer" in both Latin America and the United States; a letter from [REDACTED] confirming that he utilized the Watersound Productions studio while producing an album for a Spanish artist, on which the beneficiary served as the "main engineer"; and letters from five recording industry professionals who attest to employment practices in the music industry, specifically to the use of independent contractors on a project basis. The petitioner also submits copies of its IRS Forms 1099 issued to contractors between the years 2000 and 2005.

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<sup>1</sup> It appears based on the evidence submitted on appeal that the petitioner may do business under the assumed name of "Watersound Studios" or "Watersound Productions," although the petitioner has not submitted a fictitious name certificate from the State of California or other evidence to document the registration of an assumed or trade name. 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)).

Upon review of the record and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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 show 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the performance of non-managerial or non-executive duties.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the petitioning company as its sole employee and general operations manager, the petitioner has failed to show that the beneficiary's actual duties will be primarily managerial or executive in nature. The petitioner initially indicated that the beneficiary's duties consist of marketing and advertising the petitioner's services to Latin markets, duties which were not clearly primarily managerial in nature. Because the petitioner failed to submit a detailed position description, the director specifically requested that the petitioner provide a detailed account of the beneficiary's duties and an account of his "typical day."

The petitioner's response lacked the level of detail requested by the director, and included duties which do not fall under the statutory definitions of managerial or executive capacity. The petitioner stated that the beneficiary's "most important" duties are to record music, including setting up musicians, microphones and musical arrangements, and "physically" recording the music. The petitioner also emphasized the beneficiary's acclaim and recognition in his role as a sound engineer and sound mixer in the recording industry. These duties, while essential to the success of the petitioning company, clearly show that the beneficiary is providing the services of the company, rather than supervising the provision of these services through lower-level personnel. 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 AAO acknowledges that the petitioner submitted evidence that the beneficiary regularly utilized the services of a recording studio technician in 2005, and paid minimal amounts to three other contractors whose duties have not been identified. However, even if a technician assists the beneficiary during recording sessions, the fact remains that the petitioner stated that the beneficiary is the sound or recording engineer for the petitioner's recording studio, and that his responsibilities as a sound engineer are his "most important" duties. The actual duties themselves 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).

On appeal, counsel again acknowledges that the beneficiary is the studio's recording engineer, but states that the beneficiary also directs "all of the activities in and around the studio, including the musicians, background singers, sound assistants, producers, managers, and computer technicians." While it is reasonable that a recording engineer would provide guidance to the recording artists, musicians, and technicians to optimize recording conditions, these activities do not rise to the level of managerial capacity as defined in the statute. Nor does the record support a determination that the beneficiary supervises the "producers" or "managers" referenced for the first time on appeal. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petitioner indicated that the remainder of the beneficiary's duties include "marketing his studio by making contacts in [the] [m]usic industry" and running "his own Public Relations department," including attending meetings with artists, their representatives, producers and record executives. While counsel characterizes these duties as purely executive in nature, the petitioner has not articulated how marketing, advertising and promoting the services of the petitioner's business falls under the statutory definition of managerial or executive capacity. The beneficiary's role in finalizing recording arrangements with recording artists or record company managers may require the beneficiary's services in a qualifying capacity, but the petitioner has not indicated that these are the beneficiary's primary duties. Again, although the director requested a detailed description of what duties the beneficiary performs on a typical day and instructed the petitioner to be specific, the petitioner's response only provided an overview of the beneficiary's three areas of responsibility with none of the requested detail. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Any 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).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. This failure of documentation is important because the beneficiary's responsibilities as a recording/sound engineer and his marketing and promotion duties, do not fall directly under traditional managerial or executive duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager or executive. See *e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The petitioner states that the beneficiary alone "operates" the business and acknowledges his

personal involvement in every aspect of the day-to-day operations. The AAO does not doubt that the beneficiary, who appears to be the owner as well as the sole employee and general operations manager of the U.S. entity, exercises discretion over the day-to-day operations of the company, and makes all management decisions on behalf of the company. The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799). There may be certain situations in which a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence, that someone other than the beneficiary performs the majority of the day-to-day non-managerial and non-executive tasks associated with operating the petitioning entity. The petitioner has failed to meet this burden.

Counsel asserts that the director failed to take into account the nature of the petitioner's industry and the fact that recording studios do not generally require a full-time staff. 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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). A review of the director's decision indicates that the director did take into account the reasonable needs of the company, and reasonably concluded that the beneficiary would be required to perform a number of non-qualifying duties associated with providing the services of the organization, as well as marketing its services and performing other non-managerial duties associated with operating the business. The petitioner requires someone to market, promote and advertise its services, purchase and maintain recording equipment in the studio, schedule and coordinate recording sessions between different parties, perform the actual audio recording services and any necessary follow-up with the parties involved, and perform administrative and clerical tasks associated with operating any business, such as paying bills and taxes, managing the company's bank account, and arranging appointments. All of these duties would have to be performed by the beneficiary as the sole employee of the company, and it is evident that these non-qualifying tasks would require the majority of the beneficiary's time.

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 may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of

managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* In this matter, while the beneficiary exercises discretion over the U.S. company, the petitioner has not established that he is relieved from performing the day-to-day operations of the enterprise, and therefore it cannot be concluded that he would be employed in an executive capacity.

Similarly, the petitioner has neither claimed nor established that the beneficiary primarily supervises a staff of supervisory, professional or managerial employees, or that he manages an essential function of the U.S. company, such that he would meet the statutory requirements for serving in a qualifying managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Rather, the beneficiary is responsible for performing, rather than managing, all functions of the company on a day-to-day basis.

Based on the foregoing discussion, the petitioner has not established that the U.S. company would employ the beneficiary in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. company has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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.

At the time of filing, the petitioner submitted its 2004 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, with Schedule K-1, identifying the beneficiary as the sole shareholder of the corporation. The petitioner also submitted a copy of its articles of incorporation, which indicate that the company was established on February 11, 1998, and is authorized to issue ten thousand shares of common stock with no par value. The petitioner did not submit a supporting letter identifying its relationship with a foreign entity or other evidence related to the ownership and control of the U.S. company.

On March 6, 2006, the director issued a request for additional evidence. In part, the director instructed the petitioner to submit: (1) the foreign entity's annual report listing all affiliates, subsidiaries and branch offices; (2) a detailed list of owners for the foreign company and the percentages owned by each owner; (3) a copy of the foreign entity's articles of incorporation; (4) proof of stock purchase of the U.S. company by a foreign company, including copies of original wire transfers, evidence identifying the origination of funds and tracing all funds back to the parent company, and corroborating bank statements; (5) a copy of the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts; (6) minutes of the meeting for the U.S. company listing shareholders and the percentage of shares owned by each; (7) copies of all of the U.S. company's stock certificates; and (8) copies of the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders and purchase price. The director also requested a letter on company letterhead explaining the qualifying relationship between the U.S. company and the foreign entity.

In a response received on July 3, 2006, the petitioner submitted evidence related to its claimed foreign parent company, [REDACTED], a Mexican corporation formed in March 1990, and currently owned by five individuals. The petitioner submitted a copy of the minutes of an annual general assembly of shareholders of the foreign entity, dated April 19, 1996, in which the shareholders agreed to invest in the U.S. business. The petitioner also provided a copy of a letter from the foreign entity, addressed to the beneficiary in which he is directed to "locate and construct a Music Recording facility" in the United States, and noting the foreign entity would fund the project with a contribution of 5,000,000 pesos.

In addition, the petitioner submitted: (1) a copy of IRS Form 2553, Election of a Small Business Corporation, dated March 19, 1998, on which the beneficiary is identified as the sole shareholder of the U.S. company and owner of 100 shares; (2) the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f) filed with the California Department of Corporations, indicating a total stock offering valued at \$100; (3) the petitioner's stock transfer ledger, indicating that 100 shares of stock were issued to the beneficiary on February 11, 1998 in exchange for \$100; and (4) a copy of the petitioner's stock certificates number one issuing 100 shares of stock to the beneficiary on February 11, 1998. The reverse side of the stock certificate indicates the following: "I [the beneficiary] hereby hold these shares as Trustee for [REDACTED] . . . and appoint [REDACTED] a widow of [REDACTED] to transfer the said shares on the share register of the within named corporation with full power of substitution in the premises." The statement is dated March 31, 1998.

The petitioner submitted a voluminous exhibit described as "wire transfers and cash deposits from [REDACTED] to [the petitioner]." The petitioner indicated that the foreign entity contributed funds in the amount of \$1,029,585.30 between 1996 and 2002 and \$145,078 from 2002 through 2006, and attached copies of wire transfer confirmations, as well as a summary of transactions for each year since 1996. Many of the confirmations identify the beneficiary, rather than the petitioning entity as the beneficiary of the funds transfers, and many of the larger transfers appear to have been deposited to the beneficiary's savings account. The monies were also deposited to two different checking accounts, but the petitioner did not submit the requested bank statements that would clarify whether the accounts are owned by the beneficiary or the petitioning company. The originators of most of the funds transferred appear to be shareholders of the foreign entity, although the petitioner did not submit evidence showing that the monies transferred came from the foreign entity's account.

Finally, the petitioner submitted copies of its federal corporate tax returns for the years 1999 through 2005, all of which were filed on Form 1120S and all of which identify the beneficiary as the sole shareholder on Schedule K-1.

The director denied the petition on September 4, 2006, concluding that the petitioner had not established the existence of a qualifying relationship between the petitioner and its claimed parent company. The director noted that while the petitioner claimed to be a subsidiary of the foreign entity, the petitioner's stock certificate, stock ledger, and corporate tax returns all indicated that the owner of the U.S. company is the beneficiary, rather than the claimed parent company. The director noted that the petitioner had failed to clarify this discrepancy, and found that the petitioner had not provided unerring and concise evidence to substantiate the claim that the foreign company owns the U.S. entity.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the foreign entity is a qualifying organization. Counsel asserts that the petitioner submitted a corporate resolution of the foreign entity which "established life of the new corporation that was subsequently formed as directed by . . . [REDACTED]" Counsel asserts that the resolution establishes that the foreign entity established a timetable for the formation of the petitioner, appointed the beneficiary "to carry out the will of the Mexico Corporation," and included in its resolution financing for the project. Counsel also contends that the petitioner submitted a "valid and transfer [sic] of all the shares" of the U.S. company to [REDACTED] and copies of money transfers from the foreign entity to the U.S. company.

Upon review, the petitioner has not submitted sufficient evidence to establish the claimed parent-subsidary relationship between the foreign and U.S. entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or

indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest, as well as documentation of monies, property or other consideration furnished by the foreign entity in exchange for stock in the U.S. company. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

As noted by the director, the record contains conflicting evidence that prohibits a finding that the foreign entity owns the U.S. company. While the AAO recognizes the April 1996 resolution, which indicates the foreign entity's intent to invest in the U.S. business, it appears that such business may have initially operated as a sole proprietorship and was not established as a subsidiary of the foreign entity. The beneficiary applied for E2 status in order to operate the business in April 1996, and obtained an extension of his status one year later, many months prior to the incorporation of the company. There is no evidence related to the legal status of the company during this time period.

When the company was eventually incorporated in February 1998, it elected S Corporation status. The petitioner submitted a copy of its U.S. Income Tax Returns for an S Corporation (Form 1120S), for the years 1999 through 2005. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by the beneficiary, as stated on the company's Schedules K-1, rather than by the foreign entity. Although the director clearly addressed this contradictory evidence in the notice of decision, this conflicting

information has not been resolved. 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).

Furthermore, contrary to counsel's statements on appeal the evidence does not clearly show that the petitioner's issued stock was transferred to the foreign company. The petitioner issued 100 shares of stock to the beneficiary on February 11, 1998, and no subsequent transfer of stock is recorded on the company's stock transfer ledger. The information on the reverse side of the stock certificate appears to indicate that the beneficiary holds the stock as trustee for the foreign entity, however, no supporting evidence, such as corporate resolutions appointing the beneficiary as trustee, has been submitted. 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.

Finally, while the petitioner has provided a large number of wire transfer receipts purportedly showing transfer of monies from the foreign entity to the U.S. company, it cannot be determined based on the receipts alone that the monies originated from the foreign entity, rather than from its individual shareholders, or that monies were deposited to the petitioner's company account. The director advised the petitioner to "provide accountholder names and affiliation to the foreign entity for all persons making purchases and the bank accounts that were used." The petitioner failed to identify the sources of the transferred funds. Furthermore, as noted above, the monies were deposited into three different U.S. checking and savings accounts, including accounts that appear to belong to the beneficiary rather than to the U.S. entity. The director specifically requested U.S. bank statements corroborating the transfer of funds to the U.S. entity. 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). While a large amount of money appears to have been transferred to the beneficiary and/or the U.S. entity, there are no reported capital contributions reflected on the petitioner's tax returns between 1999 and 2005, and the value of the issued stock remains at \$100.00.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not submitted sufficient evidence on appeal to overcome the director's determination on this issue. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage. The petitioner indicates that the beneficiary will receive a weekly salary of \$500 to \$1500, or between \$26,000 and \$78,000 annually.

In determining the petitioner's ability to pay the proffered wage, USCIS 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. Although the beneficiary is currently employed by the petitioner as an E2 nonimmigrant, the petitioner has not demonstrated that the beneficiary currently receives a salary from the petitioning entity, or

that he is compensated as an officer of the corporation. Rather, his income is reported as "Ordinary Business Income" on Schedule K-1 (Form 1120S). In 2005, the beneficiary's income was reported as a loss of \$24,435.

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 September 23, 2005, the AAO must examine the petitioner's tax return for 2005. As noted above, the petitioner's IRS Form 1120S for calendar year 2005 presents a loss of \$24,435. The petitioner could not pay a proffered wage of \$26,000 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.

For the 2005 year, the petitioner's corporate tax return reflects net current assets of \$19,759. The petitioner could not pay the proffered wage out of these assets. Accordingly, the petitioner has not established its ability to pay the proffered wage. For this additional reason, the petition cannot be approved.

Finally, beyond the decision of the director, the director notes that the record as presently constituted contains no evidence that the beneficiary was employed by the foreign entity for at least one year in a managerial or executive capacity in the three years preceding his entry to work for the petitioner as a nonimmigrant, as required by 8 C.F.R. § 204.5(j)(3)(i)(B). The beneficiary commenced employment with the petitioning entity in E2 status on or about May 1996. The record is devoid of any information or evidence relating to his employment prior to that time, and therefore it cannot be concluded that he ever worked for the foreign entity, that he worked for the foreign entity for the required time period, or that he was employed by the foreign

entity in a managerial or executive capacity. As the director failed to request this required initial evidence, the AAO notes these deficiencies for the record and will not discuss these issues further.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.