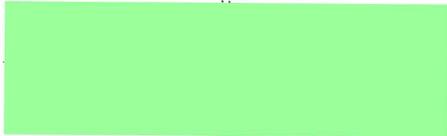




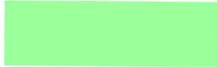
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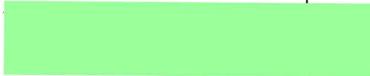


DATE: **MAR 04 2013**

OFFICE: TEXAS SERVICE CENTER

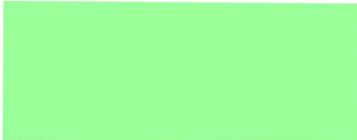
FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a Maryland corporation that seeks to employ the beneficiary as president and general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition determining that the petitioner did not establish: (1) that it would employ the beneficiary in a primarily managerial or executive capacity; (2) that it had the ability to pay the proffered wage; and (3) that it has a qualifying relationship with beneficiary's last foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner submits a statement on the Form I-290B, Notice of Appeal or Motion, asserting that the director's decision was in error, and a copy of an unpublished AAO decision.

I. The Law

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 a 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.

II. Employment in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a managerial or executive capacity.

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

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 immigrant visa petition on March 2, 2011. The petitioner operates a boutique gift and jewelry store. The petitioner stated on the petition (Form I-140) that it has a gross annual income of \$117,000 and nine employees. The petitioner seeks to employ the beneficiary in the position of president and general manager.

In a letter dated February 11, 2011, the petitioner stated that it had employed the beneficiary in this position since May 2009 and that six personnel reported directly to the beneficiary including a supervisor, an accounting manager and four sales people. The petitioner explained that the beneficiary indirectly supervises 23 personnel working at the foreign company "with regard to quality of products being exported to the U.S., their specifications based on his review of the market research as well as demand."

In addition, the petitioner explained that the beneficiary has overseen the "import of products from the parent company in tens of thousands of dollars," has "been engaged in high-level negotiations with buyers and wholesalers" in the United States, and "has liaised with customs and other government officials to comply with regulatory procedures and policies related to [the petitioner's] business operations." Furthermore, the petitioner stated:

In this position, [the beneficiary] executes contracts on behalf of the company; develops policies and procedures for the overall operations of the company; and provides strategic direction. He ensures that the company is fiscally responsible and institutes plans for sustainable development of the company. [The beneficiary] reports to the Board of Directors and the parent company in Nepal. He conducts high-level meetings with representatives of other companies to assess the market for [the petitioner's] products in the U.S. and abroad as well as conducts meetings with attorneys and accountants to seek legal representation, assessment of tax liabilities, and tax reporting on behalf of the company. He assesses feasibility of manufacturing [the petitioner's] products in the U.S. and/or import based on his review of additional market research to be conducted.

[The beneficiary] is a high-level decision maker in the company. He oversees the import of products from the parent company and is engaged in high-level negotiations with buyers and wholesalers across the U.S. to increase the sales territory for [the petitioner's] products. He liaises with customs and other

government officials to comply with regulatory procedures and policies related to the business operations. He also advises on manufacturing and production matters and on product specifications to achieve quality production. . . .

With regard to managerial duties, during the initial years of the U.S. company's operations, [the beneficiary] has and will continue to hire and oversee the initial staff in the U.S. and indirectly supervise the 4 professional staff in Nepal - Manager, Production Manager, Accountant and Marketing Manager. The four managers in Nepal in turn supervise and will continue to supervise approximately 20 garment and silver workers. Please note that he has not and will not engage in day-to-day jewelry sales and store operations.

The petitioner's letter included a detailed list of duties for the current positions of supervisor, accounting manager and sales staff. The petitioner indicated that it intends to hire another supervisor and a sales, research and marketing coordinator. The petitioner also provided a description for a product manager position, but identified the position as vacant on the organizational chart submitted at the time of filing.

The petitioner offered the following to describe how the beneficiary would spend his time while employed in the U.S.:

Generally, sixty percent of [the beneficiary's] time will be spent on non-managerial duties, i.e., executive duties and a small percentage of that time is also spent in performing technical duties such as advising on manufacturing and production matters or on product specifications to achieve quality production. The remaining 40% of his time will be spent on managerial duties where he will receive reports from his direct reports in the U.S. as well as all 3 managers and accountant in Nepal on various aspects of the company on a regular basis, advise on complex issues, conduct high-level meetings, engage in performance evaluations for those under his direction supervision, and review financial reports. [The beneficiary] will also continue to be a member of the executive team of the parent company in Nepal, of which he owns 100%. He will continue to have authority to sign documents on behalf of the company to commit the company including budget/expense documents, credit/marketing information documents, and all types of contracts. He will continue to be responsible for developing a budget, pertaining to new products and business development, while establishing goals and policies relating to his responsibilities.

On November 2, 2011, the director sent a request for evidence (RFE) to the petitioner, in which he instructed the petitioner to submit statements regarding the beneficiary's position, specific daily duties, percentage of time spent on each of those duties, and an organizational chart with names, job descriptions, and educational requirements for the beneficiary's subordinate

employees. In addition, the director requested copies of IRS Forms W-2, Wage and Tax Statement, for each employee.

In the RFE response dated January 25, 2012, counsel asserted that the beneficiary will be primarily engaged in executive duties while managing the petitioner's staff and continuing to oversee manufacturing and staff for the foreign entity. In addition to those responsibilities, counsel asserted that the beneficiary also manages an essential function within the company. That function involves overseeing brand development, recognition, marketing and establishing the business in the U.S. market.

Also as part of the response, the petitioner provided additional information regarding the beneficiary's duties in the areas of financial oversight, marketing and sales oversight, human resources oversight, legal and regulatory oversight, and networking and business development. However, the petitioner did not offer any insight into the amount of time the beneficiary would spend performing duties in any of those areas, and instead reiterated that the beneficiary would spend 60 percent of his time performing primarily executive duties and 40 percent of his time performing managerial duties. In addition, the petitioner asserts that the evidence provided in response to the RFE "reflects the kinds of managerial and executive decisions and/or duties that [the beneficiary] performs," including:

1. Establish and supervise the company management team in Nepal and staff in the U.S.
2. Authorize and coordinate the implementation of strategic and operational planning.
3. Negotiate and finalize high-level transactions.
4. Oversee market research through brand development, recognition and marketing.
5. Consult with the team regarding addition of services and products as well as on operational or any strategic plans.
6. Allocate responsibilities, duties, and authority for each member of the management team.
7. Work closely with Accountant to make any financial decisions.
8. Conduct conference calls with staffs in Nepal and receive updates and give out orders to the workers and the staff with regard to exports to the U.S.
9. Advise on manufacturing and production matters or on product specifications to achieve quality production.
10. Assign market researchers in different areas and receive information regarding the new market products.
11. Manage the budget for the new products and services.
12. Work closely with the website maker to give the best web shopping service in the upcoming business webpage.

(b)(6)

13. Ensure effective selection, training, development and compensation of management personnel and other employees.
14. Develop an effective organizational structure to sustain U.S. operations.
15. Deal on the company's behalf with various commercial and trade organizations.

The petitioner provided copies of its IRS Forms W-2, Wage and Tax Statement, for the years 2009 through 2011. The wages paid to the employees identified at the time of filing were as follows:

| Job Title | 2010 W-2 Wages | 2011 W-2 Wages |
|--------------------|----------------|----------------|
| Supervisor | \$435.00 | \$1,252.50 |
| Accounting Manager | \$1,350.00 | \$1,365.00 |
| Sales staff #1 | \$435.00 | \$615.00 |
| Sales staff #2 | \$587.25 | \$1,334.00 |
| Sales staff #3 | \$329.85 | \$108.75 |
| Sales staff #4 | not employed | \$2,936.25 |

One other individual identified in the record as the product manager received \$10,950 in wages in 2010, and \$2,212.50 in 2011. The petitioner indicated at the time of filing that this position was vacant.

The director denied the petition on February 29, 2012, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director failed to properly review and consider evidence which the petitioner contends is sufficient to establish eligibility under this classification. Specifically, counsel asserts that the director denied the petition, in part, based on the small size of the petitioning company, but failed to take into account the reasonable needs of the organization in light of its overall purpose and stage of development, as required by section 101(a)(44)(C) of the Act. The petitioner submits a brief and a copy of an unpublished AAO decision.

Upon review, the petitioner's assertions are not persuasive. 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 performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.*

In this matter, the petitioner stated that 60% of the beneficiary's time would be spent on "primarily executive duties" but "a small percentage" of that time would be devoted to technical duties involving manufacturing and production. The remaining 40% would be spent on

managerial duties. However, the petitioner failed to provide any details regarding the specific tasks that the beneficiary would actually perform. The petitioner provided vague and general responsibilities for the beneficiary such as establishing and supervising a management team, authorizing and coordinating implementation of plans, overseeing market research, and consulting on services, products, and plans. Given these very broad responsibilities, it is impossible to determine how the beneficiary would spend his time on a daily basis. 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).

In response to a request for evidence (RFE) from the director, the petitioner included additional information describing the beneficiary's duties under the headings of financial oversight, marketing and sales oversight, human resources oversight, legal and regulatory oversight, and networking and business development. Despite offering more detailed descriptions under those headings, the duties listed included a combination of managerial, executive and non-qualifying duties. The petitioner's failure to allocate a percentage of time dedicated to each of those tasks makes it impossible to determine whether the beneficiary would be performing in a primarily managerial or executive capacity. Furthermore, by failing to allocate a percentage of time allocated to the beneficiary's individual duties, the petitioner did not comply with the director's specific request for additional information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner also asserted that the beneficiary will manage an essential function within the company. 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 in managing the essential function, 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. *See* 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.

In this matter, the petitioner provides very little explanation to support its claim that the beneficiary manages an essential function, stating that the beneficiary is "routinely engaged in sales analysis to ascertain what measures must be taken and strategies must be deployed to establish company products as one of the highest quality hand-crafted products from Nepal." The petitioner also stated that the beneficiary would be responsible for brand development,

marketing and product recognition but this description failed to adequately articulate the function or describe the beneficiary's daily duties as required for a function manager. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will primarily perform the duties of a function manager.

On appeal, counsel submits a copy of an unpublished AAO decision in which an appeal was sustained for a petition involving a function manager. Counsel provides a copy this decision and underlined presumably relevant sentences but failed to offer any discussion or explanation as to how the facts and circumstances of that matter are in any way analogous to the instant matter. Yet, even if the matter were similar, 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. Overall, while the AAO does not doubt that the beneficiary performs some qualifying duties and holds the appropriate level of decision-making authority within the petitioning company as its president and ultimate owner, the record as a whole does not support the petitioner's claim that the beneficiary performs primarily qualifying executive or managerial duties, or its claim that he is relieved from day-to-day involvement in the petitioner's retail store.

Notably, the director found that the small number of employees working for the petitioner, together with very low wages paid over the course of a year, indicated that not all employees were employed full time. Based on the unavailability of lower level staff to relieve the beneficiary from the day-to-day operations of the company, the director questioned whether the beneficiary would work in a primarily managerial or executive capacity.

The initial Form I-140 listed nine current employees but the letter accompanying the petition noted seven employees with another two to be hired in the future. The director found based on review of the evidence that the petitioner employed a total of six workers at the time the petition was filed. In response to the RFE, the petitioner asserted that two additional employees had been hired. However, regardless of the number of employees found or claimed, the petitioner submitted IRS Forms W-2 reflecting payment of wages to eight employees including the beneficiary and the product manager in 2011.

On appeal, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

In this matter, the petitioner fails to reconcile the discrepancy between the reasonable needs of the company with the size and availability of the current staff. Notably, the petitioner leased retail space in a major shopping mall which requires the company to remain open during all mall hours. It is not unreasonable to expect this store to be open for up to 70 hours per week yet a review of the record reveals that the petitioner claimed only four sales staff during calendar year 2011. The cumulative total of wages paid to all four sales staff for in 2011 was approximately \$5000.00. A single full-time employee working a 40 hour week at the federal minimum wage rate applicable to Maryland would earn \$15,080 annually. Nevertheless, the petitioner paid well below that amount to its entire sales staff in 2011. The remaining staff, including the supervisor, accounting manager, and product manager, all earned less than \$2,500 in annual wages during the same year.

The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates include supervisors or managers, or even that they sufficiently relieve the beneficiary from performing the day-to-day tasks associated with the operation of a retail store. Yet, notwithstanding the fact that the petitioner's employees clearly work minimal hours, the petitioner maintains that the beneficiary "has not and will not engage in day-to-day jewelry sales and store operations." The petitioner claimed that the beneficiary directs and manages sales activities, yet it does not appear that there are sufficient personnel on staff to actually perform the sales function.

The petitioner's claims in this regard are not credible. Without a single full time employee, it is unreasonable to expect this business to remain open without the beneficiary's involvement in the day-to-day operations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is

performing the sales function, 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The AAO has long interpreted the statutory language at section 101(a)(44)(C) of the Act to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008). Here, the petitioner failed to establish that the beneficiary would be relieved from primarily performing non-qualifying duties.

Accordingly, the appeal will be dismissed, as the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act.

III. Ability to Pay

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

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

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner provided Form W-2 Wage and Tax Statements for tax year 2009, 2010 and 2011. The petitioner

paid the beneficiary \$9,600.00 in 2009, \$17,280.00 in 2010, and \$17,280.00 in 2011. The proffered wage for this position is \$38,000.00 therefore, the petitioner has not employed the beneficiary at a salary equal to or greater than the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now USCIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on March 2, 2011, and the 2011 tax return was not available, the director examined the petitioner's tax return for 2010. The petitioner's IRS Form 1120 for calendar year 2010 presents a net taxable income of \$210.00. The petitioner could not pay a proffered wage of \$38,000 per year out of this income.

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.

In order to determine current assets and current liabilities, USCIS looks to the IRS Form 1120, Schedule L Balance Sheets. The petitioner submitted an unsigned IRS Form 1120 for tax year 2010 and left the Schedule L blank. Therefore, based on this document the current assets are insufficient to pay the proffered wage.

The petitioner asserts that consideration should be given to other documentation provided, such as unaudited profit and loss statements and bank statements. However, the petitioner's unaudited financial report will not be considered in lieu of its tax return pursuant to 8 C.F.R. § 204.5(g)(2). It is unclear why the petitioner failed to provide a completed tax return or why a supplemented return for 2010 or the company's 2011 IRS Form 1120 was not provided on appeal. Nevertheless, based on the documentation provided, the petitioner has not established its ability to pay the proffered wage. For this additional reason, the appeal will be dismissed.

IV. Qualifying Relationship

The remaining issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The director concluded that the petitioner failed to provide sufficient evidence of its qualifying relationship with [REDACTED]. Specifically, the director found insufficient evidence to establish the ownership of the foreign entity.

Upon review, the petitioner has submitted sufficient evidence to establish a qualifying relationship and the director's determination will be withdrawn with respect to this issue. The petitioner has consistently claimed that [REDACTED] is the owner of the petitioning company and that [REDACTED] is owned by the beneficiary, and has submitted sufficient relevant and credible documentary evidence in support of these claims, including the petitioner's articles of incorporation and stock certificates and evidence that the foreign entity is registered as a sole proprietorship owned by the beneficiary.

Notwithstanding the AAO's favorable determination with regard to the last ground for denial, the petitioner remains ineligible for the immigration benefit sought based on the remaining grounds for ineligibility fully discussed above.

V. Prior Nonimmigrant Approvals

It is acknowledged that the petitioner places a great deal of significance upon USCIS' prior action in granting the beneficiary L-1A nonimmigrant classification for his current position. However, it must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant L-1A Classification 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 USCIS 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).

Each petition filing is a separate proceeding with a separate record and a separate burden of proof. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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'r 1988). Further, the director denied the instant immigrant petition, in part, based on the petitioner's failure to establish that it has the ability to pay the beneficiary's proffered wage, a requirement that does not apply in the L-1 nonimmigrant context.

VI. Conclusion

The appeal will be dismissed and 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.