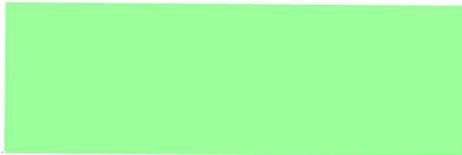


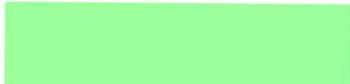
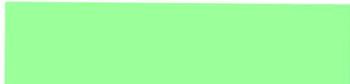


U.S. Citizenship  
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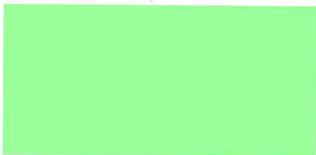


DATE: **OCT 02 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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 (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 preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that claims to be a subsidiary of [REDACTED] the beneficiary's former foreign employer located in Pakistan. The petitioner is seeking to employ the beneficiary as its president. 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.

In support of the Form I-140, the petitioner submitted a letter dated June 20, 2011 containing, in part, a description of the beneficiary's proposed duties and a brief statement about the beneficiary's prior position with the foreign employer. The petitioner also provided copies of its shareholder agreement, corporate meeting minutes and stock certificates in support of its claim that it is a subsidiary of the foreign employer. Finally, the petitioner submitted supporting evidence in the form of corporate, business, and tax documents pertaining to the beneficiary's foreign employer, the petitioner and the petitioner's claimed U.S. subsidiary, [REDACTED]

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. Therefore, the director issued a request for evidence (RFE) dated September 4, 2012 informing the petitioner of evidentiary deficiencies. The director requested additional evidence to establish: (1) the qualifying relationship between the foreign employer and the petitioner; (2) the petitioner's ability to pay the beneficiary; (3) that the petitioner has been doing business for at least one year; and (4) the beneficiary's qualifying employment with the foreign and proposed employer.

The petitioner's response to the RFE included several documents already included in the record. In addition, the petitioner provided tax returns and quarterly state tax reports for [REDACTED]

[REDACTED] Several invoices and bills were submitted to establish the business relationship between the beneficiary's foreign employer and [REDACTED] during 2010 and 2011.

After reviewing the record, the director concluded that the petitioner failed to establish: (1) that the petitioner has a qualifying relationship with the foreign employer; (2) that the beneficiary would be employed in a qualifying managerial or executive capacity; (3) that the petitioner had been doing business for the previous year; and (4) that the petitioner has the ability to pay the proffered wage. Therefore, the director denied the petition on April 3, 2013.

On appeal, counsel disputes the director's findings as arbitrary and not based upon the evidence in the record. Counsel indicated on the Form I-290B, Notice of Appeal or Motion, filed May 2, 2013 that a legal brief and additional evidence would be submitted within 30 days. The record reflects that no additional documentation was provided within this timeframe and the record is considered complete.

## 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.

## II. Qualifying Relationship

The first issue to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's last foreign employer, [REDACTED]. 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 regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In a letter dated June 20, 2011, the petitioner indicated that it is a subsidiary of [REDACTED] Pakistan. Specifically, the petitioner stated that it "is 50% owned and controlled by [REDACTED]" The petitioner's Articles of Incorporation show that it was established in Florida on April, 4, 2003 and is authorized to issue 1000 shares. The petitioner submitted two share certificates to establish the company's ownership. Share certificate no. 2 issued on October 31, 2008, indicates that [REDACTED] holds 500 of the petitioner's shares. The petitioner also submitted its stock certificate no. 5 issued on October 31, 2010, which indicates that [REDACTED] Company holds 500 of the petitioner's shares.

Along with the stock certificates, the petitioner submitted the minutes of a shareholders meeting held on October 31, 2010. This document states that 50% of the petitioner's stock is "now owned" by [REDACTED] However, the minutes also state that [REDACTED] and not [REDACTED] owned the remaining 500 shares the petitioner's stock as of that date. Further, the minutes identified [REDACTED] as the petitioner's chairperson, vice-president, director, and treasurer. The petitioner also provided a shareholder agreement dated October 31, 2010 signed by [REDACTED] and [REDACTED] as shareholders, which states "[i]t is hereby agreed that, all final business and management related decisions will be made unanimous and [REDACTED] will have a final authority on all management and policy issues."

Finally, the petitioner's initial evidence included a copy of its IRS Form 1120, U.S. Corporation Income Tax Return for 2009, which identifies [REDACTED] as an officer of the corporation and indicates that he holds 0.0% of stock in the company.

In the RFE issued on September 4, 2012, the director requested that the petitioner submit additional evidence to establish that it has a qualifying relationship with the foreign entity. The director specifically advised that this evidence may include but is not limited to submission of all stock certificates, a stock ledger, and proof of stock purchase. In response, the petitioner resubmitted its stock certificates nos. 2 and 5 issued to [REDACTED] and [REDACTED] in 2008 and 2010, respectively, and the minutes of the shareholders meeting dated October 31, 2010 which identifies [REDACTED] and [REDACTED] as the shareholders as of that date.

The director found the evidence insufficient to establish that the petitioner has a qualifying relationship with the foreign entity and denied the petition.

On appeal counsel provides no new evidence and repeats the same assertions already noted in the record.

Upon review, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer.

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 establish 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.

The petitioner has submitted insufficient evidence to support its claim that [REDACTED] owns 50% of the company's stock. Further, based on a review of the shareholder's agreement, even if the petitioner had established [REDACTED] 50% ownership, it has not established the required element of control.

First, the petitioner's evidence of ownership was incomplete and inconsistent. Specifically, the petitioner submitted only stock certificate numbers two and five reflecting 50% share ownership by [REDACTED] and 50% share ownership by [REDACTED]. The omission of certificates one, three, and four raises questions regarding the existence and content of these missing certificates. 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)).

Notwithstanding the stock certificates provided, the petitioner claims that the company ownership is now split between [REDACTED] and [REDACTED] in equal parts. However, the petitioner failed to explain the transition of shares from [REDACTED]. Rather, the petitioner's evidence appeared to show that three separate shareholders currently own 50% of the company's stock. Despite an RFE from the director regarding stock holdings and company ownership, the petitioner provided no evidence to corroborate [REDACTED]'s acquisition of the stock. The petitioner did not submit a share certificate ledger or registry or copies of all issued stock certificates to establish the petitioner's shareholders. 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). Absent copies of all issued and outstanding stock certificates, cancelled certificates, and a stock ledger, the critical element of ownership cannot be determined.

Even if the petitioner had submitted complete and consistent documents reflecting ownership of the company as claimed, the voter agreement appears to give [REDACTED] final authority over management and policy issues but the agreement, as written, is too vague and requires additional explanation to sufficiently demonstrate [REDACTED]'s full power and authority to control the entity based on its claimed 50% ownership.

Furthermore, other documentation the petitioner provided in support of this petition introduces additional unresolved inconsistencies. Specifically, the petitioner's meeting minutes dated October 31, 2010 indicate that the beneficiary is president of the petitioning company; however, the petitioner's tax forms and annual company report filings indicate that [REDACTED] was and continues to be the petitioning company's president creating a question as to the validity of the documentation. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

For these reasons, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer and the appeal will be dismissed.

In addition to being a subsidiary of [REDACTED] the petitioner claims that it is "the 100% parent corporation" of [REDACTED], a Florida corporation established in March 2006 which is also the beneficiary's current U.S. employer. The petitioner's claim appears to be crucial in creating a link between the foreign employer and the petitioning entity. However, the petitioner has not submitted consistent evidence to support its claim.

The record reflects that [REDACTED] filed an I-140 immigrant petition on behalf of the beneficiary in February 2009. At that time, [REDACTED] submitted a copy of its un-dated stock certificate number "0" indicating that 10 shares, out of 1,000 authorized shares, were issued to [REDACTED]

In support of the current petition, the petitioner has submitted a copy of stock certificate no. 3 for [REDACTED] which is dated June 16, 2011 and identifies the petitioner as the owner of ten shares of the company. According to the minutes of a special meeting of the board of directors of [REDACTED] the directors resolved to issue ten shares of the company to the petitioner in exchange for \$10.00, and also resolved that the ten shares previously issued to [REDACTED] be cancelled. The petitioner has not submitted copies of stock certificates no. 2 or 3 or a stock ledger for [REDACTED] and thus it cannot be determined whether any or all of the remaining 990 authorized shares have been issued.

Additionally, the record includes copies of IRS Forms 1120, U.S. Corporation Income Tax Returns for [REDACTED] for the tax years 2008, 2010 and 2011. In each tax year, [REDACTED] identified the beneficiary as its sole owner and he signed the returns in his capacity as "owner." The petitioner did not resolve the inconsistencies of ownership of [REDACTED] 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 the foregoing deficiencies and inconsistencies, the evidence of record does not establish that the [REDACTED] is a subsidiary of the petitioning company.

### III. Proposed Employment in a Managerial or Executive Capacity

The second 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. 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.

In 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). 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). The AAO 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 other 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 petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. According to its Form I-140 filed on August 24, 2011, the petitioner imports and distributes cutlery and beauty instruments and has ten employees. A letter from the petitioner dated June 20, 2011 included position descriptions for the beneficiary as well as for the positions of vice president, senior executive, office administrator, marketing manager, sales representative, shipping, warehouse/shipping manager, and a quality control/custom manufacturing position.

The petitioner listed eight general areas of responsibility for the beneficiary and indicated the number of hours he would spend on each area on a weekly basis as follows:

10 Hours – Direct and coordinate personnel engaged in marketing, sales and import/distribution functions through assignment of tasks and responsibilities to the vice president (operations), marketing manager, and office administrator.

5 Hours – Formulate administrative policies for short term business practices based upon analysis of financial and sales data.

5 Hours – Oversee development of goals and policies related to improving business operations implemented by the Vice President.

2 Hours – Review budgets and costs and adjust financial planning accordingly.

8 Hours – Analyze data and coordinate production and scheduling at Pakistan suppliers.

3 Hours – Confer with the Vice President regarding department policies and discuss required changes to improve programs and reduce costs.

2 Hours – Allocate funds to support appropriate functions regarding importing/distributing, quality control, and purchasing operations.

5 Hours – Direct and coordinate production and delivery of customer orders, special manufacturing requirements, etc.

The petitioner also stated in its letter in support of the petition that the beneficiary serves in the dual role of president for both the petitioner and [REDACTED]. As the petitioner's president, the beneficiary is "responsible for hiring and firing employees and directing all functions regarding the financial, managerial, sales, production, purchasing and marketing activities." The petitioner failed to incorporate all of these duties into the hourly chart of the beneficiary's activities. Further, the petitioner's duty description lacks specificity. The duties the petitioner did list were broadly described and provided little insight into what the beneficiary was to do on a day-to-day basis. 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).

In response to the director's request for further evidence, the petitioner resubmitted the same June 20, 2011 letter and nothing more relating to this issue. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). 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). On appeal the petitioner provided no brief and no additional evidence for consideration.

The definitions of executive and managerial capacity each 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).

A review of the general duties the petitioner described suggests that the beneficiary will be involved in non-qualifying tasks such as directing supervision of lower level employees, substantial involvement in financial matters, and substantial involvement in coordination of production, scheduling and delivery for the business. Based on the number of hours allocated to these activities the petitioner has not established that the beneficiary would be primarily engaged in qualifying duties. 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).

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.

As noted, the petitioner claims to be engaged in the import and distribution of cutlery and sporting goods and states that it has ten employees. Although the petition was filed in August 2011, the petitioner initially submitted evidence of wages paid to employees in 2010 only, including copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, and Florida Forms UCT-6, Employer's Quarterly Report. This evidence reflects that the petitioner's staffing levels varied between a low of two employees and a maximum of eight employees in 2010. The petitioner provided a list of claimed current employees that corresponded to the employees named in the quarterly report for the fourth quarter of 2010. These employees included a vice president, a senior executive, a marketing manager, an office administrator, two sales representatives, a shipping employee, a warehouse and shipping manager and a quality control/custom manufacturing employee. The petitioner provided brief job duty descriptions for each position.

In the RFE, the director specifically requested that the petitioner submits copies of its IRS Forms 941 for all four quarters of 2011. The petitioner failed to submit this evidence in response and instead submitted quarterly tax filings for [REDACTED]. 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 record contains no corroborating evidence of the petitioner's staffing levels as of the date of filing the petition in August 2011. The petitioner's 2009 tax returns and 2010 quarterly tax filings are insufficient to support the petitioner's claim of ten employees as of the date of filing, and the record does not corroborate the information provided in the petitioner's organizational chart and employees list. 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).

In sum, the petitioner has submitted an inadequate description of the beneficiary's duties and insufficient evidence of its organizational structure. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act, and for this additional reason, the appeal will be dismissed.

#### **IV. Doing Business**

The third issue addressed by the director was whether the petitioner presented evidence to establish that it had been doing business for one year prior to filing the petition, as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

'Doing Business' means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The director determined and the AAO agrees that the petitioner did not submit sufficient evidence to establish that it had been doing business for one year prior to filing the instant petition. The petition was filed on August 24, 2011 and therefore the petitioner's evidence must reflect regular and continuous business activities since August 2010.

The petitioner indicated on the Form I-140 that it has gross annual income of \$1,830,870, a figure that was reported on the petitioner's IRS Form 1120 for the 2009 tax year. The petitioner included payroll documents for 2010, company brochures and photographs of buildings reflecting the petitioner's name and current address.

In the RFE, the director requested that the petitioner submit additional evidence that it has been doing business, including, but not limited to, receipts, invoices and reports as well as a copy of the petitioner's import/export license and contracts or agreements with shipping and receiving companies. The director also requested copies of the petitioner's most recent IRS Form 1120, annual report or audited financial statement, and evidence of wages paid to employees in 2011.

In response to the RFE, the petitioner submitted 2010 and 2011 tax returns for [REDACTED] along with evidence of wages paid to this unrelated company's employees in 2011. The petitioner also submitted copies of invoices for goods shipped from [REDACTED] to [REDACTED] in 2010 and 2011. However, none of the included documentation was responsive to the director's request that the petitioner provide additional evidence of its regular and continuous business activities since 2010. 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).

In summary, the petitioner has failed to provide sufficient evidence that it was doing business as defined in the regulations during the year preceding the filing of the petition. For this additional reason, the appeal will be dismissed.

#### **V. Ability to Pay**

The fourth and final issue is whether the petitioner established its ability to pay the beneficiary's proffered wage of \$35,000 per year. *See* 8 C.F.R. § 204.5(g)(2).

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 August 24, 2011, the AAO must examine the petitioner's tax return for 2011, which should have been available at the time the petitioner submitted its response to the director's RFE on December 3, 2012. As the petitioner provided a copy of only its 2009 IRS Form 1120 at the time of filing, the director specifically requested relevant tax documentation which the petitioner failed to submit. 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 failed to establish that it had the ability to pay the beneficiary the proffered wage and for this additional reason the appeal will be dismissed.

## VI. 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.