U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 0 9 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: SELF REPRESENTED

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, an electronics import-export company, seeks to employ the beneficiary as its 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.

On March 13, 2012 the director denied the petition concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a primarily managerial or executive capacity; and (2) that it has the ability to pay the beneficiary the proffered wage.

On appeal, the petitioner asserts that the director substantially minimized and overlooked evidence establishing the beneficiary's and petitioner's eligibility, therefore the decision was incorrect. The petitioner submits a brief in support of the appeal.

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.

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.

II. Employment in the United States in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner filed the immigrant visa petition (Form I-140) on May 26, 2011. The petitioner asserted that the beneficiary would be serving in a managerial or executive capacity as manager of the U.S. company engaged in the import and export of electronic products, technology products, and quality specialized services. The company was established in May 2001 and claimed five employees on the Form I-140.

In a letter dated May 23, 2011, the petitioner stated that the beneficiary's duties in the United States will be primarily managerial would include the following:

1) Overseeing and coordinating commercial operations, 30%

2) Establishing appropriate contact and business relationship with customers, distributors, and others, reviewing terms and negotiating most favorable deals for the company, 30%

3) Monitoring consumer preference and possible marketing opportunities, assuring a correct positioning within the market promotion of the product or service offered, 30%

4) Assisting sales, setting goals, and analyzing sales statistics to determine sales potential and inventory requirements, 10%

The petitioner further described the beneficiary's duties as follows:

> This position requires the beneficiary to establish the operation of the company, organize and oversees [*sic*] administrative matters, exercise full responsibility for recruiting, hiring, training an [*sic*] dismissing employees. He will ensure the coordination of the departments and workers, implement policies and adopt strategies to improve business holding full authority over all executive decisions aiming to achieve the profitability goals set by the corporation.
>
> . . . . He will handle all policy and business decision [*sic*] such as negotiation of contracts to provide for services, purchases, sales pricing, banking insurance and credit terms. He is also responsible for insuring that sales and profit goals are met each quarter, has the discretionary authority to reduce costs as he sees fit.

Further, the petitioner stated that the beneficiary's job duties in the United States will be "identical to his job duties overseas, because we are in the same field of business." Therefore, in pertinent part, the beneficiary's duty description abroad is as follows:

> As a manager, his main area of responsibility involved participating in the preparation of business plan [*sic*], campaigns, and service development plans. At [the affiliate] he was in charge of analysis of the operational system and destination of electronic equipments [*sic*] and technology to other around the world markets; complete analysis of customs process and costs; evaluation of

> final section of equipment, standard operational procedures for the whole import and export activities; final pricing, customs preliminary paperwork; elaboration and supervision of products transportation, selection of commodity description for foreign customs purposes; project leader for the execution of project of transportation commanding crew and organizing use of special equipments [*sic*] for logistics purposes; on a day-to-day basis, the beneficiary was in charge of the establishment of operational objectives and work plans, as well as the delegation of assignment to subordinate managers; was in charge to develop contacts with existing and potential clients; sales presentation such as negotiation of sales contracts, including terms, pricing and volume; technical proficiency and consults with prospective clients regarding the use of a company products; investigation of potential product improvements; managing client profits and loss, expenses and performance to quota; investigating and evaluating new business opportunities pertaining to alternative channels and customers; marketing intelligence to sales management and participation in the development of sales forecast and strategies.

On November 22, 2011, the director issued a request for additional evidence (RFE) instructing the petitioner to provide, *inter alia*, evidence establishing that it will employ the beneficiary in a qualifying managerial or executive capacity. Specifically, the director requested a more detailed description of the beneficiary's job duties and an explanation of how the beneficiary would be able to devote the majority of his time to managerial or executive duties within the petitioner's current staffing arrangement. The director also requested the job titles, and duty descriptions for all employees to be supervised by the beneficiary, as well as educational requirements and actual educational qualifications for any subordinates identified as managers, supervisors or professionals.

In response to the RFE on the issue, the petitioner submitted a brief asserting that the beneficiary had been employed in a primarily managerial capacity while abroad and would continue to be so employed while with the petitioner. The petitioner also asserted that it had previously submitted "very extensive evidence that supports the approval" of the petition, while acknowledging that "the evidence may not be exactly the ones requested, but [is] comparable." The petitioner reiterated the U.S. duty description provided at the time of filing.

The petitioner did not directly address the director's request for information regarding the number and types of employees the beneficiary supervised abroad and would supervise in the United States. The petitioner stated: "Employees in a small company are likely to have actual authority to direct and control some aspect of the company's functions or policies, and their performance of more hands-on activities sometimes can be explained in terms of business necessity, as it is this instant case." The petitioner provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2010, which reflects that the company reported $0 in salaries and wages, no payments to contractors, and $17,030 in commissions in the year preceding the filing of the petition.

The director found that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director concluded that the beneficiary would

be primarily engaged in duties that fall outside the scope of ""managerial" or "executive," in part, due to the petitioner's failure to establish that the beneficiary will have staff to relieve him from performing non-qualifying duties. Further, the director denied the petition, in part, based on the petitioner's failure to provide additional evidence of the beneficiary's duties or any information at all about other employees as requested in the RFE.

On appeal, the petitioner submits a brief asserting that the director's denial is erroneous and not supported by the weight of the evidence. The petitioner reiterates the position description previously provided and asserts that it is fully sufficient to support the approval of the petition.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity.

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).

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 provided a short and general duty description stating the beneficiary would be generally responsible for operations, administration, personnel, coordination, executive decisions, negotiations, and finance issues. In the same letter, the petitioner stated the beneficiary would spend at least 30% of his time on marketing related matters, a responsibility not included in the first description. Finally, the petitioner stated, again in the same letter, that the beneficiary's duties in the United States. would be "identical" to the duties the beneficiary performed abroad, but the petitioner did not explain how the description of duties abroad corresponded with the first two U.S. duty descriptions, which were already inconsistent with each other. 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).

The petitioner's allocation of the beneficiary's time includes 30% overseeing and coordinating commercial operations. This is a very broad description of responsibilities which fails to offer the level of detail necessary to convey an understanding of the beneficiary's actual tasks and activities on a regular basis. The remaining time allocation by petitioner also fails to include specific and detailed tasks to elaborate on how the beneficiary would allocate his time beyond broad generalizations. 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. Overall, 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).

The petitioner asserts that while employed with the U.S. company the beneficiary will perform as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner asserted that the U.S. company is engaged in the business of retail, import & export of products and quality specialized services. However, it is unclear exactly what essential function the beneficiary is claimed to manage. When viewed together, the three duty descriptions included in the petitioner's initial letter appeared to involve a wide variety of responsibilities. Further, based on the evidence, it appears the beneficiary will be expected to not only manage various functions but also perform some of the functions.

According to the information provided on the Form I-140, the petitioner claims five employees. The petitioner 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.

Although the petitioner claims to employ five employees, no evidence has been submitted to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Despite the director's RFE, the petitioner failed to present any

additional evidence regarding the staffing of the U.S. company, including the requested job titles and job duties for the beneficiary's claimed subordinates. 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).

Further, the AAO notes that one version of the beneficiary's duties fails to identify any supervisory responsibilities, and the petitioner's IRS Form 1120 for 2010 indicates that the company paid no salaries or wages in the year preceding the filing of the petition. Therefore, while the petitioner states that the beneficiary's managerial duties include "overseeing and coordinating commercial operations," establishing relationships with customers and distributors, and setting marketing and sales goals, the petitioner has not established who, other than the beneficiary, is available to perform the actual day-to-day sales, purchasing, marketing, administrative and logistics activities inherent to operating an import-export business.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The AAO has long interpreted the statute 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).

Based on the petitioner's failure to submit a consistent, detailed description of the beneficiary's duties and its failure to respond to the director's request for additional evidence of the beneficiary's duties and those of his claimed subordinates, the petitioner has failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

III. Employment Abroad in a Managerial or Executive Capacity

The second issue to be addressed is whether the petitioner established that the beneficiary was employed by its foreign parent company in a qualifying managerial or executive capacity prior to his admission to the United States.

In the petitioner's May 23, 2011 letter, it stated that the beneficiary's primary areas of responsibility abroad included participating in the preparation of a business plan, campaigns and service development plans. The letter also included a long list of duties such as being "in charge

of analysis of the operational system and destination of electronic equipments and technology to other around the world markets; complete analysis of customs process and costs; and evaluation of final section of equipment." Among other very general duties, the beneficiary was in charge of standard operating procedures, final pricing, customs paperwork, supervision of products transportation, selection of commodity description for foreign customs purposes, and served as project leader for the execution of a project. According to the letter, on a daily basis the beneficiary was responsible for duties such as the establishment of operational objectives and work plans, delegation of assignments to subordinate managers, developing contacts with clients, sales, consulting with clients, investigating product improvements, managing profits and losses, investigating new business, and development of sales forecast and strategies. Additionally, the petitioner provided a percentage of time the beneficiary spent on management-level duties as follows:

(1) Supervision of subordinates and reviewing creative staff to ensure best creative work and best results, 40%

(2) Maintaining permanent contact with potential clients and manufacturer partners, third party associates, and developing a consistent relationship, 30%

(3) Providing financial analysis and cost control to meet Company objectives within the established budget, 20%

(4) Reviewing contracts, analyzing reports and budgets, 10%

In the RFE, the director requested a more detailed description of the beneficiary's duties, job titles for all personnel the beneficiary supervised, and for his superiors. In response, the petitioner offered none of the requested evidence. The petitioner asserted that the beneficiary "was already in a managerial capacity with the Brazilian affiliate" and reiterated some of the duties previously mentioned. The petitioner did add that the beneficiary's duties involved the "supervision of function managers" in a number of areas but failed to provide specific names, job titles or duties in support of this statement.

As stated above, 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 initial description of the beneficiary's duties included many responsibilities that would be considered non-qualifying such as developing contacts with clients, consulting with clients, investigating products, and dealing with standard operating procedures. These types of responsibilities qualify as performing a function not managing a function. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner initially listed the beneficiary's duties as including both managerial and administrative or operational tasks, but failed to quantify the time the beneficiary spent on them. This failure of documentation is important because several of the beneficiary's daily tasks

already noted do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary was primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

While the petitioner followed up the initial description with a breakdown of percentage of time the beneficiary spent on management level tasks, it failed to mention how much of the beneficiary's time overall was spent specifically on management-level tasks. This description was also short and vague. Supervising subordinates and reviewing creative staff purportedly consumed 40% of the beneficiary's time but the petitioner failed to explain the day-to-day details or tasks involved, nor did it identify the number of types of employees he is claimed to have supervised. Another 30% of the beneficiary's time was spent interacting with others while the final 30% appeared to involve finance and other operational activities. Although the petitioner allocated time to these general responsibilities it is meaningless without a more detailed and specific discussion of the beneficiary's actual daily duties and tasks. 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 this matter, the petitioner failed to provide sufficiently detailed and consistent duty descriptions to establish that the beneficiary would be employed primarily in a managerial or executive capacity.

The petitioner also asserted that the beneficiary performed primarily as a manager of "function managers" while employed abroad. In support of the assertion, the petitioner attributed 40% of the beneficiary's time to supervising subordinates and reviewing creative staff but it did not explicitly include hiring, firing or any other personnel type actions for those individuals among the beneficiary's duties. Furthermore, the petitioner did not provide any evidence to establish that the beneficiary actually managed or supervised others. Despite the director's RFE, the petitioner ignored the opportunity to supplement the petition with this information. The petitioner provided no organizational chart, no list of employees and no duty descriptions to establish that the beneficiary supervised subordinate staff while employed abroad. 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).

As noted, the remainder of the beneficiary's "management" time appeared to include non-qualifying duties such as accounting, marketing and sales, though the lack of detail prevents a determination of how much time was spent on those non-qualifying duties. The petitioner provided a second duty description stating that the beneficiary's main responsibility involved participating in business plans, campaigns, and service development plans. On a day-to-day basis, the beneficiary was in charge of establishing operational objectives and work plans, developing client contacts, sales presentation including negotiating terms, pricing, and volume of sales contracts, consulting with clients and delegating assignments to subordinate managers. Once again the description offers no indication of how much time the beneficiary spent performing non-qualifying duties in relation to how much time he allocated to performing in a managerial capacity. Based on the evidence, it appears the beneficiary may have been engaged in performing actual operations and functions and while it is permissible to do so, the petitioner has not established that the beneficiary was performing primarily in a managerial or executive

capacity. 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).

Notably, the petitioner also asserted that the beneficiary had been employed with an affiliate prior to arriving in the United States, however, it did not identify the beneficiary's actual dates of employment with the foreign entity in the original petition, in its response to the RFE, or on appeal. Only a review of the entire case file including a prior immigrant petition reveals a mere assertion that the beneficiary was employed with the affiliate from 2005 until the beneficiary left for the United States in 2007. Furthermore, the beneficiary's 2008 resume failed to mention the foreign company as his employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner failed to establish that the beneficiary was employed in a qualifying managerial or capacity abroad for at least one year within the relevant three-year time period and failed to respond to the director's request for additional evidence to support its claims. For these additional reasons, the appeal will be dismissed.

IV. Ability to Pay

The third and final issue addressed by the director is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage of $780 per week, or $40,560 annually.

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 did not establish that it had previously employed the beneficiary.

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 May 26, 2011, the AAO must examine the petitioner's tax return for 2010. The petitioner's IRS Form 1120 for calendar year 2010 presents a net taxable income of -$50,337.00. Therefore, the petitioner could not pay a proffered wage of $780 per week (or $40,560 per year) for full time employment 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.

According to schedule L of IRS Form 1120 for calendar year 2010 the petitioner has net current assets in the amount of $16,004.00. Based on this information, the petitioner's net current assets of $16,004.00 are not greater than the proffered salary of $780.00 per week for the year therefore, the petitioner has not established an ability to pay the proffered salary.

Therefore, the director properly determined that the evidence of record did not establish the petitioner's ability to pay the proffered wage. The petitioner has not addressed this issue or submitted additional evidence of its ability to pay the beneficiary's wage in support of the appeal. For this additional reason the appeal must be dismissed.

V. Qualifying Relationship

Beyond the decision of the director, a remaining issue to be discussed is whether the petitioner has established that it has a qualifying relationship with the beneficiary's claimed 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 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 asserted the beneficiary was previously employed by its Brazilian parent company, In support of its assertion of a qualifying relationship between the foreign and U.S. company, the petitioner provided copies of brochures, invoices, and bills of sale. Further, the petitioner asserted "besides ownership controlled by the same group of individuals, the business relationship between the U.S. employer and foreign entity must exist due to the nature of import & export of products."

The petitioner failed to provide any evidence of common ownership or control between the U.S. and foreign companies. Instead, the petitioner provided several documents that appeared to illustrate a transfer of ownership of all stock in the petitioning company from an individual named to the beneficiary in February 2008. These documents included:

(1) The "Minutes of Combined Meeting of Stockholders and Directors" dated February 11, 2008, in which it was "resolved that the shares (stock) of the corporation would be assigned as following [beneficiary] – 1,000 shares common stock" which represented 100% of the outstanding shares entitled to vote;
(2) a "Waiver of Notice -- Combined Meeting" dated February 11, 2008, reflecting that the holder of the 1,000 shares of common stock prior to "the assignment" above was one individual named who was also identified as president, director, and secretary;
(3) a document reflecting resignation as vice-president, treasurer, and director on October 20, 2007 and resignation as president, secretary and director on February 22, 2008;
(4) a document indicating the petitioner's intent to sell the company and an instruction to to execute the sale;
(5) a document entitled "Stock Transfer" dated February 11, 2008, in which transferred, for unstated value received, 1,000 shares of the petitioner's common stock, represented by certificate number one;
(6) a sales agreement between the beneficiary (buyer) and (seller) reflecting the sale of the petitioning company, dated February 11, 2008; and
(7) a "closing statement" reflecting details of the sale to include a payment agreement for the "balance of the purchase price of $10.00", dated February 11, 2008.

The petitioner failed to provide a copy of the only stock share certificate referenced.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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, USCIS is unable to determine the elements of ownership and control.

Notwithstanding the stock transfer and company sale referenced in the documents already listed, the record contains several years of Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return. According to the tax returns, the petitioning company was wholly owned by in 2007. In 2008 and onward however, the tax returns reflect that the company was wholly owned by " " No evidence was provided to establish the ownership or control of either of these foreign companies. Furthermore, this evidence contradicts the documentation provided, which indicates that the beneficiary owns the petitioning company. 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).

In response to an RFE regarding the qualifying relationship the petitioner asserted that the petitioner and the claimed parent company "share the same field of activities" and noted that the petitioner "meets the criteria of being a similar industry in the field of import and export" but provided no additional relevant evidence for consideration. 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).

Therefore the petitioner failed to provide evidence establishing common ownership between the U.S. and foreign company sufficient to establish a qualifying relationship required under the statute. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

VI. Conclusion

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.

ORDER: The appeal is dismissed.