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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: AUG 14 2008

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant 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 states that it is engaged in the manufacture of shade structures. It seeks to employ the beneficiary as its president.

The director denied the petition on December 18, 2007 on two independent and alternative grounds. Specifically, the director determined that the petitioner failed to establish: (1) that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity; and (2) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his transfer to the United States as a nonimmigrant intracompany transferee. The director noted that the position descriptions submitted for both the foreign and U.S. positions were overly broad and therefore insufficient to establish the beneficiary's employment in a qualifying capacity with either entity. With respect to the beneficiary's U.S. employment, the director observed that the petitioner had failed to submit clear evidence of wages paid to its claimed employees.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary has been and will be providing services as a manager or executive for both the foreign and U.S. entities. Counsel objects to the director's finding that the petitioner's descriptions of the beneficiary's duties were overbroad, and attempts to explain the lack of documentation with respect to the company's payroll in 2006. Counsel submits a brief and additional evidence in support of the appeal.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

I. Not Employed in the United States in a Primarily Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that the beneficiary will 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), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The immigrant petition was filed on January 29, 2007. The petitioner stated on Form I-140 that it has four employees and five independent contractors, and indicated its intention to employ the beneficiary as its president. In a letter dated January 18, 2007, the petitioner described the beneficiary's duties as follows:

On a daily basis, [the beneficiary] reviews and signs all contracts for [the petitioner]. [The beneficiary] conducts strategic and business planning, marketing and product development, oversees the sales and the installation departments. He makes decisions regarding the finances and serve [sic] as the Project Manager. He oversees the Human Resources Department and the day-to-day administration of the business and serves as head of sales

More recently, [the beneficiary] made the business decision, as an executive of the business and within the executive capacity, to adjust the marketing and distribution strategy of [the petitioner]. This decision proved to be a positive and profitable move for [the petitioner]. The marketing and distribution strategy was shifted from a direct sales approach with branch offices in multiple locations to a reseller distribution network. . . . In addition to having 39 reseller representatives in the field, [the petitioner] employs three (3) direct sales representatives, two (2) of which are in Jacksonville and one (1) in South Florida.

* * *

An approximate breakdown of [the beneficiary's] time is spent in the following manner: 50% developing business strategies, 20% setting goals and policies, 20% supervising managers and professional staff and 10% on the remaining duties such as negotiating contracts and overseeing the budgets.

In sum, [the beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision-making in, establishing the most advantageous courses of action for [the petitioner] as well as its affiliate [the foreign entity].

The petitioner also attached a more detailed list of duties performed by the beneficiary in his role as president:

Strategic & Business Planning

- Establish company's strategic direction to include multi-channel distribution strategy (direct and indirect), related sales targets, pricing & marketing programs and all activities to ensure that the Company's business planning objectives and policies are met.

- Establish business relationships with related manufacturers and suppliers of the products used by the Company.
- Approve all budgets and projections prepared by management personnel to include daily/weekly/monthly and annual cash flow and job profitability analysis.
- Maintain personal contact and develop relationships with Company bankers, accountants, lawyers, insurance agents, and other professionals etc. as required for various business issues.
- Interface frequently with Directors of GMM Shade Structures in South Africa on daily business issues that include profitability, US product and marketing requirements to insure success of the United States operation.

Marketing & Product Development

- Establish annual marketing budget to include collateral materials (brochures, catalogs, etc.), trade show participation to expand Company's recognition in various markets Develop educational programs that teach sales reps/distributors the benefits provided by shade technology.
- Supervise all market research resulting in new marketing programs and product development.
- Establish pricing database and guidelines to insure all outgoing proposals meet Company's profitability requirements.

Sales Management

- Establish sales quotas with Sales manager and oversee sales reps & distributors activities to includes [sic] new customer prospects and quote summaries.
- Evaluate customer's needs, wants, likes and dislikes about the Company's products and service. Take corrective measures to address customer feedback.
- Personally pursue strategic customer alliances and close deals that generate substantial revenue and provide long-term placement opportunities within high-profile local, national and government accounts.

Installation Management

- Manage day-to-day installation operations that include scheduling, manpower, equipment, part procurement, engineering, permitting, travel and logistics.
- Ensure that quality control procedures and critical path analysis are followed and adhered to by installation personnel. . . .

Personnel Management

- Develop organizational infrastructure to meet strategic objectives.
- Set personal goals and incentives for all Company personnel & approval all management and personnel hiring, promotions, firings, demotions, warnings, etc.
- Conduct daily/weekly/monthly briefings . . . with management and employees to discuss/supervise daily workload/activities.

- Manage personnel records to ensure that all monthly, quarterly and annual state and federal filings are done on a timely basis.
- Supervise and train management personnel and their subordinates in the manufacturing, selling, and general business techniques needed to sell, install and promote shade technology.

The petitioner also submitted an organizational chart depicting its corporate structure. The chart shows that the beneficiary, as president, supervises a marketing and operations manager (██████████) a sales support and business division manager (██████████), and a technical manager (██████████). According to the chart, the marketing and operations manager, and a subordinate administrator (the beneficiary's spouse) are responsible for "administration, collaterals/website, certifications/contracts, trade shows, costing/proposals, engineering and permits." The chart indicates that the sales support and business division manager supervises three sales associates and states that this division is responsible for direct sales, vertical market support, reseller recruitment and reseller support. Finally, the technical manager is depicted as supervising one installation technician (██████████) and the chart indicates that this department is responsible for "installations, job prop, warehouse, ship outs, install training." The chart also identifies a total of eight companies described as "distributors/resellers."

The petitioner did not provide evidence of wages paid to the employees listed on the organizational chart. It did submit a copy of an un-audited profit and loss statement for 2006 which shows that the company paid \$96,474.07 in "Labor," approximately \$8,000 in commissions, and payroll expenses, taxes and administration costs that totaled approximately \$7,200.

On August 15, 2007, the director issued a request for evidence (RFE), in which he advised the petitioner that the submitted position description was overly broad in nature and did not adequately detail the specific duties of the position. Accordingly, the director requested that the petitioner provide a detailed, comprehensive position description, and instructed the petitioner to clearly define the specific, day-to-day duties performed by the beneficiary. The director further requested more specific information regarding the beneficiary's subordinates, including their job titles, job duties, minimum qualifications, and a sample work schedule. Finally, the director requested that the petitioner provide copies of its Employer's Quarterly Federal Tax Returns (Forms 941) for each quarter of 2007, along with copies of the employees' 2006 W-2 or 1099 forms.

In response to the RFE, the petitioner submitted the following statement of duties performed by the beneficiary:

1. Daily meetings . . . to be held with management and employees to discuss and supervise the daily workloads. (15%)
2. Establishing contacts and business relationships with various related manufacturers and suppliers of the products used by the company, as well as distributors. . . . (4%)
3. Approving of all management and employees hiring, firings, promotions, demotions, warnings, etc. (1%)
4. Weekly and monthly meetings held with company management and employees to discuss and supervise the manufacturing process, on the job expenditures, job schedules, employee

- roster (requirements, cost center expenses and other related items (including planning for these meetings). (15%)
5. Managing employees to ensure that all monthly, quarterly and annual state and federal filings are timely filed. (3%)
 6. One on one contact with the Company bankers, accountants, lawyers, insurance agents and other professionals etc. as regards various business related issues. (10%)
 7. Supervising and training the management and employees as regards all aspects of manufacturing, selling and general business techniques etc. (10%)
 8. Approving all budgets and projections prepared by the management and employees . . . (4%)
 9. Frequent contact with the directors and management of the foreign company . . . (2%)
 10. Supervision of management and employees training (both internal and external) and education requirements in order to ensure that all management and employees are kept up to date with all of the latest education requirements. (8%)
 11. Meeting (together with Company management and employees) with Company customers to discuss their needs, wants, likes, and dislikes about the company, its management, employees and products. . . . (15%)
 12. Ensuring that quality control procedures and critical path analysis procedures are followed and adhered to at all times. (3%)
 13. Supervision of all research and development and design projects; development of new shade technology. (2%)
 14. Reviewing of all proposals, staffing requirements, timing constraints, etc. for each job, project and engagement. (5%)
 15. Setting personal goals and incentives for the management and employees. (2%)
 16. Performing various other duties as required by a person in a similar position within a similar industry in the United States. (1%)

Counsel stated in a letter dated September 21, 2007 that the petitioner has a total of five employees and 24 independent contractors. The petitioner submitted a new organizational chart which depicts the beneficiary as president with three direct subordinates: a vice president of sales/marketing [REDACTED], an office manager [REDACTED]; and a vice president engineering/design [REDACTED]. The chart shows that the vice president of sales supervises six sales representatives as well as "Bliss Products" and ten additional "Bliss Sales Reps." The vice president of engineering/design is depicted as supervising four "lead hands" and four temporary installation assistants.

The petitioner provided the requested position descriptions for the positions of "sales and marketing manager," "installation and engineering manager," and office manager. As these descriptions are part of the record, they will not be repeated here.

In response to the director's request for copies of the petitioner's Forms 941 for the first three quarters of 2007, the petitioner submitted the following explanation in a letter dated September 21, 2007:

Please be advised that [the petitioner] does not have any current Federal Quarterly Tax Returns (941) for 2007. We have hired a payroll company (Paychex) in July 2007 to handle

our 941s and payroll for [the petitioner's] employees. [The petitioner] did not withhold any taxes for employees for the first two quarters (January until June), but will issue 1099's at the end of the year.

The petitioner submitted a copy of its agreement with Paychex, and copies of payroll records for the pay periods ended on June 29, 2007 through August 31, 2007. During this period, the petitioner paid wages to the beneficiary and his direct subordinates as indicated on the organizational chart. The beneficiary and the two "vice presidents" were both paid \$1,000 weekly and the office manager received wages of \$920.70. One additional employee, [REDACTED], who is identified as a "Lead Hand" on the organizational chart, appears to have been hired in early August 2007.

In response to the director's request for copies of the petitioner's 2006 IRS Forms W-2 and 1099, the petitioner submitted a Form 1099-MISC in the amount of \$102,000 issued to the beneficiary as "Nonemployee compensation." The petitioner also submitted a copy of a 2006 Form W-2 for Stephina Otto, which was issued by "South East Employee Leasing" in the amount of \$27,142.99. The petitioner did not indicate whether it had paid any other employees in 2006 and simply stated that it was submitting the requested Forms W-2 for two employees. Although the petitioner submitted a Form 1099 for the beneficiary indicating that he had no payroll deductions, the record also contains copies of pay stubs issued to the beneficiary for the last six months of 2006 showing that he did in fact have deductions taken from his pay.

The director denied the petition on December 18, 2007, concluding that the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity. In denying the petition, the director determined that the submitted position descriptions were overbroad and failed to clarify the specific duties to be performed by the beneficiary on a day-to-day basis, despite the fact that the director specifically requested clarification regarding the beneficiary's job duties. The director also observed that the record lacks clear evidence of the petitioner's employment of the workers listed on the various organizational charts submitted. The director observed that it is not clear from the record whether the company had any direct employees in 2006 or during the first half of 2007. The director acknowledged that the petitioner's unaudited profit and loss statements included "Labor" costs, but found that the amounts paid would not support the number of employees and contractors claimed by the petitioner. Therefore, the director concluded that, given the vague job description and the lack of specific evidence regarding the other employees and contractors, the record does not adequately demonstrate that the beneficiary would be relieved from performing non-executive and non-managerial functions.

On appeal, counsel for the petitioner asserts that the director's decision is erroneous "because the Beneficiary routinely lends his expertise and provides leadership to [the petitioner's] entire operation." Counsel contends that the beneficiary acts in an executive capacity because he "directs management, lends leadership to the entire operation, establishes goals and corporate policies, has complete discretion over how the business is run; . . . formulates strategy and directs implementation of strategy by subordinate managers." Counsel states that the beneficiary will also be employed in a managerial capacity because he supervises and manages professional employees and has authority to make hiring, firing and other personnel decisions.

With respect to the director's finding that the beneficiary's position description was too broad, counsel contends that "the definition of 'management' is also rather broad. . . . and escapes a firm definition." Counsel argues that the legislative history of the Act shows that Congress intended to leave the definition "flexible and vague." Counsel submits the "standard job description of a manager" from the U.S. Department of Labor's *Occupational Outlook Handbook*, and asserts that it is no more vague or broad than the description provided by the petitioning company. Counsel further emphasizes that the beneficiary was twice approved for L-1A classification to serve as the petitioner's president, and has not been demoted or otherwise experienced a decrease in his level of responsibility.

Counsel asserts that the petitioning company currently has six employees, including the beneficiary, the office manager, a sales/marketing manager, an engineering manager, and two installation laborers who work on an as-needed basis. Counsel notes that the beneficiary also negotiated a distribution deal with Bliss Products & Services, Inc. which has a sales force of 24 contractors, as well as a manufacturing deal with Superior Shade and a supplier agreement with Playland, Inc. The petitioner submits letters from each of these entities confirming their relationship with the petitioner and the beneficiary.

In support of the appeal, the petitioner submits two lists of job duties purported to represent "a snapshot of Beneficiary's schedule and actual work performed on January 10 and January 11, 2007." However, upon review of the lists of duties, it is clear that they represent the beneficiary's duties as of January 2008. Both documents bear a handwritten notation with "2008" crossed out and "2007" written in its place. They also refer to the beneficiary's negotiation for a "12% price increase over 2007," and various other price increases effective in 2008. Therefore, it is evident that these descriptions are not indicative of the beneficiary's duties at the time of filing and they will not be considered. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner also addresses the director's findings with respect to the lack of evidence regarding wages paid to the company's employees and contractors. Counsel explains in a letter dated January 16, 2008 that a former employee of the company, [REDACTED], quit his job, but returned to the company premises in September 2006 and removed a computer containing all of the company's books and records. Counsel states that, for this reason, the petitioner was unable to prepare its corporate tax returns. Counsel further states that the company received poor advice from an accountant and thus portions of its taxes were "done on 1099 forms, rather than pursuant to W2 forms." Counsel asserts that the company has resumed "normal bookkeeping operations." The petitioner submits a copy of the lawsuit and resulting settlement agreement with [REDACTED]

Finally, the company submits various payroll documentation on appeal. This documentation includes:

- Form 941, Employer's Quarterly Federal Tax Return, and Florida Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2007 filed by the petitioner, Shade America, Inc. (Federal employer identification number [REDACTED] which indicates that the company had five employees in October and no employees during the months of November and December 2007.

- 2007 Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, filed by Shade America, Inc., which indicates total payments to employees of \$74,089.40. The petitioner indicated on the form that this was its final return, due to the business closing or no longer paying wages.
- Form 941 and Form UCT-6 for the fourth quarter of 2007, filed by [REDACTED] Inc. (Federal employer identification number [REDACTED]), showing that the company had no employees in October, four employees in November and five employees in December.
- Copies of Forms W-2, Wage and Tax Statement for 2007 issued by Shade America, Inc. to the beneficiary, [REDACTED] and [REDACTED]. Counsel explained that these Forms W-2 were issued for part of 2007 "due to reorganization of the company."
- Copies of Forms W-2, Wage and Tax Statement, for 2007 issued by Air Shade America, Inc. to the beneficiary, [REDACTED] and [REDACTED].
- Copy of the beneficiary's 2006 Form 1099, which was previously submitted.
- A copy of a facsimile transmission from Southeast Personnel Leasing, Inc., dated January 3, 2008, addressed to the petitioning company. Counsel indicates that "Southeast Paychex" provided the petitioner's payroll services in 2005 and 2006.
- Payroll records from Southeast Personnel Leasing, for Shade America, Inc. for 2006. According to the records, the employees paid in 2006 included [REDACTED] who earned \$30,309 and [REDACTED], who earned \$36,250.

Upon review of the totality of the evidence in the record, including the new evidence submitted on appeal, the petitioner has not established that the beneficiary will be employed by the U.S. 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's initial description of the beneficiary's duties, as stated in its letter dated January 18, 2007, failed to establish that he would be performing primarily managerial or executive duties. The petitioner stated that the beneficiary would review and sign all contracts, conduct business planning, marketing and product development, oversee the sales and installation departments, serve as project manager, oversee the company's human resources department, and serve as the head of sales. While these duties indicate that the beneficiary will oversee the company's operations and functions as a whole, they also suggest that he would be directly involved in the company's day-to-day sales, marketing, product development and installation activities, either directly or as a first-line supervisor.

An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, 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).

In addition, the description was somewhat confusing given that the petitioner does not claim to have a “human resources department,” and given that the petitioner does claim to have subordinate managers to oversee sales and installation projects. As discussed further, *infra*, the petitioner has not submitted evidence to substantiate its claimed subordinate staff, and thus it appears more likely than not that the beneficiary himself was responsible for direct oversight of both sales and installation activities.

The petitioner’s statement in the same letter that the beneficiary will devote 50 percent of his time to developing business strategies, 20 percent of his time to setting goals and policies, 20 percent of his time to supervising managerial and support staff, and 10 percent of his time on “remaining duties” also fell significantly short of establishing that the beneficiary will perform primarily managerial or executive duties on a day-to-day basis. Not only did this breakdown appear to be at odds with the petitioner’s concurrent contention that the beneficiary would be serving as project manager and head of sales, as it does not account for time the beneficiary allocates to these roles, it merely relies on broad generalizations regarding the beneficiary’s overarching responsibilities. 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 provide any detail or explanation of the beneficiary’s activities in the course of his daily routine. The actual duties themselves will 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).

Furthermore, the petitioner submitted a list of 19 duties allocated to the areas of strategic and business planning, marketing/product development, sales management, installation management, and personnel management. Again, this description of the beneficiary’s duties was not consistent with the breakdown of the beneficiary’s duties provided in the petitioner’s letter dated January 18, 2007. The description included a number of duties that could not be considered managerial or executive in nature. For example the beneficiary’s responsibilities for establishing relationships with manufacturers and suppliers, advising the foreign entity of U.S. product and market requirements, developing educational programs, establishing a pricing database, evaluating customers needs and wants, personally pursuing customer alliances, and personally managing day-to-day installation operations, including scheduling, parts procurement, permitting and logistics aspects of installations, have not been established to be managerial duties.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, the director was unable to determine whether the claimed managerial duties constitute the majority of the beneficiary’s duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner’s description of the beneficiary’s job duties did not adequately establish what proportion of the beneficiary’s duties is managerial in nature, and

what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Accordingly, the petitioner was advised of the deficiencies and instructed to provide a list of the specific day-to-day duties the beneficiary performs. In response, the petitioner submitted a list of 16 duties. However, in response to the RFE, the petitioner did not elaborate upon the previously listed job duties. Instead, it reiterated many of the same duties, and excluded some of the previously submitted non-qualifying duties, particularly related to the company's installation projects and marketing activities. In response to the RFE, the petitioner indicated that the beneficiary spends a total of 54 percent of his time to personnel related responsibilities, including attending daily, weekly and monthly meetings with subordinate employees, and supervising and managing employees and their training. The petitioner previously indicated that the beneficiary allocated just 20 percent of his time to such tasks. 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). Upon review of the three different position descriptions in the record, the director correctly concluded that the petitioner's various descriptions of the beneficiary's duties were overly broad, included non-qualifying duties, and failed to provide the requested detailed, meaningful, consistent breakdown of how the beneficiary's time is allocated.

The petitioner does not submit any additional information on appeal to further clarify the nature of the beneficiary's duties. Instead, counsel simply asserts that the term "manager" is meant to be broad and flexible. While the L-1A visa classification may be intended to encompass many different types of managers across various industries, the petitioner is still obligated to submit sufficient evidence to demonstrate to USCIS the actual duties the beneficiary performs within the scope of its specific business and operating structure are primarily managerial or executive in nature, and that it has a realistic need for an employee who performs primarily managerial or executive duties. Simply stating that the petitioner's job description is no broader than a generic description of a managerial position prepared by the Department of Labor is not sufficient to meet the petitioner's burden of proof, and such arguments will not exempt the petitioner from providing a description of the beneficiary's actual duties within the context of the business he is claimed to manage. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Here, the AAO cannot determine from the various accounts in the record what duties the beneficiary performs on a day-to-day basis, and therefore the duties cannot be classified as primarily managerial or executive in nature.

In addition to failing to provide a sufficient job description to establish the beneficiary's employment in a managerial or executive capacity, the petitioner has failed to submit documentary evidence of its staffing levels as of the date of filing and evidence of wages paid to employees. The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. It should be emphasized that the petitioner must establish eligibility as of the date of filing, January 29, 2007, and any hiring of subordinate staff subsequent to that date will not be considered. 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. 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).

The employees claimed at the time of filing, based on the petitioner's organizational chart, included a marketing and operations manager [REDACTED], a sales support and business division manager [REDACTED], a technical manager [REDACTED], an administrator [REDACTED], an installation technician, and three sales associates. The petitioner indicated that this nine-person staff included four contractors, but never indicated which employees were independent contractors. While the petitioner's organizational chart depicts a multi-layered management hierarchy, the petitioner has not provided corroborating documentary evidence to support its claimed staffing levels. The director specifically requested the petitioner's quarterly wage records for 2007 and Forms W-2 and 1099 for 2006. This evidence, which should have been readily available to the petitioner, is critical, as it would have corroborated the petitioner's claimed staffing levels and assisted in determining whether the company's subordinate staff is sufficient to relieve the beneficiary from performing non-qualifying administrative and operational tasks.

As noted above, in response to the RFE, the petitioner inexplicably stated that it did not file Forms 941 during the first two quarters of 2007. For 2006, it submitted a copy of the beneficiary's Form 1099, and a Form W-2 for the beneficiary's spouse, apparently issued by a payroll company. It provided no explanation for the absence of documentation for any other employees or contractors for 2006. On appeal, the petitioner offers an explanation, claiming that a former employee removed its financial records in 2006 and therefore the company did not retain all of its payroll information for 2006. At the same time, the petitioner claims to have utilized the services of a payroll service in 2006 and now submits records from 2006 that were ostensibly maintained by that service. The petitioner has still not provided any payroll records for the first quarter of 2007, which are particularly critical to its claim that it had sufficient staff to support a managerial or executive position as of the date the petition was filed.

Furthermore, the petitioner has not submitted any audited financial statements or corporate tax returns that would reveal how much the petitioner actually paid in salaries, wages, payments to contractors, and commissions during the relevant time period. *See* 8 C.F.R. 204.5(g)(2). In fact, there is no evidence in the record to establish that the petitioner has even filed a corporate tax return since 2003. The petitioner repeatedly emphasizes that the company applied for an extension to file its return in 2005, however, given that this petition was filed in January 2007, and the petitioner's response to the request for evidence was submitted in September 2007, the company's tax returns for both 2005 and 2006, as well as copies of all W-2s and Forms 1099 issued in those years, should have been available. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Therefore, a determination as to who was actually employed by the petitioner at the time of filing is severely restricted by the lack of credible documentation on record evidencing payments made to employees. Relying on the payroll information provided by South East Employee Leasing, Inc., the only persons who received wages from the company during 2006 were the beneficiary's spouse, who has been given the job titles of "administrator" and "office manager," and [REDACTED] who is listed on the organizational chart as a technical manager. However, there is no evidence of any payments to [REDACTED] in 2007 and it is therefore reasonable to conclude that he was no longer with the company when the petition was filed in

January 2007. Furthermore, it is still unclear why the petitioner is unable to provide a copy of his Form W-2 for 2006. As noted above, the beneficiary received a Form 1099 indicating that he had no payroll deductions taken in 2006, but the record contains copies of his pay stubs for the second half of 2006 indicating that he had deductions taken for insurance and federal taxes. This discrepancy raises questions regarding the credibility of both the pay stubs and the Form 1099. There is also a discrepancy between the wages paid to the beneficiary's spouse per the payroll company's records and the amount indicated on her Form W-2. Again, 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. at 591-92). While the petitioner appeared to employ a total of five direct employees by October 2007, it cannot be determined when these employees were hired, or if any employees were on the company's payroll as of January 2007 when the petition was filed. The petitioner appears to be compensating the beneficiary, Mr. [REDACTED] and [REDACTED] a salary of \$1,000 weekly, and paid them each a total of \$17,000 during the first ten months of 2007. Although requested by the director, there is no evidence that any of them received any payments from the petitioner prior to July 2007. Again, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Therefore, the record does not support the petitioner's claims regarding its organizational structure as of the date of filing. Absent evidence that the company actually employed a subordinate staff at that time, the petitioner has not established that he would serve in a primarily managerial or executive capacity. Although the petitioner claims that the beneficiary would manage a subordinate staff of managerial and professional employees, the petitioner did not establish that it actually employed the subordinate staff at the date of filing and has thus not established that he qualifies as a manager based on his supervision of personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, since many of the beneficiary claimed responsibilities indicate that he relies on subordinate managers and employees to carry out his duties, the position description is lacking in credibility and probative value.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "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)). Furthermore, 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 petitioner has not provided evidence that it employed a subordinate staff as of the date of filing who would relieve the beneficiary from performing non-qualifying duties, nor established that the reasonable needs of the petitioning company might plausibly be met through the services of the beneficiary as president and no other staff. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still

establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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

II. Not Employed Abroad in a Managerial or Executive Capacity for at Least One Year in the Three Years Preceding Entry to the United States as a Nonimmigrant

The second issue addressed by the director is whether the petitioner established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign entity for at least one year within the three years preceding his entry to the United States as a nonimmigrant.

In its letter dated January 18, 2007, the petitioner stated that the beneficiary served as Head of Marketing and Customer Management for the foreign entity from 2000 until August 2003. The petitioner provided the following position description:

[The beneficiary's] duties with [the foreign entity] were and still are to ensure that quality control procedures and critical path analysis procedures are followed and adhered to at all times, supervise all research and development and design projects and develop new shade technology. He is also responsible for reviewing proposals, staff requirements, time constraints, etc. for each project and engagement. [The beneficiary] sets personal goals and incentives for the management of employees. He has made and continues to make changes in technology within the Shade Industry, he trains installation crews and determines how many crews need to be trained in the U.S. with [the petitioner]. [The beneficiary] communicates on a daily basis with drafts people in auto cad drawing and 3D drawings. He attends Trade Shows in the U.S. as the U.S. Representative for [the foreign entity] and sends the information he learned back to South Africa in order to enhance the business. Lastly, he introduces all new markets for shade net applications to the U.S. and sources new agencies for [the foreign and U.S. entities].

The petitioner also provided a list of duties performed by the beneficiary as "director" of the foreign entity, but it essentially restates the duties that are contained in the above-referenced letter.

The petitioner provided a "list of employees as of February 2004" for the foreign entity which identifies an administration manager, a production manager-steel works, an assistant to the director, an administrative clerk, three welders, two cutters, two cleaners, a production manager – fabrics, six seamstresses, and a general assistant. The petitioner also submitted an organizational chart for the foreign entity which included a managing director, a director (the beneficiary), and a worldwide sales and marketing manager, in addition to the staff listed on the employee list.

Finally, the petitioner provided an employment letter from the foreign entity, ostensibly from "██████████" which states that the beneficiary has held "a non-executive Director position at GMM (Pty) Ltd. Since 2001." The letter does not bear a signature, and is made to appear as if it was faxed from the foreign entity on October 17, 2003. However, upon review, there are several typographical errors on the facsimile letterhead which lead the AAO to question the authenticity of the document. For example, the name of the foreign entity is typed as "General-Mineral & Marine {Pty) Ud." The letter does not have the appearance of a faxed document, i.e., it appears to have been printed directly from a laser printer and never faxed. The information that would normally be automatically imprinted by a fax machine, i.e., the date, time, sending party, and recipient's fax number, is printed in several different fonts. Furthermore, the supporting evidence does contain at least one document, a 2003 income statement, that does appear to have been faxed from the foreign entity, and the imprint at the top of the page looks completely different.

Based on the noted discrepancies, the AAO must question this letter's authenticity and cannot give the letter great weight as evidence of the beneficiary's employment with the foreign entity for the requisite time period. Furthermore, 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.

Moreover, the petitioner's initial evidence also included a copy of the beneficiary's resume. According to his resume, the beneficiary's "primary business focus" from 1993 until 2003 was "Elite Motor Sales" which is described as a used auto retailer with eight locations throughout South Africa. The beneficiary states on his resume that he owned 80 percent of this business until July 2003. The beneficiary did also list the foreign entity on his resume with the dates "2000 to current," but given that the foreign entity is actually one of four employers listed for the same time period and not identified as his "primary business focus," the petitioner's indication that he worked for this entity 10-12 hours per day for the three years prior to coming to the United States is not credible.

The beneficiary also filed a Form G-325A, Biographic Information, in connection with a Form I-485, Application to Register Permanent Resident Status or Adjust Status. Where asked to indicate his employment for the previous five years, the beneficiary indicated that his last employment abroad was with "Elite Auto," in Vereeniging, South Africa, from 1996 until 2003.

In the RFE issued on August 15, 2007, the director requested that the petitioner provide a comprehensive description of the beneficiary's duties while employed with the foreign entity, including a breakdown of the amount of time he allocated to each duty. The director also requested more specific information regarding the beneficiary's subordinates abroad. The director specifically requested job titles, job duties, minimum qualifications and a sample weekly work schedule for all subordinates supervised by the beneficiary.

In response, the petitioner submitted a list of fourteen duties and the percentage of time devoted to each duty. The duties closely resemble those listed in the beneficiary's U.S. job description, which has been included in its entirety, *supra*. Accordingly, the description will not be repeated here. The petitioner submitted an organizational chart for the foreign entity which indicates that the beneficiary served as "director of the foreign entity and supervised the following personnel: an assistant, an administration and finance manager,

two operations managers, one operations foreman, one administration assistant, two cleaners, three welders, two cutters and six seamstresses.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director acknowledged the position description submitted with the initial petition, but noted that the duties relate to the beneficiary's presence in the United States, and did not appear to represent the beneficiary's employment with the foreign entity prior to his entry to the United States as a nonimmigrant. The director further noted that the second iteration of the beneficiary's duties identified his job title as "director" rather than as "head of marketing and customer management," as indicated in the petitioner's initial letter. The director observed the similarity between the foreign and United States position descriptions, and therefore found the position description submitted in response to the RFE to be too broad and nonspecific to establish that the beneficiary was employed abroad in a qualifying capacity.

On appeal, counsel asserts that the beneficiary was employed abroad for the requisite time period in a primarily managerial and executive position, and that he "remains a top manager in the original South African entity and continues to perform key duties for that entity." Counsel argues that the perceived discrepancy in the beneficiary's job title is "a simple matter of semantics." Counsel emphasizes that the beneficiary has successfully obtained L-1A classification as a "bona fide international executive or a top level manager."

Upon review, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity for at least one year within the three years preceding the filing of the petition.

Preliminarily, the AAO finds that the petitioner has not adequately documented that the beneficiary was employed by the foreign entity in *any* capacity. As discussed above, the faxed employment letter dated October 17, 2003 and submitted to verify the beneficiary's dates of employment with the foreign entity does not appear to be authentic, nor is it actually signed by a representative of the foreign entity. The beneficiary did not identify the petitioner's claimed affiliate as his last foreign employer abroad on his Form G-325A, and he indicated on his resume that his "primary business focus" in the years leading up to his relocation to the United States was the operation of a used car dealership. There are no official company documents identifying the beneficiary as a director of the foreign entity. As discussed further, *infra*, the foreign entity's stock certificates, which ostensibly identify the beneficiary as a stockholder, are also lacking in credibility and probative value.

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. Furthermore, 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).

Here, the AAO concludes that the petitioner's claim that the beneficiary was employed by the foreign entity for the requisite time period is not supported by any credible evidence, and therefore, the petitioner has failed to meet its burden of proof. Accordingly, the appeal will be dismissed. As the petitioner's claim that the beneficiary worked for the foreign entity is not credible, the AAO will not further discuss his claimed employment capacity with the foreign entity, but notes for the record that the petitioner has not submitted evidence on appeal to overcome the director's conclusion that the position was described in excessively vague and general terms, and appeared to include many duties that would not fall under the statutory definition of managerial or executive capacity.

III. No Qualifying Relationship

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). The petitioner must also establish that the petitioner and the foreign entities are doing business. "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. 8 C.F.R. § 204.5(j)(2).

The petitioner claims to be an affiliate of GMM (Pty) Ltd. (GMM), a South African company, based on common ownership and control by the beneficiary. In its letter dated January 18, 2007, the petitioner stated that the beneficiary became a partner in GMM in 2000 and maintains 50 percent ownership of that company. The petitioner further stated that the beneficiary purchased a 50 percent ownership in the U.S. company prior to coming to the United States, and purchased the remaining 50 percent of the corporation on August 22, 2003.

The petitioner indicated that it was submitting a copy of a share certificate for GMM giving the beneficiary a 50 percent ownership interest in the company. The attached exhibit is a share certificate #2 issued by "Private Preview Investments 31 (Pty) Ltd." It states the following: "This is to certify that [the beneficiary] of GMM (Pty) Ltd. is the registered proprietor of [illegible name] fully paid shares of [illegible] each. . . ." The certificate is dated February 1, 2002. Although the certificate is numbered "2," the shares issued are numbered 1 to 50.

With respect to the ownership of the U.S. company, the petitioner submitted a purchase agreement dated August 14, 2003. Based on the agreement, the beneficiary agreed to purchase "50%" of the petitioning company from [redacted] for the sum of R850,000. The petitioner also submitted a purchase agreement dated August 23, 2003, in which the beneficiary agreed to purchase the petitioner for the amount of \$120,000. The petitioner also submitted a stock certificate #2 issuing 1,000 shares of the petitioner's stock to the beneficiary on August 23, 2003. The certificate shows that the stock was transferred from [redacted]. The certificate is signed by [redacted] as president and another individual as secretary. The petitioner is authorized to issue 1,000 shares of stock.

The AAO notes that, given that the beneficiary is claimed to have made two separate stock purchases in the U.S. company from two different shareholders, it is unclear why the stock certificate suggests that [REDACTED] was the sole prior owner of the company. Since there was apparently only one stock certificate issued previously, it is questionable whether the claimed transaction between the beneficiary and [REDACTED] ever took place. The record does not contain any documentation that would definitively establish the original ownership structure of the company.

In the RFE issued on August 15, 2007, the director requested that the petitioner submit documentary evidence to establish the qualifying corporate relationship between the petitioner and the foreign entity.

In response, the petitioner submitted a copy of its stock certificate #3 issuing 1,000 shares of stock to the beneficiary on August 1, 2003. The certificate is signed by the beneficiary as president and by another individual as secretary. As noted above, the petitioner does not claim that the beneficiary purchased any shares in the United States entity prior to August 14, 2003. Furthermore, the petitioner had already submitted a stock certificates #2 dated August 23, 2003 identifying the beneficiary as the owner of all 1,000 shares of the petitioner's stock. The format of the stock certificate #3 is also completely different from that of the previously submitted stock certificate #2.

The record also contains a 2003 IRS Form 1120-S, U.S. Income Tax Return for an S Corporation, marked as an "amended return." The tax return includes two Schedules K-1 indicating that [REDACTED] held a 55.263158% interest in the company, and the beneficiary's interest was 44.736842%.

Based upon the discrepancies noted above, the petitioner has not credibly established the ownership of the United States company. Again, 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. at 591-92. 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. *Id* at 591.

With respect to the foreign entity, the petitioner submitted two stock certificates identifying the company as "G.M.M. (Pty) Ltd." The stock certificates are un-numbered and the format of the certificates is essentially identical to that typically issued in the United States. The certificates, both of which are dated August 1, 2000, indicate that the beneficiary and [REDACTED] are each owners of 50 of the foreign entity's 100 authorized shares. The petitioner also submitted a "Record of Certificates Issued and Transferred" which indicates that the beneficiary and [REDACTED] are the sole owners of the foreign entity.

As noted above, there are discrepancies in the record which provide reason to question whether the beneficiary was in fact employed by the foreign entity. Similarly, the beneficiary's claimed ownership interest in the foreign entity can be questioned. There is evidence in the record which indicates that the full, registered name of the South African entity is "General Mineral and Marine (Pty) Ltd." The use of the abbreviated name on the stock certificates, considered with the questionable appearance of the certificates, raises serious doubts regarding their authenticity. Furthermore, there are numerous invoices from the foreign entity which

list a single company director, “[REDACTED]” In addition, the petitioner has provided no explanation for its submission of the above-referenced partially illegible stock certificate in support of the initial petition filing. As noted, that certificate was originally intended to establish the beneficiary’s ownership in the foreign entity. It appears that the certificate was intentionally misleading, as it appears to associate the beneficiary with the foreign entity, but pertains to an entirely unrelated company.

Absent some corroborating documentation showing that the foreign entity was established on August 1, 2000 with the beneficiary and [REDACTED] as its sole shareholders, the AAO finds that the stock certificates have limited probative value. As general evidence of a petitioner’s claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Here, the petitioner has not submitted credible evidence of the ownership and control of either the foreign entity, and therefore, the record does not support the petitioner’s claim that the two companies have a qualifying affiliate relationship. Accordingly, the petitioner cannot be approved.

IV. No Ability to Pay Proffered Wage

Another issue not addressed by the director is whether the petitioner has the ability to pay the beneficiary’s proffered annual salary of \$104,000. The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

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

Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41. The petitioner bears the ultimate burden of establishing eligibility for the benefit sought, and that burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

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.

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.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Here, the petitioner submitted a Form 1099 indicating that the beneficiary received the proffered wage from the petitioning company in 2006. However, in comparing the beneficiary's Form 1099 to the petitioner's profit and loss statement for 2006, the petitioner did not record this amount as a payment to the beneficiary. None of its expenses except for "Installation -Other" exceed \$100,000. In addition, as noted above, the petitioner submitted conflicting evidence as to whether the beneficiary was on the petitioner's payroll as a regular employee in 2006. His name does not appear on the payroll company's statement for 2006, yet the record contains copies of pay stubs issued to the beneficiary in 2006 indicating that he had federal taxes and insurance expenses deducted from his weekly paychecks in 2006. Given the discrepancies, there is sufficient grounds to doubt the validity of the submitted Form 1099. Again, 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.

Furthermore, the petition was filed in January 2007, and the petitioner must show that it has the ability to pay the proffered wage as of the date of filing. As discussed above, there is no evidence that the petitioner was paying any wages to the beneficiary during the first half of 2007. Based on the submitted Forms 940, 941 and W-2 for 2007, the petitioner paid the beneficiary a total of \$17,000 between July and October 2007, and another company, Air Shade America, Inc. paid the beneficiary \$8,000 during November and December 2007. Meanwhile, the petitioner indicated on its Form 940 for 2007 that the business is closed and/or no longer paying employees. As noted above, the petitioner's burden to establish its ability to pay the proffered wage is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petitioner has not submitted its tax returns for any year other than 2003, and the record contains no acceptable alternative evidence, such as the company's audited financial statements. Therefore, the petitioner has not established its ability to pay the beneficiary's proffered wage based on its net income or net current assets.

The AAO acknowledges the petitioner's reference on appeal to a "company restructuring." There is evidence in the record related to both "America Shade, Inc." and "Air America Shade, Inc." There is also evidence that the petitioner has intentionally misrepresented documentation pertaining to Air America Shade, Inc. as its own. Specifically, the record contains invoices, bank statements, financial records, and other documents, dated from approximately November 2006 and beyond, on which it is quite evident that the petitioner has used correction fluid to cover the word "Air" in the company name. While the petitioner has submitted evidence that it registered "Air America Shade" as a fictitious name in July 2007, publicly available records indicate that Air America Shade, Inc. was incorporated in the State of Florida in September 2006, four months before the instant petition was filed.¹ While the beneficiary appears to be one of three officers of this company, public records indicate that [REDACTED] is the president of Air Shade America, Inc. Since the petitioner has not provided any details regarding the newly claimed "company restructuring" it has not been established that the two Florida companies are related by common ownership and control, or whether the petitioner continues to do business in its own right. The fact that the petitioner altered documents for submission with this petition suggests that it had some motive to obscure the fact that a newly created company was in fact carrying out the business activities represented.

Based on the above, it can not be determined that the petitioning company intends to employ the beneficiary on a permanent basis at the proffered wage, or that it has the ability to pay the proffered wage. For this additional reason, the petition cannot be approved.

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

¹ See the Florida Department of State, Division of Corporations web site at <http://www.sunbiz.org>; accessed on August 11, 2008.

The AAO acknowledges that the petitioner has twice successfully filed L-1A nonimmigrant intracompany transferee petitions on behalf of the instant beneficiary. The AAO has consistently determined that prior nonimmigrant approvals do not preclude CIS from denying an extension or a separate immigrant petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity and on similar definitions of qualifying relationship/organization. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44) and 8 C.F.R. § 204.5(j)(2) and 8 C.F.R. § 214.2(l)(1)(ii). Although the statutory definitions for managerial and executive capacity are the same and the definitions of qualifying relationship/organization are similar, the question of overall eligibility requires a comprehensive review of all of the provisions, not just these definitions. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant 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.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form 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).

Moreover 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 does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the prior nonimmigrant petition approvals by denying the instant petition. Furthermore, based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the claimed foreign affiliate, or that it has a qualifying relationship with the foreign entity. The approvals of the prior nonimmigrant petitions may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

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

ORDER: The appeal is dismissed.