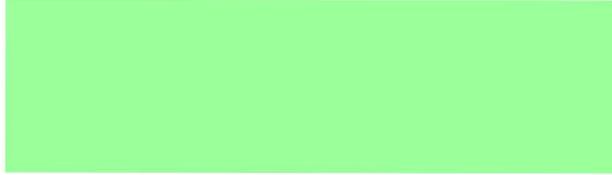


(b)(6)

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



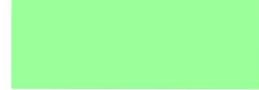
U.S. Citizenship
and Immigration
Services



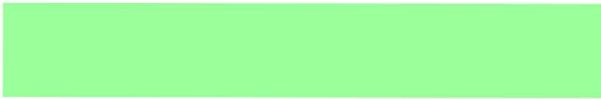
DATE: **NOV 12 2013**

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE: Petitioner:
Bénéficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a Texas limited liability company that is engaged in natural supplement sales. The petitioner, which claims to be an affiliate of [REDACTED] located in Mexico, seeks to employ the beneficiary as its chief executive officer. 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 June 19, 2013, the director denied the petition based on the following grounds of ineligibility: (1) the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity in Mexico; (2) the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity; (3) the petitioner failed to establish that it has a qualifying relationship with the foreign entity; and, (4) the petitioner failed to establish the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

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 and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. The Issues on Appeal

A. Employment Abroad in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner provided sufficient evidence to establish that the beneficiary had been employed by the foreign entity in a managerial or executive capacity.

In the decision dated June 19, 2013, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary had been employed by the foreign entity in a managerial or executive capacity because it had provided an overly broad position description that failed to specify the nature of the beneficiary's day-to-day duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Upon review of the beneficiary's duties for the foreign entity, the petitioner provided a very brief job description with overly general duties. 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. For example, the beneficiary's job duties with the foreign company included: "overseeing design, marketing, promotion, delivery and quality of services"; "managing resources within budget guidelines"; and, "focusing on setting the strategy and vision for the company." 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).

On January 31, 2013, the director requested additional information of the beneficiary's job duties but the petitioner failed to submit a more detailed statement of the duties, including the percentage of time spent on each duty. The petitioner's failure to submit this information cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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.

Here, the director observed discrepancies between the information provided in the foreign company's organizational chart and statements made in a letter submitted by the foreign company's director of

finance. The director noted that the letter stated that the beneficiary had six subordinate employees but the organizational chart showed 18 subordinate employees. In addition, out of the six subordinate employees identified in the letter, five of them were not listed on the organizational chart. 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). Based on these unresolved discrepancies, the petitioner has not provided reliable evidence of the number and type of employees the beneficiary supervised during his employment with the foreign entity.

On appeal, counsel for the petitioner contends that the beneficiary worked for the requisite one year abroad with the foreign company as Chief Executive Officer from November 2009 to December 2010. On appeal, counsel did not provide any additional information or evidence to overcome the director's concerns regarding the brief and vague job description for the beneficiary's duties while working abroad, or provide information to overcome the discrepancies in the information regarding the organizational structure of the foreign entity during the beneficiary's relevant period of employment in Mexico. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, based on the deficiencies and unresolved inconsistencies discussed, the petitioner has not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. U.S. Employment in a Managerial or Executive Capacity

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

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *see also* 8 C.F.R. § 204.5(j)(5). However, as observed above, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

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).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity.

With regard to the U.S. position, the petitioner provided a vague and general job description that failed to provide insight into the nature of the beneficiary's day-to-day tasks. For example, the petitioner stated that the beneficiary would be responsible for the "important function of planning and strategizing the growth of the company" and "generating new business and forming new strategies for the company." The beneficiary would also be responsible for the "coordination of the goals and activities of the different departments"; "ensuring the supply chain between the factory in Mexico and the distribution centers is running according to plan"; "reviewing reports of export and import and other related functions"; and, "reviewing the finances of the company." It is unclear which specific tasks actually fall within these broad areas of responsibility and whether any supervisory tasks the beneficiary will perform are of a qualifying nature. Again, 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 her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's vague and general description of the beneficiary's position does not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description, when viewed in light of the totality of the evidence submitted, also includes several potentially non-qualifying duties such as generating new business, coordinating the activities of departments, reviewing export and import reports, and reviewing company finances. These duties generally suggest the beneficiary's supervision of subordinate staff organized among different departments. However, the petitioner's quarterly federal tax returns show, and the petitioner confirms, that it has only one employee other than the beneficiary. The petitioner does not provide sufficient evidence it has employees to assist with the budgeting, bookkeeping, sales, marketing, business development and importing and exporting operations and, thus, it appears that the beneficiary would need to be actively involved in the day-to-day operations of the business. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. 593, 604 (Comm. 1988).

On appeal, counsel for the petitioner states that "many of the responsibilities detailed in the job description are broad job responsibilities," and, "if the Service considers the nature of the business it should be clear that the duties listed by [the petitioner] are appropriate for a Chief Executive Officer." However, as discussed herein, USCIS looks beyond the petitioner's description of the beneficiary's job duties and reviews the totality of the record when examining the claimed managerial or executive

capacity of a beneficiary. This review takes into account 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.

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.

As discussed above, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. Throughout 2011 and 2012, the petitioner operated with the beneficiary and one other employee. 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). The petitioner has not established that one employee is able to relieve the beneficiary from having to perform primarily non-qualifying duties associated with the daily functions of the business.

Based on the foregoing, the petitioner has failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

C. Qualifying Relationship

The third issue in this proceeding is whether the petitioner submitted sufficient evidence to establish 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 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 director requested additional evidence to establish that the two companies have a qualifying relationship. In response, the petitioner submitted a letter from its accountant, who stated that "the members of the LLC . . . are the same people who own the Mexican company." She identified the petitioner's members as the beneficiary, [REDACTED]

In the director's decision dated June 19, 2013, the director noted that the documentation and evidence submitted by the petitioner regarding its qualifying relationship with the beneficiary's foreign employer was not consistent. Specifically, the director observed that the information in the foreign entity's corporate documents was not the same information as provided in the petitioner's statements, and did not corroborate the claim that the two companies are owned by the same group of individuals. In addition, the director denied the petition, in part, based on the petitioner's failure to provide full English translations of the foreign entity's documents.

On appeal, counsel for the petitioner contends that "the Service overlooks the fact that the U.S. and foreign companies are two legal entities owned and controlled by the same group of individuals." Counsel asserts that the director "makes an erroneous conclusion of law when it denies there is a qualifying organization" based on the fact that the foreign entity has eight owners while the U.S. company has only five owners. In addition, on appeal, counsel cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990) and *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) in support of her assertion that two companies may qualify as affiliates even though they are not owned by the exact same individuals.

The *Sun Moon Star Advanced Power* decision is distinguishable from the facts of the present matter. First, the court relied heavily on *Matter of Tessel, Inc.* to conclude that the two entities were affiliates through indirect ownership. 17 I&N Dec. at 633. Although *Matter of Tessel* determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship, counsel has misconstrued the decision. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management" *Id.* It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.*

The facts in the present matter can be distinguished from *Matter of Tessel*, however, because it has not been established that one shareholder holds a majority interest in both companies. As later codified in part A of the definition of affiliate at 8 C.F.R. § 204.5(j)(2), the petitioner in the *Tessel* case would have qualified as an affiliate given that the beneficiary owned and controlled a majority of both entities. The record in the present matter, however, fails to demonstrate that there is majority ownership and control, directly or indirectly, of both companies by any one person. The foreign entity's documents reflect that [REDACTED] holds a majority of the company's shares; however, the petitioner has not provided evidence that the same individual also owns a majority membership interest in the U.S. company. The petitioner has not provided copies of its membership certificates or operating agreement identifying the proportion of membership interest owned by each

member. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now USCIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. Prior to the adjudication of the *Sun Moon Star* petition, the Immigration and Naturalization Service amended the regulations so that the definition of "subsidiary" recognized indirect ownership. See 52 Fed. Reg. 5738, 5741-2 (February 26, 1987). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor USCIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

In this case the U.S. entity is owned by five individuals with no documented majority shareholder, and the foreign entity is majority owned by [REDACTED] with seven minority shareholders. While the companies do have five owners in common, the companies are not affiliates as both companies are not owned and controlled by the same entity, individual or group of individuals. Based on the evidence submitted, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the petition cannot be approved.

D. Ability to Pay

The final issue in this proceeding is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.)

The petitioner indicates on the Form I-140, at Part 6, that it will pay the beneficiary a salary of \$60,000.00 per year.

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 case, the petitioner did not submit any documentation evidencing that it paid the beneficiary's proffered salary of \$60,000 per year. Rather, the petitioner stated that the foreign entity has been paying his salary during his period of stay in the United States as a nonimmigrant.

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.

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.

As the petition's priority date falls on October 17, 2012, the AAO must examine the petitioner's tax return for 2012; however, it was unavailable at the time of filing and has not been provided on appeal. The director determined that the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, did not reflect sufficient net income or net assets to pay the proffered salary of \$60,000, and the petitioner has not contested these findings.

The petitioner provided an unaudited profit and loss statement covering the time period from January 2012 through June 2012 to indicate that it can pay the beneficiary's proffered wage. However, as noted by the director, the profit and loss statement precedes the priority date and thus, does not indicate that the petitioner can pay the proffered wage as of October 2012. In addition, on appeal, counsel for the petitioner states that "based on their past gross receipts and continues influx or new contracts and product orders, [the petitioner] reasonable believes they can pay the proffered wage to the beneficiary." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Accordingly, in light of the lack of sufficient corroborating evidence submitted to establish that the petitioner meets the provisions of 8 C.F.R. § 204.5(g)(2), the petition cannot be approved.

III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.