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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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MAY 01 2009

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date:
LIN 06 235 52206

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

for

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the import, distribution, wholesale, and retail of various household products. The petitioner seeks to employ the beneficiary as its general 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 based on three independent grounds of ineligibility: 1) the petitioner failed to establish that it has an employer/employee relationship with the beneficiary; 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish that it had and continues to have the ability to pay the beneficiary's proffered wage.

On appeal, the beneficiary, on behalf of the petitioner, submits a letter of explanation in an attempt to address the director's concerns. A comprehensive discussion of the director's decision and all relevant evidence is provided below.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 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 petitioner and the beneficiary have the requisite employer/employee relationship to qualify for the immigration benefit sought herein.

As explained in 8 C.F.R. § 204.5(j)(5), the petitioner must establish that the beneficiary will be "employed" in an executive or managerial capacity. It is noted that "employer," "employee," and "employed" are not specifically defined for purposes of the Act even though these terms are used repeatedly in the context of addressing the multinational executive and managerial immigrant classification. Section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), requires beneficiaries to have been "employed" abroad and to render services to the same "employer" in the United States. Further, section 101(a)(44), 8 U.S.C. § 1101(a)(44), defines both managerial and executive capacity as an assignment within an organization in which an "employee" performs certain enumerated qualifying duties. Finally, the specific definition of "managerial capacity" in section 101(a)(44)(A), 8 U.S.C. § 1101(a)(44)(A), refers repeatedly to the supervision and control of other "employees." Neither the legacy Immigration and Naturalization Service nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employer," or "employed" by regulation for purposes of the multinational executive and managerial immigration classification. *See, e.g.*, 8 C.F.R. § 204.5 and 8 C.F.R. § 214.2(l). Therefore, for purposes of this immigrant classification, these terms are undefined.

The Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Within the context of immigrant petitions seeking to classify the beneficiary as a multinational manager or executive, when a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker may only be defined as an "employee" if he or she is subject to the organization's "control." *See Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003); *see also New Compliance Manual* at § 2-III(A)(1)(d). Factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (citing *New Compliance Manual*).

In the present matter, the petitioner provided a letter dated July 26, 2006 in support of the petition in which it claimed that the beneficiary owns 70% of the foreign entity and 50% of the U.S. entity. The AAO notes for the record that among its supporting documents, the petitioner included the foreign entity's executive summary, where the beneficiary was identified as 100% owner of the foreign entity. This document is inconsistent with the claim made by the petitioner in its support letter. 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).

On June 22, 2007, the director issued a request for additional evidence (RFE), instructing the petitioner to provide evidence showing how many of its shares are outstanding and establishing the ownership of the outstanding shares.

In response, the petitioner provided a letter from counsel dated September 13, 2007 in which counsel explained that the beneficiary owned all of the foreign entity's shares when the company was first established. Counsel further explained that prior to the beneficiary's departure from her home country, she transferred 30% of her ownership shares to be equally divided among her three siblings, leaving the beneficiary with a 70% ownership interest in the foreign entity. With regard to the U.S. entity's ownership, the petitioner provided a document dated January 17, 2005, entitled, "Minutes of

Action of Incorporator of [the petitioner] (a California corporation) Taken Without a Meeting by Written Consent." In the section discussing the issuance of company stock, the document shows that the beneficiary owns 25,000 shares, [redacted] owns another 25,000 shares, and the foreign entity owns the remaining 50,000 shares. In addition, the record contains the petitioner's stock certificate No. 20, dated January 14, 2007, which purports to issue an unspecified number of shares to the beneficiary. No information was provided as to the whereabouts of stock certificate Nos. 1-19, nor did the petitioner clarify whether the issuance of the latest stock certificate changed the previously specified ownership breakdown. *See id.*

On April 14, 2008, the director denied the petition citing the lack of an employer/employee relationship between the petitioner and the beneficiary as one of three grounds for denial. The director observed that the petitioner failed to provide a stock transfer ledger despite having been requested to do so. The director pointed out that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The director also noted that the petitioner failed to provide documentation to support the claim that 30% of the beneficiary's ownership interest had been transferred to her siblings. It is noted that 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)). Accordingly, based on the evidence submitted, the director concluded that the beneficiary has controlling interest in both the U.S. and foreign entities, which precludes the existence of an employer/employee relationship between either company and the beneficiary.

On appeal, the beneficiary, on behalf of the petitioner, reiterates the information previously provided with regard to her 70% ownership interest in the foreign entity and her direct 25% ownership interest in the U.S. entity. It is noted, however, that no documentation was submitted to support the claimed distribution of 30% of the beneficiary's interest in the foreign company to her siblings. Thus, the only documentation on record shows that the beneficiary is 100% owner of the foreign entity. As such, the beneficiary does not only own 25% of the U.S. entity, but she also indirectly owns another 50% of the U.S. entity by virtue of her ownership of the foreign entity, thereby giving the beneficiary an overwhelming majority, i.e., 75%, ownership of the petitioning entity.

Accordingly, applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that the beneficiary will be an "employee" employed in a managerial or executive capacity. As explained above, the petitioner is a corporation, which appears to be ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that anyone other than the beneficiary herself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it appears the beneficiary is the employer for all practical purposes. She will control the organization; set the rules governing her work; and share in all profits and losses. Based on this initial finding, the AAO cannot approve this petition.

The second issue in this proceeding calls for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary would be employed in the United States in a qualifying 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

In the petitioner's July 26, 2006 support letter, the following list of the beneficiary's proposed job duties was provided:

1. Making discretionary decision[s] on the day-to-day operation of the U[.]S[.] subsidiary;

2. Formulating strategic marketing plans for the development of the U[.]S[.] [s]ubsidiary;

3. Setting up sales guidance and ensur[ing] its implementation;

4. Managing and overseeing the general operation of the U[.]S[.] subsidiary;

5. In charge of company finance, marketing and sales department;

6. Hiring and firing department managers and subordinate employees;

7. Promoting or demoting department managers and subordinate employees;

8. Negotiating and signing contracts as a representative of the company;

9. Implementing company policies and ensuring its compliance;

10. Responsible for filing company tax returns for paying federal and state taxes;

11. Acting as a liaison between the parent company and the U[.]S[.] subsidiary; and

12. Reporting directly to the parent company regarding the operations of the U[.]S[.] subsidiary.

In the RFE, the director noted that the above list lacked sufficient detail. Accordingly, the petitioner was instructed to expand on the above by providing a more specific list of daily tasks to be performed and the percentage of time allotted to each enumerated task. The director also asked the petitioner to provide a detailed organizational chart, including depicting the positions of all company employees and their respective job descriptions.

In response, the petitioner provided the following percentage breakdown of the beneficiary's proposed tasks:

1. **Direct the Management of the Organization and its Employees (40%)**: [The beneficiary] manages and oversees the general operation of [the petitioner]. She is in charge of the hiring and firing of department managers and its subordinate employees. She is in charge of promoting and demoting them as well. [The beneficiary] sees to it that the operations of the company are conducted and implemented in accordance with the established company's policies and guidelines on a day-to-day basis.

2. **Establishes Goals and Policies (20%)**: [The beneficiary] establishes and implements the company's specific goals and policies. She devises strategies and formulates plan [sic] and policies to ensure that the company's objectives are met. She utilizes her expertise in promoting their merchandise to increase their clientele

on different [s]tates of the U.S. and overseas. Because of [the beneficiary]'s effective marketing strategy and plan, the company continues to experience a significant and steady increase on [sic] the company's gross sales and profits for the past two years.

3. **Exercises Wide Latitude of Discretionary Decision Making and Receive[s] only General Supervision or Direction from Higher Level Executives, Board of Directors or Stockholders (40%)**: [The beneficiary] exercises a wide latitude of discretionary decision making, which includes but are [sic] not limited to the following: [s]etting up the sales guidance and ensuring its strict compliance[;] to negotiate and enter into contracts with suppliers or any person or entity, which may be necessary for the company's operation and sales[;] to act as a liaison between the parent company in Indonesia and [the petitioner; and is] accountable for the accuracy of their financial reporting, marketing, and the operational success of the company.

The petitioner also provided its organizational chart, illustrating a five-tier hierarchy with the beneficiary at the top, [redacted] as shareholder directly below the beneficiary, [redacted] as the sales manager and third from the top of the hierarchy, [redacted] as the secretary directly subordinate to the sales manager, and two sales associates and a shipping and supply clerk at the bottom of the hierarchy.

The petitioner also provided photographs of its business showing what appears to be the storefront of a retail jewelry operation. The accompanying hours of the operation summary shows that the store is open from 9 a.m. until 6 p.m. seven days per week and further indicates that the beneficiary is at the store location during all hours of operation, seven days per week. The schedule also shows that the beneficiary is assisted by one of two sales associates Monday through Saturday and by both sales associates on Sunday. The work schedule also shows that [redacted], who was previously identified as a secretary, is an independent contractor who comes in bi-weekly to complete payroll. The petitioner also provided 2006 Form 1099s for each of its sales associates, as well as a 2006 Form 1120 showing no officer compensation or employee salary and wages.

In the denial, the director actively notes the inconsistency with regard to the role of [redacted] within the U.S. entity, pointing out that this individual had been identified by two different position titles. The director further concluded that the evidence indicates that the beneficiary would be directly involved in the petitioner's day-to-day operational tasks and that she would not manage professional, managerial, or supervisory personnel. Based on these findings, the director concluded that the beneficiary would not be employed in the United States in a managerial or executive capacity.

On appeal, the beneficiary, on behalf of the petitioner, provides a confusing explanation, stating that she manages the independent contractors, who are paid 40% commission. The beneficiary does not distinguish between the sales associates and the secretary/accountant who does the company's payroll. As such, it is unclear on what basis the petitioner can pay [redacted] commission-based wages. The AAO further notes that the two Form 1099s for each of the petitioner's sales associates show that both were paid identical wages in 2006. It is unclear, and requires further clarification to

explain how two commission-based employees could have received identical pay when both individuals' wages were based on the total amount of their respective sales transactions. When this anomaly is considered further in light of the inconsistent information provided in the petitioner's 2006 tax return regarding the salaries and wages paid, the AAO is lead to question the authenticity of the documentation submitted. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. In light of these unanswered questions, the AAO further doubts the authenticity of the organizational hierarchy that was illustrated in the petitioner's organizational chart, as it is unclear which employees the petitioner actually employed at the time the Form I-140 was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), requiring the petitioner to establish eligibility at the time of filing.

While the petitioner's staffing is not the sole factor being considered, it is highly relevant for the purpose of determining who within the petitioner's organization is available to relieve the beneficiary from having to primarily performing non-qualifying tasks. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). In the present matter, the petitioner has not submitted adequate documentation establishing whom it employed at the time of filing. Without sufficient evidence of an adequate support staff, the AAO can only assume that the beneficiary is left to perform the petitioner's daily operational tasks. It is noted that 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Lastly, in examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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 the instant matter, the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis and how much of her time would be spent on qualifying tasks versus the non-qualifying ones. For instance, in response to the RFE, counsel stated that 20% of the beneficiary's time would be allotted to establishing and implementing goals and policies. However, counsel failed to specify any actual goals or policies, nor did she provide a thorough explanation of the specific tasks the beneficiary would undertake on a daily basis in her efforts to implement these goals and policies. Counsel stated that another 40% of the beneficiary's time would be spent making decisions regarding sales guidance and contract negotiation, communicating with the foreign company, and ensuring accuracy regarding financial reporting, marketing, and operational success. These broad statements, however, fail to indicate any specific tasks the beneficiary would perform. In other words, it is

unclear what specific actions amount to sales guidance. Furthermore, if the beneficiary is involved in contract negotiation, the petitioner must specify the role to be assumed so that the beneficiary's tasks can be distinguished from those of a sales associate. Counsel also failed to expand on the types of tasks the beneficiary would undertake with regard to the petitioner's finances, marketing, and operational success. Aside from a contracted payroll employee (for whom the petitioner has provided no wage or salary information), the petitioner does not claim to employ anyone to deal with the company's finances, nor is there any indication that anyone other than the beneficiary is available to assume any of the petitioner's marketing responsibilities. It appears, therefore, that any non-qualifying tasks that are associated with finances or marketing are performed by the beneficiary herself. As the petitioner has provided no specific information establishing exactly what these tasks entail, the AAO cannot conclude that they are of a qualifying nature.

Finally, while counsel stated that 40% of the beneficiary's time would be spent directing management of the petitioner and its employees, the duties underlying this broad set of responsibilities are highly questionable in light of the lack of documentation establishing whom exactly the petitioner employed at the time of filing the Form I-140. As far as directing the management of the company, it is unclear how the beneficiary's duties can be limited to mere management in the absence of a sufficient support staff to perform daily operational tasks.

In summary, while the petitioner has provided little information as to what actual tasks the beneficiary would carry out on a daily basis, the evidence of record suggests that the petitioner operates primarily as a retailer/wholesaler of jewelry. At best, the beneficiary may be the first-line supervisor of a staff consisting of two sales associates, a payroll clerk, and a shipping clerk, none of whom have been established as being professional, managerial, or supervisory employees. However, as previously stated, the beneficiary's job duties have not been made clear despite the director's express request for this relevant information. Thus, in light of the deficient documentation regarding the petitioner's support staff and the insufficient information regarding the beneficiary's actual daily job duties, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

The third ground for ineligibility as cited by the director is the petitioner's ability to pay. 8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

> 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.

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. In the present matter, the petitioner claims that the beneficiary is compensated

by the foreign entity. Therefore, it cannot be determined that the beneficiary has been remunerated a salary equal to or greater than the proffered wage.

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 USCIS) 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.

The above analysis was conducted by the director, who properly determined that $5,534, which was shown as the petitioner's income in the 2006 tax return, is not sufficient to establish the ability to remunerate the beneficiary a proffered wage of $50,000 annually.

Lastly, if the net income the petitioner demonstrates it had available during the pertinent period added to the wages paid to the beneficiary during the period do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In the present matter, however, the petitioner did not complete Schedule L of the 2006 tax return. As such, the AAO cannot conclude that the petitioner's assets were sufficient to establish its ability to pay the beneficiary's proffered wage. Therefore, based on this third ground of ineligibility, the petitioner's Form I-140 cannot be approved.

Furthermore, the record does not support a finding of eligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(B) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to her entry to the United States as a nonimmigrant to work for the same employer. In the instant matter, the director specifically addressed this issue in the RFE by instructing the petitioner to provide a detailed analysis of the beneficiary's daily activities during her employment abroad. Although the petitioner did provide a percentage breakdown, it is not apparent that the breakdown applies to the beneficiary's employment abroad. Rather, the description appears to apply to the beneficiary's proposed employment. As the petitioner provided little information regarding the beneficiary's employment abroad, the AAO cannot conclude that her time was primarily devoted to job duties within a qualifying managerial or executive capacity.

Second, 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that 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." Although the photographs provided in response to the RFE indicate that the petitioner is a sales operation, the record lacks evidence of any sales transactions during the requisite one-year period prior to the date the petition was filed. Despite the petitioner's submission of its 2006 tax return, there is no way of determining the frequency of the petitioner's sales transactions from this annual return. As such, the AAO cannot conclude that the petitioner has been conducting business during the time period and in the manner prescribed by regulation. *See id.*

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). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown 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 at 1043, *aff'd,* 345 F.3d 683.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.