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U.S. Citizenship  
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAY 08 2007  
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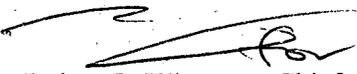
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:  
[REDACTED]

**INSTRUCTIONS:**

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner filed the instant immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Texas that is operating as a wholesaler and retailer of garden and home decorative items. The petitioner seeks to employ the beneficiary as its vice-president.

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

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) incorrectly analyzed the nature of the beneficiary's employment by considering the number of workers employed subordinate to him, rather than considering his employment as a function manager. Counsel submits a brief 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 issue in the instant proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

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

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

The petitioner filed the Form I-140 on January 23, 2006 noting the beneficiary's proposed employment as the vice-president of the United States organization. As part of the initial filing, the petitioner submitted its business plan, in which it outlined its plan of marketing its products in the United States through nurseries and distributors, as well as maintaining booths at trade shows in Dallas and Houston. The petitioner did not submit with its initial filing a description of the beneficiary's proposed position or associated managerial or executive job duties.

In a notice dated March 21, 2006, the director requested that the petitioner submit a statement addressing the following: (1) how the beneficiary would perform primarily managerial or executive job duties, and would

not be engaged in the day-to-day operations or tasks of the petitioning entity; (2) whether the beneficiary would manage subordinate managers or professionals; and (3) the job duties performed by the beneficiary's subordinate employees and their educational levels. The director asked that the petitioner also provide an organizational chart of the United States entity and copies of the petitioner's tax returns for the fourth quarter of 2005 and the first quarter of 2006.

Counsel for the petitioner responded in a letter dated June 12, 2006, claiming that the beneficiary's proposed employment in a primarily executive capacity is demonstrated "not only by the staffing that allows him to focus on executive directing but more importantly by the nature of the duties he has and is to perform." Counsel stated:

[The beneficiary] has been responsible for the creation, implementation and monitoring of importation, sales and marketing operations as well as business investment plans for [the petitioner]. [The beneficiary] is responsible for developing, implementing and executing business strategies for the distribution of products and the expansion of our business. [The beneficiary] formulates company policies and executes product expansion strategies for [the petitioner] – e.g., the Joint Venture with Prince Neon<sup>1</sup> and the outsourcing contract with Hebatbhoy Abdeali in India<sup>2</sup>. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. [The beneficiary] handles all facets of sales and distribution, as well as the financial arrangements, and oversees our overall financial administration.

To accomplish these goals, [the beneficiary] will be given the authority to negotiate and enter into contracts on behalf of [the petitioner], hire employees, direct their training, dismiss employees, and oversee domestic and foreign distribution systems. [The beneficiary] is granted broad discretion over the day-to-day operations of [the petitioning entity]. *From a staffing point of view, [the beneficiary] will be able to accomplish these executive duties by having command over approximately fourteen (14) personnel, including administrative assistants and support staff – here in the United States and outsourced in India.*

(Emphasis in original).

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<sup>1</sup> The record indicates that the petitioner entered into a joint venture agreement with the United States company Prince Neon on March 31, 2006, or three months after the instant filing. Therefore, the petitioner's anticipated business venture is not relevant to determining the beneficiary's employment capacity on the filing date. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (finding that a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts).

<sup>2</sup> The petitioner and counsel emphasize the petitioner's use of outsourced workers in India, as well as its Sales Agent Contract with the Indian company [REDACTED] as evidence that the petitioner maintains a "marketing team" in India that would relieve the beneficiary from performing the petitioner's day-to-day sales function. The petitioner claimed that the sales agent contract and employee contracts were submitted as exhibits at the time of filing the Form I-140. The AAO notes that the record does not contain copies of the referenced documents.

Counsel further stated that the beneficiary would manage the petitioner's essential "vice-presidency function," claiming: "The U.S. organization has sufficient support from contractors, W-2 employees, outsourced employees, and partnership employees to accomplish the [b]eneficiary's managerial dictates upon the Vice Presidency function." Counsel further notes that the beneficiary's control over the claimed outsourced Indian employees "is not a mere allegation but rather a contractual term."

In support of the beneficiary's employment in a primarily executive capacity, counsel submitted a June 12, 2006 letter, in which the petitioner provided essentially the same description for the beneficiary's proposed position of vice-president. The petitioner explained that to increase its sales, it relies predominantly on joint venture and agency agreements, attending trade shows, and "exclusive rights arrangements," which allows it to "accomplish large volume sales in the early stages of business development without suffering for lack of large employee staffs [sic]."

Counsel submitted a "functional flow chart" identifying the beneficiary's responsibilities as: holding responsibility for "the creation, implementation and monitoring of importation, sales and marketing operations as well as business investment plans"; developing and executing product distribution "strategies" and those related to trade show marketing; negotiating and entering into contracts on behalf of the petitioner; hiring and firing employees; overseeing distribution systems; formulating policies; and, executing "product expansion strategies."

In an appended organizational chart, the beneficiary was identified as supervising a manager, an assistant manager, an outsourced sales manager, two outsourced sales agents, and an outsourced clerk. The petitioner described the job duties related to each position in an attached statement. The AAO notes that although the beneficiary was represented as supervising six lower-level employees, four of which were claimed to be contracted employees, the petitioner's March 31, 2006 quarterly wage report indicates that the petitioner employed two workers during the month of January, the period during which the instant petition was filed. The record does not clarify whether the manager or assistant manager was employed on the filing date. Yet, based on the wages paid to these same two employees during the fourth quarter of 2005, it appears that the manager was not receiving compensation from the petitioner during January 2006, and that the assistant manager was likely employed at the time the Form I-140 was filed. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Also, as noted previously, although the petitioner points to a sales agent contract and contractual agreements as evidence of its use of outside workers, particularly those overseas, there is no documentation that the petitioner paid for contractual services during January 2006. 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)).

In a decision dated July 25, 2006, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director found that the beneficiary would not be supervising managerial, executive or professional employees, and noted that the petitioner's staffing levels did not appear to be adequate in light of its overall purpose and stage of development. The director concluded that the petitioner's staff in light of its operations as a wholesaler and retailer since 2003 did not support a finding that the beneficiary's employment would be primarily managerial or executive in nature. The director further noted that the petitioner had not documented

the amount of time the beneficiary would devote to managing his direct subordinates or "detail[ed]" the beneficiary's specific managerial or executive tasks. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on August 24, 2006, and subsequently submitted a brief in support of the appeal. In his September 21, 2006 appellate brief, counsel contends that the beneficiary qualifies for the requested immigrant visa classification. Counsel claims that in denying the immigrant visa petition, CIS erroneously focused on the petitioner's staffing levels without considering the beneficiary's employment as a function manager. Counsel states that "the entire absence of subordinate employees" does not exclude the beneficiary from classification as a manager or executive, and further contends that the beneficiary's subordinates are not required to possess a college degree in order to be considered professionals.

With respect to the petitioner's reasonable needs, counsel contends that as a "young company" in operation for less than five years, the petitioner "requires few employees." Counsel states:

It should be noted that the nature of wholesale business is such that independent shippers coordinate large volumes, for a fee, and thus free up the clients to focus on the high level negotiations, planning, marketing, etc. Additionally, it should be noted that e-commerce is by nature also highly labor efficient.

\* \* \*

A few subordinates is a low number only by comparison to long established major corporations, a new business should not be held to such standards and in fact the regulations do not hold petitioners to such standards.

\* \* \*

What can be concluded is that [CIS] has made a determination based on a mechanical analysis of employee count. Here, the beneficiary is executing the vice-presidency function. It was not the employee count that one could 'reasonably assume' required management. Rather, it was the presidency function that one could 'reasonably assume' required management. . . . The duties of the beneficiary, in light of the overall stage of development, should have been the proper focus.

With respect to the beneficiary's purported management of the vice-presidency function, counsel states that the beneficiary: functions in a senior-level position in the United States organization; "manages the essential function of finance"; and "exercises discretion over the day-to-day operations of the financial activities." Counsel references several unpublished decisions, in which the AAO recognized the beneficiary's employment as a function manager despite employing a small subordinate staff.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity.

As counsel correctly observes on appeal, a review of the beneficiary's job duties is the "proper" or relevant consideration in whether the beneficiary would be employed as a manager or executive. See 8 C.F.R.

§ 204.5(j)(5) (requiring that the petitioner submit with its initial filing a statement clearly describing the managerial or executive job duties to be performed by the beneficiary).

The present record, however, does not corroborate counsel's claim that the beneficiary's job duties, in light of the petitioner's overall stage of development, establish the beneficiary's employment in a primarily managerial or executive capacity. Counsel asserts that the beneficiary would be employed as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

Here, counsel contends that the function managed by the beneficiary is the "vice-presidency" function. The record, however, is extremely limited in defining or explaining the beneficiary's role as a manager of the vice-presidency function. In his June 12, 2006 response to the director's request for evidence, counsel outlined and essentially relied on the regulatory definition of function manager to establish the beneficiary's claimed employment as such, without explaining the specific managerial tasks associated with the function of vice-presidency. Counsel stated only that: "[The beneficiary] has strategically followed an efficient business model of relying on partnerships, exclusive contracts, and outsourced employees [and] [a]s such, it is submitted that the [b]eneficiary will manage the essential function of [v]ice [p]résidency at the organization."

Counsel's statements on appeal with respect to the beneficiary's proposed employment as a function manager are equally vague, noting only that the beneficiary would: occupy a senior-level position in the organization; manage "the essential function of finance"; and exercise "discretion over the day-to-day operations of the [company's] financial activities." As the regulations require a description of the specific function to be managed by the beneficiary, counsel's statements fall short of establishing the beneficiary as a function manager. Notwithstanding the inconsistent representations of the actual function to be managed by the beneficiary, the "vice-presidency" function or the "finance" function, counsel cannot merely suggest the beneficiary's role as a function manager based on his title of vice-president without providing clarification of the specific managerial or executive job duties associated with the function. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The unsupported assertions of counsel 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).

Similarly, the additional representations offered on the "functional flow chart" of the beneficiary's creation and monitoring of corporate "operations," "strategies," and "policies," fail to establish the beneficiary's employment in a primarily managerial or executive capacity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In support of the beneficiary's employment as a function manager, counsel points to the petitioner's claimed use of outsourced employees, an overseas sales agent, and a joint venture arrangement. The AAO again notes that the referenced joint venture was not established until March 2006, two months after the present filing, and therefore, is not relevant to the instant matter. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (finding that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts). Also, the contractual agreements claimed to have been submitted by the petitioner are not part of the current record. However, even if the AAO were to acknowledge the petitioner's use of outsourced employees and a foreign sales agent, as will be discussed in greater detail below, the record does not establish the beneficiary's purported employment in a primarily managerial or executive capacity.

Counsel correctly notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In the instant matter, based on the petitioner's March 31, 2006 quarterly tax return, at the time of filing, the petitioner employed the beneficiary and one other employee, who, although not specifically identified by the petitioner, appears to have been employed as an assistant manager. As noted above, the petitioner also claims, yet fails to document, the use of an outsourced sales manager, two sales assistants, who were identified in appended e-mails as working in the territories of Southern and Northern India, and a clerk. While the petitioner's staffing levels suggest that from a sales perspective the United States company is represented overseas, the petitioner has not documented who is responsible for its marketing and sales in the United States, as well as its importing and exporting functions and services as a middleman.

The petitioner claimed in its business plan that its sales in the United States would consist mainly of selling to retail nurseries and home and garden décor distribution centers. The record indicates that the petitioner maintains a warehouse in Texas and also actively participates in two annual trade shows in Texas, which the beneficiary is identified as attending as an exhibitor. In addition, based on invoices offered by the petitioner, the United States company is engaged in importing products from Mexico and Morocco, shipping products to overseas ports, and acting as a middleman for products shipped from overseas ports in Africa to Venezuela. Based on the finding that at the time of filing, the petitioner employed in its United States office the beneficiary and another employee, who has not been specifically identified, it does not appear that the petitioner's sales, marketing, importing, purchasing, and warehousing functions might reasonably be met through the services of its three-person staff. The beneficiary is represented as overseeing the company's sales and distributions functions, yet the petitioner has not specifically identified any subordinate workers who would perform these functions in its United States office. Moreover, a review of the limited subordinate staff in connection with the petitioner's claim that the beneficiary "handles all facets of sales and distribution," suggests that the beneficiary would personally perform these non-qualifying functions for the business rather than primarily manage the functions. The record as presently constituted does not establish that the petitioner maintained a sufficient subordinate staff at the time of filing to support the beneficiary in a primarily managerial or executive capacity. The AAO notes 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel cites on appeal several unpublished decisions of the AAO. Notwithstanding the statutory requirement that the petitioner's limited staffing levels cannot be the sole basis for denying the instant petition, the petitioner has not demonstrated that the beneficiary would be primarily employed as a function manager, or that the beneficiary would be relieved from primarily performing the non-managerial or non-executive tasks of the business. There is insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further notes on appeal the "preponderance of the evidence" standard, which 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 relevant or probative of the beneficiary's claimed employment in a primarily managerial or executive capacity. The petitioner has failed to account for the performance of a substantial portion of its non-qualifying business functions in the United States, which suggests that the beneficiary would be personally responsible for primarily performing the non-managerial and non-executive functions related to the petitioner's business. Moreover, the record is devoid of specific and detailed evidence corroborating the petitioner's claim that the beneficiary would be employed as a function manager. Based on the foregoing discussion, a review of the beneficiary's job duties in connection with the petitioner's reasonable needs fails to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated its ability to pay the beneficiary's proffered annual salary of \$32,500 at the time of filing.

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

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

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 at the proposed salary. The beneficiary's salary in 2005 was \$30,000, or \$2,500 less than his proffered salary.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

Although the director requested a copy of the petitioner's 2005 federal income tax return, none was submitted for the record, as the petitioner explained that the petitioner had received a filing extension. The record contains an unaudited 2005 income statement, but no financial documents for 2006. The petitioner's March 31, 2006 quarterly tax return demonstrates that the beneficiary is receiving \$7,500 per quarter, which is less than the beneficiary's proffered wages. The limited documentary evidence precludes a finding of whether the petitioner has sufficient net taxable income or net current assets at the time of filing from which to compensate the beneficiary his entire proposed salary. 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. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

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

**ORDER:** The appeal is dismissed.