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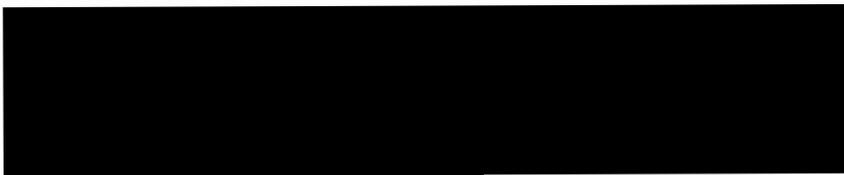
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Washington, DC 20529



U.S. Citizenship
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Office: TEXAS SERVICE CENTER

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Petitioner:

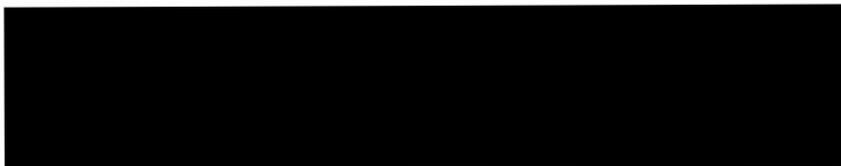
Beneficiary:



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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Florida that is operating as a freight forwarder. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had failed to demonstrate that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; (2) the beneficiary's foreign employer existed and was doing business in Venezuela at the time the immigrant petition was filed; and (3) the petitioner had the ability to pay the beneficiary's proffered wages.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) erred in concluding that the beneficiary was not eligible for the requested immigrant visa classification. Counsel submits a brief and additional documentary evidence in support of the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

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

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

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140 on January 25, 2006, identifying the beneficiary as occupying the position of president in the nine-person United States company. In an appended letter, dated January 12, 2006, the petitioner identified the beneficiary's job duties as being executive in nature, and provided the following job description:

The CEO and President of the company is responsible for establishing, monitoring and enforcing all the strategies, policies and procedures of the corporation in the areas of sales and marketing, procurement, operations, administration (including bookkeeping & taxes), and human resources. In addition to those direct supervisory roles, he will be responsible

for the selection, initial negotiation of conditions and supervision of the relation with mayor [sic] suppliers both in the US an[d] abroad in direct contacts and while attending trade shows. He also will identify new lines of products and/or potential acquisitions to expand the business of the corporation in new areas. He will also be responsible for the establishment of the policies in regard to the accounting and taxes of the corporation as well as the Human Resources policies in conjunction with the head of each division, the respective bookkeepers, as well as with the external advisors and contractors. He will set up and supervise the incentive programs for the Division Heads and supplies the payroll information to the outside payroll contractor.

The president of the corporation is also an active member of the board of directors of other corporations in the US and abroad in which he has interest as shareholder as well, but that are not related or affiliated to the petitioner. In addition, he will conduct large negotiations related to the other corporations where he has interests.

As President of [the petitioning entity,] [the beneficiary] will undertake the direction of the company and will implement the new operations lineaments of the business. [The beneficiary] will be responsible for implementing the business plan, which will be formulated to expand [the petitioning entity] and to coordinate the day-to-day business activities. In order to continue this growth[,] we respectfully request that [the beneficiary] be afforded the opportunity to be transferred in the permanent position of President of our corporation. This is a key executive position and he will continue to implement the goals and policies of our company, as well as continuing to introduce the product and services of our company to new markets, both in the United States and overseas.

As such[,] [the beneficiary] will be responsible for the overall operation, administration and development of the company. He will be also [sic] responsible for planning, developing and establishing long-range goals and objectives to expand [the petitioner's] business activities in the U.S. He will plan, coordinate, direct and control the program and execution of the company's budget to assure it has been executed among the parameters defines [sic] by the Board of Directors. He will exercise far-reaching and discretionary executive decision-making authority and reports directly to the Board of Directors in the United States and in Caracas, Venezuela. He will direct management through his managerial personnel to establish contact and reliable business relationships with distributors worldwide. As business expands, he will be responsible for hiring additional personnel for the company. He will present and create new markets [sic] projects and its achievements within the corporation standards. He will implement goals through subordinate administrative, logistic, and marketing personnel. He will coordinate activities of departments, such as operating, sales, maintenance and development, to effect operational efficiency and economy.

He will direct the work of at least 15 people including employees, who are professionals that include different departments from [the petitioning entity] and [] two subsidiary companies Independent and outsourcing contractors performing day-to-day functions could be taken into account in the analysis of [the beneficiary's] directing responsibilities as a manager, as referred the Administrative Appeals Unit in *Matter of Irish Dairy Board, Inc.*

The petitioner's counsel also submitted a letter at the time of filing, which provided essentially the same description for the beneficiary's proposed position. The petitioner further submitted the following list of "executive" duties associated with the beneficiary's employment as president and the number of hours allocated to each duty on a weekly basis:

- He will be designated to this executive position to act as a liaison between both companies and further [the petitioner's and its United States subsidiary's] corporate growth. 7.0
- He will be responsible for the overall operation, administration and development of the company. 6.0
- He will also be responsible for planning, developing and establishing long-range goals and objectives to expand [the petitioner's] business activities in the U.S. 3.0
- He will exercise far-reaching and discretionary executive decision-making authority and reports directly to the Board of Directors in the United States and in Caracas, Venezuela. 4.0
- He will direct management through his managerial personnel to establish contact and reliable business relationships with distributors worldwide. 7.0
- He will implement goals through subordinate administrative, logistic, and marketing personnel. 5.0
- He will coordinate activities of departments, such as operating, sales, maintenance and development, to effect operational efficiency and economy. 3.0
- He will direct and coordinate the work of at least 8 people including employees, who are professionals. 5.0

An attached organizational chart of the United States entity depicted the beneficiary as supervising a direct subordinate, who would occupy the position of general manager, and directing the company's administrative, operations, traffic and claims, and financial departments.¹ Based on the organizational chart, the petitioning entity was comprised of fourteen positions, in addition to the positions of drivers and warehouse workers, which were identified as being occupied by subcontractors. The AAO notes however, that five of the individuals named as employees of the petitioning entity are also identified on the foreign entity's organizational chart.

On March 9, 2006, the director issued a request for evidence, directing the petitioner to address the beneficiary's proposed employment in the United States in the form of a "definitive statement" listing the beneficiary's job duties, and including: (1) the beneficiary's position title and salary; (2) the percentage of time the beneficiary would devote to performing each named task; (3) the subordinate managers, supervisors, and employees who would report directly to the beneficiary, and a brief job description for each; (4) the

¹ The submitted organizational chart also identifies the beneficiary as overseeing two separate United States companies. The AAO notes that based on the evidence provided, the two additional United States companies are not subsidiaries of the petitioning entity. While the companies share two common stockholders with the petitioner, they do not meet the regulatory definition of the term "affiliate," as provided for at 8 C.F.R. § 204.5(j)(2). The petitioner's business in the United States is not dependent on or linked with the operations of the other two companies. Accordingly, the beneficiary's involvement in each company's operations is not relevant to the analysis of whether he would be employed by the petitioner in a primarily managerial or executive capacity, and will not be considered herein.

beneficiary's level of authority in the United States entity and the qualifications necessary to hold his proposed position; and (5) the persons responsible for performing the services offered by the petitioner. The director noted that the previously submitted organizational charts identified employees as working for both the petitioner and the foreign organizations. The director asked that the petitioner clarify in which company each worker is employed, or identify the tasks and hours devoted to the petitioner's business if employed by both the foreign and United States organizations.

Counsel for the petitioner responded in a letter dated May 25, 2006. As evidence of the "executive" nature of the beneficiary's employment, counsel provided essentially the same job description as that previously submitted and outlined above. Counsel also stated:

[The beneficiary's] primary duties will be [to] direct the management of the companies and establishes [sic] organizational goals and policies, exercises wide latitude in discretionary decision-making, and is within the board of director[s]. An employee with a title such as President of a company qualifies as an executive, which is the case of [the beneficiary].

Counsel referenced a "detail[ed] organizational chart" included as part of the petitioner's response, which is essentially a copy of the same organizational chart previously submitted for review. Counsel also provided a revised organizational chart of the foreign entity, which identified workers and positions different from those previously named, likely in an attempt to clarify the discrepancies raised by the director with respect to the petitioner's staffing. In addition, counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, which, for the quarter ending March 31, 2006, indicated that the petitioner employed five workers on the filing date. The petitioner did not submit copies of its state quarterly wage reports for this same period. As a result, the record does not clarify which of the workers named on the organizational chart were employed by the petitioner at the time of filing.

The director subsequently issued a notice of intent to deny, dated June 15, 2006, again requesting the same "definitive statement" of the beneficiary's proposed position. The director noted that counsel had submitted the same organizational chart of the United States company and had failed to clarify the company in which each worker was employed.

Counsel responded in a letter dated June 28, 2006, again providing essentially the same previously submitted description of the beneficiary's employment. Counsel provided "correct" organizational charts of both the foreign and United States entities, stating that none of the petitioner's workers are employed by the foreign organization.

In a July 31, 2006 decision, the director concluded that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director stated the petitioner's obligation to establish that the beneficiary's job duties would be primarily managerial or executive, and not related primarily to "the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company." The director also noted that neither the beneficiary's title nor ownership of the petitioning organization is an "indicator[]" of the capacity in which the beneficiary would be employed. The director concluded that the petitioner had not established that "the beneficiary's primary assignment has been or will be directing the management of the organization nor that the beneficiary has been or will be primarily directing or supervising a subordinate staff

of professional, managerial, or supervisory personnel, who relieve him from performing non-qualifying duties." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on September 1, 2006, contending that CIS erred in concluding that the beneficiary would not be employed in a primarily managerial or executive capacity. In an October 27, 2006 letter, counsel claims that the beneficiary's proposed employment is comprised of primarily managerial or executive job duties, stating that he would: direct the management of the petitioning organization; establish the company's goals and policies; and, exercise wide latitude in discretionary decision-making. The AAO notes that a significant portion of counsel's letter on appeal is comprised of restatements of the beneficiary's previously submitted job description. Counsel references the petitioner's organizational chart as evidence that the beneficiary would "supervise the work of 10 managers and numerous professional staff within the company who will relieve him from performing non-qualifying duties," as well as that the director erroneously concluded that the beneficiary would supervise lower-level employees. Counsel emphasizes that the beneficiary "will implement goals through subordinate administrative, logistic and marketing personnel," and plan and coordinate the activities of each department. Counsel further contends that the beneficiary's named job duties "represent policy-making, operational, policy management and executive decision-making tasks that will be performed by the beneficiary in his position as President for the petitioner – they do not suggest that the beneficiary will be performing primarily 'operational and administrative tasks' nor that the beneficiary is involved in the supervision of lower level employees as the USCIS officer erroneously states."

Counsel claims that CIS ignored "the detailed documentary evidence" presented by the petitioner. Counsel states that the offered job description "suggest[s] that [the beneficiary] will be performing primarily executive/supervisory tasks – through planning, managing and organizing a major function of the organization, including making high-level decision making policies." Counsel states that the "few" lower-level tasks performed by the beneficiary represent less than a quarter of the beneficiary's job duties.

Counsel also contends that CIS "erred in determining the applicable standard of proof." Counsel states that the petitioner established by a preponderance of the evidence that the beneficiary would perform primarily executive and managerial job duties as the president of the United States entity.

Counsel submits on appeal copies of the initial letters submitted by her and the petitioner at the time of filing, as well as the beneficiary's job description and the original organizational charts.

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

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 beneficiary's job description, while lengthy, is not sufficient to establish the beneficiary's employment in a primarily managerial or executive capacity. The offered job description is comprised of generalized statements, which essentially paraphrase the statutory definition of "executive capacity," and is devoid of specific references establishing the beneficiary's purported executive employment as the president of a freight forwarding company. *See* § 101(a)(44)(B) of the Act. For example, based on the submitted job description, the beneficiary would be responsible "for establishing, monitoring and enforcing all the strategies, policies and procedures of the corporation," directing the company, implementing new operations, devising the

company's business plan and goals, establishing long-range objectives, and "exercis[ing] far-reaching and discretionary executive decision-making authority." These broad statements fail to address the specific executive or managerial job duties to be performed by the beneficiary with respect his purported supervision or management of the United States freight forwarding business. Additionally, the attached list of "executive duties" is essentially comprised of statements extracted from the beneficiary's job description, and does not depict specific managerial or executive job duties of the beneficiary. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations explicitly require the petitioner to describe the managerial or executive job duties to be performed by the beneficiary. *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).

Moreover, the record does not support several of the petitioner's claims as to the beneficiary's purported executive or managerial authority. Specifically, the petitioner noted that the beneficiary would establish, monitor and enforce the company's sales, marketing, procurement, operations, administration, and human resources policies and strategies, responsibilities that the petitioner suggests would be primarily executive in nature. The AAO notes, however, that as the petitioner is not represented as employing personnel in the areas of sales, marketing, and procurement, the beneficiary is not merely *establishing* and *supervising* the implementation of these policies, but is also responsible for personally performing the day-to-day tasks related to these functions. Similarly, the petitioner's claims that the beneficiary would "implement goals through subordinate administrative, logistic, and marketing personnel," and coordinate the activities of its operating, sales, maintenance and development departments, are severely undermined by the staffing levels represented on its organizational chart. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO notes that if the beneficiary is responsible for performing the sales, marketing, and inventory functions of the petitioner's business, as well as performing negotiations with the company's major suppliers, it is doubtful that the beneficiary would be deemed to be occupy a primarily managerial or executive position in the United States entity. 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 further notes counsel's and the petitioner's failure in their responses to both the director's request for evidence and notice of intent to deny, as well as in counsel's appellate brief, to provide a more detailed or "definitive" statement of the beneficiary's proposed job duties. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, despite being offered two opportunities to supplement the record with specific, detailed evidence of the beneficiary's employment in a primarily qualifying capacity, counsel submitted essentially duplicate job descriptions, which clearly fall short of establishing the beneficiary's employment as

a manager or executive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record is equally deficient with respect to the petitioner's staffing levels. The petitioner claimed on the Form I-140 to employ a staff of nine as of January 2006, yet declared the employment of five workers on its March 31, 2006 IRS federal quarterly tax return. Conversely, the petitioner identified thirteen lower-level positions, as well as "drivers" and "warehouse workers," on its organizational chart. No additional evidence, such as state quarterly wage reports documenting the petitioner's employees during January 2006, or evidence of payments made to contract workers, was provided for the record. As a result, the discrepancies in the petitioner's staffing levels on the date of filing remain unresolved. 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).

Counsel's attempt to clarify the petitioner's personnel with a revised organizational chart of the foreign entity is not sufficient. Absent personnel and payroll records from the foreign and United States organizations, the amended organizational chart, by itself, is not sufficient to clarify or establish the petitioner's true staffing levels at the time the immigrant visa petition was filed. The AAO also notes that on appeal, counsel again submitted the foreign entity's original organization chart, which identified five employees purportedly also employed by the petitioning entity. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. at 534.

Furthermore, as noted above, the record is devoid of evidence corroborating the petitioner's claims of utilizing outside workers, such as drivers and warehouse contractors. The petitioner failed to submit copies of its years 2004 and 2005 federal income tax returns, stating instead that it had requested filing extensions from the Internal Revenue Service. The petitioner's federal income tax returns are relevant, as they would document whether the petitioner incurred expenses for work performed by outside contractors. Also, the petitioner did not offer documentary evidence, such as cancelled checks identifying compensation paid for contracted services, or copies of IRS Form 1099, which is presented to independent contractors by the contracting company. Accordingly, the petitioner has not documented its claimed staffing levels with independent and objective evidence. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Absent a reliable depiction of the staffing levels maintained by the petitioner on the date of the filing, the AAO cannot determine the beneficiary's true position in the United States organization, or whether he would be relieved from performing the non-qualifying functions of the business by a sufficient support staff. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel contends that in denying the immigrant visa petition, CIS "erred in determining the applicable standard of proof." The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone

but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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

Here, the submitted evidence is not probative and credible. As previously discussed, the petitioner has failed to provide an accurate and clear depiction of its staffing levels on the filing date, or the requested "definitive" description of the beneficiary's specific managerial or executive job duties. This evidence is critical to determining the true capacity in which the beneficiary would be employed, and whether he would be relieved from performing primarily non-managerial or non-executive functions.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. *Id.* The unresolved discrepancies, particularly in light of the petitioner's three opportunities to clarify the record, cast doubt on its claim that the beneficiary's employment would be primarily managerial or executive in nature. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Accordingly, the director properly denied the petition.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue in the instant proceeding is whether the beneficiary's foreign employer continues to exist in Venezuela, so as to establish a qualifying relationship at the time of filing the immigrant visa petition, as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C).

In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States 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"). A multinational manager or executive is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

In its January 12, 2006 letter, the petitioner described the foreign entity as "a leading international air and ocean freight company catering [to] the ever-changing demands and needs for exporters and importers alike, serving Miami and Latin America, with special emphasis in [sic] Venezuelan market." As evidence of the foreign entity's existence, counsel for the petitioner submitted a translated copy of the foreign company's mercantile registry, dated October 17, 1996.

In her March 9, 2006 request for evidence, the director asked that the petitioner submit documentary evidence demonstrating that the beneficiary's foreign employer "is still in business and a viable company." The director specifically requested copies of the foreign entity's 2005 income tax returns, including the corresponding rate in U.S. Dollars, and local or national newspaper, magazine or trade publication advertisements.

In her May 25, 2006 response, counsel submitted the following evidence related to the foreign company: (1) monthly tax returns for 2005 and for the months of January through April 2006; (2) translated copies of financial statements for the years 2003 through 2005; (3) August 2005 through February 2006 bank statements; and (4) invoices from September through December 2005.

In her subsequent Notice of Intent to Deny, the director asked that the petitioner provide copies of the foreign entity's telephone directory listings and local and national advertisements.

In her June 28, 2006 response, counsel indicated that the foreign company had recently changed locations, and, as evidence of the foreign entity's purported existence in Venezuela, referenced a new lease, new telephone numbers, and a directory listing. The AAO notes that the record does not contain the above-referenced documentary evidence. Counsel also neglected to submit evidence of the foreign entity's advertisements.

In her July 31, 2006 decision, the director concluded that the petitioner had not established the continued existence of the foreign entity in Venezuela. The director noted that in response to her request for information regarding the foreign company's operations, counsel explained that the foreign corporation had recently moved, and referenced a telephone directory, which pertained only to the petitioning entity. The director stated: "While other bases of business may exist in Venezuela and in the United States under the ownership of the beneficiary, such foreign entities are not shown currently, or by the date of filing, to be doing business." The director noted that the petitioner had not presented sufficient evidence to resolve the discrepancies with respect to the foreign entity's continued existence. Consequently, the director denied the petition.

On appeal, counsel references the documentary evidence previously submitted with respect to the foreign entity's business operations, and contends that the director ignored the documentation establishing that the foreign company was doing business at the time of filing the Form I-140.

Upon review, the petitioner has not established that the beneficiary's foreign employer continued to exist and do business in Venezuela following the beneficiary's departure for the United States so as to satisfy the requirements for a qualifying relationship between the foreign and United States entities.

As addressed above, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C) instructs that to qualify as a multinational manager or executive, the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. The instant immigrant visa petition was filed on January 25, 2006. The record indicates that the beneficiary entered the United States as a nonimmigrant on January 4, 2006. While the record contains documentation that the foreign entity was doing business prior to the beneficiary's departure from Venezuela, there is limited evidence that the foreign entity continued to exist and do business after the beneficiary entered the United States.

As evidence of the foreign entity's existence, counsel points to copies of the company's monthly tax returns, financial statements, bank statements, and invoices. But for the monthly tax returns and bank statements, the documentary evidence pertains to time periods prior to the instant filing. While the record contains copies of tax returns filed monthly in 2006 by the foreign entity, the information contained on the untranslated filings seems to suggest that the foreign entity has not realized any sales during 2006, but rather incurs a monthly tax based on an earlier sales figure.² Similarly, the foreign entity's bank statements, which, according to the certified translation merely reflect "charges for Bank Debit Tax" and "Checks Summary," are not sufficient to demonstrate that the foreign entity has continued to do business in Venezuela. *See* 8 C.F.R. § 204.5(j)(2) (instructing that a "multinational" is a qualifying entity, or its affiliate, or subsidiary, which *conducts business in two or more countries, one of which is the United States*). 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.

Despite the director's requests for evidence of the foreign business' operations, and subsequent observation in her July 31, 2006 decision that the record lacked sufficient documentation establishing the foreign entity's existence and operations, the petitioner fails to submit additional evidence on appeal. Counsel simply stresses that the previously submitted documentation, including copies of the invoices, bank and financial statements, claiming that it demonstrates "that the company clearly conducts 'regular, systematic, and continuous provision of goods and or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.'" The AAO notes, however, that counsel did not provide copies of sales invoices or receipts for 2006 to establish the foreign entity's continued business operations in Venezuela. Also, as noted by the director, counsel neglected to provide the referenced directory listing or "new lease" agreement for the foreign corporation. Again, there is no concrete documentary evidence that the foreign entity continued to do business after the beneficiary's most recent admission into the United States in January 2006. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel

² The AAO notes that appended to the tax returns is a brief "document description" from a certified translator, which references the company's name, tax identification number, address, telephone number, and representative. The petitioner did not offer a translation or explanation of the financial information depicted on the tax returns. *See* 8 C.F.R. § 103.2(b)(3)(requiring that the petitioner submit an English language translation of any document containing foreign language submitted to CIS).

do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the foregoing discussion, the petitioner has not established that the foreign corporation continues to do business in Venezuela so as to satisfy the statutory definition of "multinational." Accordingly, the appeal will be dismissed for this additional reason.

The third issue in this proceeding is whether the petitioner established at the time of filing its ability to pay the beneficiary his proffered annual salary of \$75,000.

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

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

In her March 9, 2006 request for evidence, the director instructed the petitioner of acceptable documentation to establish its ability to pay the beneficiary's proffered wages, including copies of its annual reports, federal income tax returns, or audited financial statements, and requested that the petitioner submit copies of the following: (1) years 2004 and 2005 federal income tax returns; (2) quarterly tax returns reflecting wages paid to its employees during 2003 through March 2006; (3) IRS Forms W-2 and W-3; and (4) evidence of wages paid to the beneficiary from the filing date.

In her May 25, 2006 response, counsel submitted: an unaudited copy of the petitioner's October 31, 2005 balance sheet; December 2005 and January through February 2006 bank statements; year 2003 federal income tax return; Forms W-2 issued by the petitioner in 2005; and quarterly tax returns filed during 2004. Counsel also provided a copy of the petitioner's request for an extension to file its federal income tax return for the tax year beginning July 1, 2004 and ending June 30, 2005. The AAO notes that the extension request indicates that the tax return would be filed by March 15, 2006, two months prior to counsel's response. Neither the petitioner's 2004 or 2005 income tax return was provided for the record. Counsel contends that the submitted evidence, particularly the balance sheet, "provides enough information to establish the company's ability to pay the proffered wage."

The director subsequently requested the same documentary evidence establishing the petitioner's ability to pay. Included in her June 28, 2006 response, counsel provided copies of the Forms W-2 issued by the petitioner in 2003 and 2004. Counsel noted that there is no evidence pertaining to wages previously paid to the beneficiary, as the beneficiary was not employed by the petitioner until 2006. Counsel states that the beneficiary is presently being compensated by the foreign entity, and references *Matter of Pozzoli*, 14 I&N Dec. 569, in which the Court permitted the salary of a beneficiary seeking classification as a nonimmigrant intracompany transferee under § 101(a)(15)(L) of the Act to be paid by the petitioner's foreign affiliate. Counsel again states that the petitioner had received extensions for the filing of its income tax returns for the years 2004 and 2005, and submits a June 13, 2006 letter, in which the petitioner's accountant addresses the penalties incurred by the petitioner due to the lapse of its extension.

The director concluded that the petitioner had not demonstrated its ability to pay the beneficiary's proffered wages. In her July 31, 2006 decision, the director noted the petitioner's failure to provide copies of its 2004 or 2005 income tax returns, and further recognized that the petitioner could not rely on its prior employment of the beneficiary to establish its ability to pay his proposed monthly wages. The director concluded that the lack of evidence precluded a finding that the petitioner had the ability to pay the beneficiary his proffered salary of \$75,000. Consequently, the director denied the petition.

In her brief on appeal, counsel references the previously submitted documentary evidence, particularly the petitioner's bank statements, as "a portrayal of the [c]ompany's assets." Counsel states that the December 2005 through March 2006 bank statements identify an average monthly balance of approximately \$45,000, which counsel states is sufficient to cover the beneficiary's proposed monthly wages of approximately \$6,250. Counsel states that the petitioner's 2004 income tax return has since been filed with the IRS, and claims that the company's net current assets of approximately \$258,000, as reflected on the income tax return, establish its ability to pay the beneficiary's proposed salary. The AAO notes that despite counsel's reference to the 2004 income tax return as "Exhibit F," this evidence has not been provided for the record.

Upon review, the petitioner has not established its ability to pay the beneficiary's proffered wages at the time of filing the immigrant visa petition.

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

As an alternate means of determining the petitioner's ability to pay, the AAO may examine the company's income tax return relevant to the period during which the instant petition was filed. 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).

As discussed throughout the record, the petitioner has not offered its 2004 or 2005 income tax returns for review. As the petition and appeal were filed during the year 2006, it is reasonable to expect that the petitioner's income tax return for this year has not been completed. Counsel essentially relies on the petitioner's bank statements and an unaudited balance sheet as evidence of the petitioner's ability to pay the beneficiary's proffered wages. As instructed in the regulation at 8 C.F.R. § 204.5(g)(2), relevant evidence of the petitioner's ability to pay includes, among other items, *audited* financial statements. As a result, the petitioner's unaudited balance sheet is not probative of its ability to pay the proposed wages of the beneficiary.

Counsel correctly notes that the previously cited regulation allows for the review of bank account records *in appropriate cases*. Here, the bank statements comprise the only relevant evidence offered by the petitioner in support of its ability to pay. The balance held by the petitioner on January 31, 2006, as reflected on its business checking account statement, was \$7,921, only \$1,671 more than the beneficiary's proffered monthly wage. Absent additional financial documents, such as the petitioner's 2005 federal income tax return or

audited financial statements, the company's bank statements are not sufficient to demonstrate its ability to pay the beneficiary's proposed salary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. at 534. For this additional reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.