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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California Service Center initially approved the employment-based visa petition. Upon subsequent review, the director properly issued a Notice of Intent to Revoke, and ultimately revoked the approval of the 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 1995. It imports, exports, and distributes CD ROM, media software, and other computer products. It seeks to employ the beneficiary as its sales manager.[1] 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 initially approved the petition. Upon subsequent review, including information obtained in an investigation in conjunction with the beneficiary's I-485, Application to Register Permanent Residence or Adjust Status, the director determined that the petitioner had not established: (1) that it was doing business in the United States; (2) a qualifying relationship with the beneficiary's foreign employer; (3) that the beneficiary had been or would be employed in a managerial or executive capacity for the petitioner; or, (4) its ability to pay the proffered annual wage of $26,000.

Upon review of the documentation submitted in response to the Notice of Intent to Revoke, the director revoked the approval of the petition on January 23, 2003, concluding that the petitioner's evidence did not overcome the grounds of revocation.

On appeal, counsel for the petitioner asserts that the director failed to consider the nature of fund transfers from China, the downturn in the economy, the petitioner's current business situation, and the reasonable needs of the organization at different stages of its development.

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):
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> * * *

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[1] The AAO acknowledges that the petitioner promoted the beneficiary to the position of president in December 1999. However, the petition and the determination to revoke the petition must consider the beneficiary's eligibility when the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, 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. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

> (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).

Citizenship and Immigration Services (CIS) regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Moreover, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet its burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, supra (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The petition was filed December 4, 1996 and was approved December 9, 1996. The beneficiary filed his I-485 application in April 1997. The Los Angeles District Office of the former Immigration and Naturalization Service (INS) conducted an investigation of the petitioning entity on April 26, 2001. The INS agent visited the petitioner's business location and did not find any evidence relating to the petitioner. An individual identified as Tony Teng told the INS agent that his business, Century Products, shared office space with the petitioner. The agent did not find the beneficiary at the site.

In an April 30, 2001 letter, the petitioner's new attorney represented that the beneficiary was the petitioner's sole employee because of a depression in sales. Counsel also represented that the INS agent had met Tony Teng, an individual who worked for another company sharing office space with the petitioner. Counsel noted that "Mr. Teng does not know much of the business nature of [the petitioner]." Counsel also represented that the petitioner's business was stagnant and the beneficiary was exploring other business opportunities. In an April 4, 2002 letter the petitioner's counsel stated that the petitioner had changed locations and the beneficiary was the president of the petitioner.

The first issue in this proceeding is whether the petitioner has continuously been doing business thus maintaining the required multinational aspect of this visa classification.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *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.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Doing Business* means the 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 initially submitted: (1) its 1995 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The 1995 IRS Form 1120 shows $189,873 in gross receipts, $4,500 paid in salaries, and a net taxable income of $2,910; (2) a two-year lease commencing on November 1, 1995 and ending October 31, 1997; (3) several invoices prepared in December 1995, and several illegible documents that appear to be invoices; and, (4) partial copies of July and August 1996 phone bills. The director approved the petition based on this limited evidence.

In the September 2002 Notice of Intent to Revoke, the director referenced the INS agent's site investigation and subsequent letters submitted by the petitioner's new counsel and a subsequent review of the initial evidence submitted. The director observed that the petitioner now claimed to do business as TXJ Technology Company and that it was now in a new business location. The director determined, however, that the evidence in the record did not substantiate that the petitioner had been doing business in the United States.

In an October 8, 2002 rebuttal, the petitioner through its director, stated that: (1) the petitioner had done business as Media Solution Multimedia Products from August 1995 through March 2002 and was doing business as TXJ Technology Company in a new location since March 14, 2002; (2) in February 1999, the petitioner's former president had resigned and had taken away a large portion of the petitioner's business as well as three of its employees; (3) the petitioner suffered heavy losses in 1999, 2000, and 2001; and, (4) the beneficiary had been appointed president in December 1999 and the company had started to turn a profit beginning in 2002. Mr. Teng claimed that the petitioner had never stopped doing business.

The petitioner submitted copies of its IRS Forms 1120 for the years 1999, 2000, and 2001. The petitioner also submitted copies of 2002 bank statements, invoices, and phone bills, and a lease commencing March 1, 2002.

The director determined that the evidence submitted did not establish that the petitioner had continuously been doing business.

On appeal, counsel for the petitioner asserts that the director ignored the petitioner's continuous efforts to develop new projects, the petitioner's current business achievements, and the petitioner's potential for further development.

Counsel's assertion is irrelevant to this proceeding. The 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). As footnoted earlier, the petitioner must establish eligibility when the petition is filed. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). In this matter, the petitioner had not submitted sufficient documentation to establish it had been doing business when the petition was filed. The petitioner had not submitted evidence that it had performed a sufficient number of transactions to establish the regular, systematic, and continuous provision of goods and/or services. Moreover, the director's obvious cursory review of the record resulted in an approval issued in error.

The INS agent's site visit to the petitioner's alleged place of business confirmed that the petitioner was not engaged in the regular, systematic, and continuous provision of goods and/or services. The petitioner's subsequent attempts to explain its failure to conduct business presented contradictory information. The petitioner, through its counsel, first stated that the INS agent had spoken to an individual who knew little about the petitioner's business, but instead operated his own company. The petitioner then identified this same individual as one of its directors, who knew enough about the petitioner to claim that it had never stopped doing business. 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, supra.*

In addition, the petitioner has not submitted any evidence that the petitioner continued to conduct business in 1996, 1997, or 1998. The petitioner's failure to present evidence that it conducted business during these years

substantiates the conclusion that the petitioner was not engaged in the continuous, systematic, and regular provision of goods and/or services. Counsel's assertion that the petitioner was continuously exploring ways to develop new projects is not documented. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez, supra.* Further, as stated above, the petitioner had not submitted evidence that it had performed a sufficient number of transactions to establish the regular, systematic, and continuous provision of goods and/or services when the petition was filed.

The petitioner has not submitted evidence to overcome the director's determination on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The director's sole concern with the petitioner's qualifying relationship with the beneficiary's foreign employer centers on the petitioner's failure to produce documentation that the foreign entity actually paid for the petitioner's stock.

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 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.

In the Notice of Intent to Revoke, the director noted that the record did not contain evidence that the beneficiary's foreign employer had actually paid for the petitioner's stock. The director observed that the record contained three copies of Applications for Telegraphic/Mail Transfer form the Bank of China on behalf of Ma, Suxian to the petitioner at the beneficiary's address. The transfers took place in May 2001.

In rebuttal, the petitioner submitted a statement from the legal representative of the foreign entity indicating that due to governmental restrictions on foreign currency transactions, the foreign entity in March 1995 transferred $80,000 to the petitioner through [redacted] parent company in the United States. The legal representative indicated that it subsequently transferred operational funds to the petitioner through Suxian Ma. The petitioner also provided a copy of its checking account statement for March 1996 showing a check in the amount of $80,000 had been deposited.

The director determined that the evidence submitted in rebuttal did not show that the foreign entity deposited funds to the petitioner's bank account. The director did not address the statement purportedly made on behalf of the foreign entity stating that the foreign entity deposited the funds through the use of a third party.

On appeal, counsel for the petitioner asserts that all parties are ready to attest that the foreign entity did provide funds for the purchase of the petitioner's stock.

Counsel's assertion is not sufficient. The assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.* Moreover, the foreign entity's statement is not a sworn statement. Further, the record contains no documentation of any agreement allegedly made with the third party company to deposit funds on behalf of the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Finally, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra.*

Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The petitioner has not established that the foreign entity paid for the petitioner's stock, thus the record does not contain sufficient evidence of a qualifying relationship in this matter.

The third issue in this proceeding is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

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
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter accompanying the petition, the petitioner stated that the beneficiary had been performing the duties of sales manager and would continue to perform the following job duties:

- To direct and manage overall operations of the Sales Department of USA branch company;
- To determine overall sales development directions and set periodic goals;
- To review market research price analysis reports so to decided [sic] sales project developments and items to promote;
- To supervise functions and performance of district sales agents;
- To set business targets so to determine long term and short term projects;
- To negotiate and sign up buying/selling and joint-venture contracts;
- To execute personnel authorities (including to hire/fire and supervise performance of all the employees within his department) [sic].

The petitioner also noted that the beneficiary reported directly to the president and directly supervised a sales representative and a purchasing clerk. The petitioner indicated that the sales representative coordinated with district sales agents, conducted some market research, initially negotiated with suppliers and manufacturers and proposed items for import. The petitioner stated that the purchasing clerk prepared market research, conducted initial purchasing negotiations with suppliers, checked specifications of inventory before purchasing, and made pickup and delivery arrangements.

In the Notice of Intent to Revoke, the director observed that the beneficiary had served as sales manager, as vice-president and, as president of the petitioner as stated in counsel's April 30, 2001 letter. The director noted that the record did not show that any of the employees on the petitioner's September 30, 1996 California Form DE-6, Employer's Quarterly Wage Report, filed with the petition continued to be employed by the petitioner, except for the beneficiary. The director also referenced the INS agent's site visit and the petitioner's counsel's April 30, 2001 statement that the petitioner employed only the beneficiary. The

director determined that the beneficiary would necessarily be performing a salesperson's tasks and would not be primarily performing the duties of a manager or executive.

In rebuttal, the petitioner focused on the beneficiary's duties as president of the organization. The petitioner indicated that the beneficiary's daily activities as president included:

> [M]eeting with the managerial staff to discuss current market conditions; reviewing marketing and financial reports of the organization; meetings and luncheons with key executives from primary customers; setting goals for the organization based on telephone discussions and facsimile reports from the foreign parent company; and exercising discretionary decision-making on issues presented by the marketing manager and purchasing manager.

The petitioner also stated that it anticipated that the beneficiary would spend 40 percent of his time establishing and implementing corporate goals and policies, 40 percent of his time reviewing and preparing communications with the executives in the foreign parent organization and training U.S. managerial personnel, and 20 percent of this time meeting with executives of principal customers. The petitioner finally noted that there were three "professional" employees under the beneficiary's direction including a secretary, a purchasing manager, and an inventory controller and that it anticipated hiring a sales manager and a sales representative in the next year.

The director determined that due to the relative size of the petitioner, the beneficiary's duties could not have all been managerial or executive. The director determined that, at most, the beneficiary would have been a first-line supervisor of non-professional employees.

On appeal, counsel for the petitioner contends that the director ignored the beneficiary's responsibility for the overall management of the company; but instead focused on the "relative size" of the company when determining the beneficiary's duties were not managerial or executive. Counsel also observed that if staffing levels are used when determining whether an individual acts in a managerial or executive capacity, the director must take into consideration the reasonable needs of the organization, in light of the overall purpose and stage of development.

Counsel's contention is not persuasive. The AAO must first consider the facts in support of the petition when the petition was filed. As stated previously, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak, supra.* The petition was filed December 4, 1996, and any subsequent change in the beneficiary's duties or position title is irrelevant to the beneficiary's claimed managerial or executive capacity. *Cf. Calexico Warehouse, Inc. v. Neufeld,* 259 F. Supp. 2d 1067, 1079-80 (S.D. Cal. 2002).

Moreover, 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. *See* 8 C.F.R. § 204.5(j)(5). A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set

forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner initially provided a general description of the beneficiary's duties as sales manager for the petitioner. For example, the petitioner states that the beneficiary's duties include the responsibility "[t]o direct and manage overall operations of the Sales Department," "[t]o determine overall sales development directions and set periodic goals," and "[t]o set business targets so to determine long term and short term projects." The petitioner did not, however, further define the petitioner's operations, goals, targets or projects. Moreover, the petitioner indicated that the beneficiary would supervise the functions and performance of district sales agents but failed to provide evidence substantiating the use of district sales agents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* 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).

In addition, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of managerial and executive capacity. *See* section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For instance, the petitioner depicted the beneficiary as executing "personnel authorities (including to hire/fire and supervise performance of all the employees within his department," and as noted above, "direct[ing] and manag[ing] overall operations." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra; Associates Inc. v. Meissner,* 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner indicated that the beneficiary would negotiate and sign contracts and decide sales project developments and promotions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International,* 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, the petitioner failed to allocate the beneficiary's percentage of time devoted to his various duties. Such a failure is important because the record suggests that the beneficiary is primarily a first-line supervisor of the sales representative and purchasing clerk or is simply the senior member of a sales and purchasing team. As the director observed a first-line supervisor is not a managerial duty unless the employees supervised are in professional positions. *See* section 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv). Neither a sales representative nor a purchasing clerk is a professional position. Thus, the AAO cannot conclude that the beneficiary was primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice,* 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The petitioner had not established that the beneficiary's assignment as a sales manager was a primarily managerial or executive position when the petition was filed. The petitioner's subsequent material changes to the beneficiary's position cannot be considered within the adjudication, including the revocation, of this petition.

Moreover, the AAO observes that the petitioner has not provided evidence of the number and tasks of the beneficiary's subordinate employees for the years 1996, 1997, and 1998. Additionally, even if the beneficiary's change in duties were considered, the record indicates that the beneficiary is the petitioner's sole employee for a number of years including 1999, 2000, and 2001. It is not possible to conclude from the evidence in the record that the beneficiary directed or managed or otherwise planned, organized, and controlled the organization's major functions and work through other employees; instead if the petitioner had actually been doing business the beneficiary would have been performing all the duties associated with operating a business.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 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). Further, 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.*

The petitioner has not established that the beneficiary's assignment was or would be primarily managerial or executive. The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue.

The final issue in this matter is whether the petitioner has established its ability to pay the beneficiary the proffered wage of $26,000 per year.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner demonstrated that it employed the beneficiary prior to filing the petition. However, the petitioner did not submit evidence establishing that it had previously paid the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In this matter, as noted above, the petitioner's 1995 IRS Form 1120 did not show that it had sufficient net income to pay the beneficiary the proffered wage. The record does not contain the petitioner's 1996, 1997, or 1998 IRS Forms 1120. The record contains an unaudited financial statement for the first six months of 1996, but unaudited statements are not sufficient for this proceeding. As the petition's priority date falls on December 4, 1996, the AAO must examine the petitioner's tax return for 1996. The petitioner however, has not provided its IRS Forms 1120 for the calendar years 1996, 1997 and 1998. Accordingly, the director's determination that the petitioner had not established that it had the ability to pay the wage offered as of the filing date of the petition is affirmed.

Beyond the decision of the director, the petitioner did not provide an adequate description or documentary evidence of the beneficiary's position with the overseas entity. For this additional reason, the petition will not be approved. 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).

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.