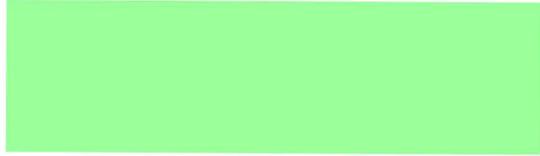


(b)(6)

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



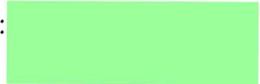
U.S. Citizenship
and Immigration
Services



DATE: OCT 28 2013

OFFICE: TEXAS SERVICE CENTER

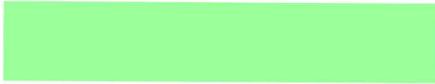
FILE:



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 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, a Florida limited liability company engaged in freight forwarding, states that it is affiliated with [REDACTED] the beneficiary's former employer in Colombia. It seeks 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.

On June 10, 2013, the director denied the petition based on the following grounds of ineligibility: (1) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer; (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; (3) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity; (4) the petitioner failed to establish that beneficiary's former foreign employer continues to do business; and, (5) 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.

II. The Issues on Appeal

A. Qualifying Relationship

The first 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 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 submitted in support of the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that it is affiliated with [REDACTED] located in Colombia. The petitioner's initial evidence did not include evidence of the ownership and control of either company.

Accordingly, the director issued a request for evidence (RFE), instructing the petitioner to submit, in part, evidence of its ownership and control. The director requested corporate documentation evidencing the ownership and control of the petitioner and the foreign entity, along with copies of the petitioner's latest corporate tax returns with all supplementary schedules.

In response, the petitioner submitted a translated corporate document issued by the [REDACTED] which indicates that the foreign entity is owned in equal parts by [REDACTED] (12,500 shares) and [REDACTED] (12,500 shares). The petitioner did not submit evidence of its ownership. It provided a "Detail by Entity Name" from the website of the Florida Department of State Division of Corporations, which identifies the beneficiary as the president of the company and [REDACTED] as "MGRM" or manager-member. The petitioner also submitted a copy of its IRS Form 1065, Return of Partnership Income, for 2011, with accompanying Forms Schedule K-1, Partner's Share of Current Year Income, Deductions, Credits and Other Items. According to the Schedules K-1, the beneficiary owns 50% of the petitioner and [REDACTED] owns the remaining 50%.

The director denied the petition, concluding that the petitioner had not submitted relevant documentation needed to establish common ownership and control between the two companies.

On appeal, counsel for the petitioner asserts that the beneficiary owns 50 percent of the petitioning company and 50 percent of the foreign entity, and as such, the companies are affiliates based on common ownership and control by the same individual. Counsel further states that the beneficiary's spouse owns the other 50 percent of the petitioner and this fact "makes her almost one hundred percent owner."

Upon review of the documentation submitted, the petitioner did not submit sufficient evidence to establish that it has a qualifying relationship with the foreign entity.

As general evidence of a petitioner's claimed qualifying relationship, a copy of a Schedule K-1 tax form is not sufficient to establish ownership of control of a limited liability company (LLC). LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution

of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner's appeal consists of assertions from counsel that the petitioner and foreign entity are affiliates. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the petitioner only provided a copy of Schedule K-1, it did not provide sufficient evidence of the qualifying relationship between the petitioner and the foreign company. 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)). Accordingly, the appeal will be dismissed.

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

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying 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, 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). That being said, however, 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.

On the Form I-140, the petitioner stated that the beneficiary will "manage and supervise that all departments of the company are running correctly. Supervise that the financial system is done in the right way."

In the RFE, the director instructed the petitioner to provide a definitive statement describing the beneficiary's job duties and specified that this statement should include her position title, all specific daily duties, and the percentage of time spent on each duty. The petitioner responded to the RFE, but did not include the requested statement describing the beneficiary's position. The petitioner provided a brief letter dated March 28, 2013 in which it stated that the beneficiary, as president/director "has developed business to make the company expand since now [sic]."

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit an adequate job description for the beneficiary cannot be excused. The 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, counsel for the petitioner provides additional information regarding the beneficiary's proposed duties. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Furthermore, as noted in the director's decision, the petitioner provided inconsistent evidence regarding its staffing levels and organizational structure. The petitioner indicated on the Form I-140 that it had three employees at the time the petition was filed. However, the petitioner's initial evidence included an organizational chart that lists 10 employees, including the beneficiary. The petitioner did not submit any recent evidence of wages paid to employees that would resolve this discrepancy.

In the RFE, the director requested an organizational chart showing all company employees, as well as their job titles, brief description of duties, educational levels and whether they work full or part-time. The director also requested copies of the relevant IRS Forms W-2, Wage and Tax Statement, for all employees, and, if applicable, evidence of the petitioner's use of contract labor. Finally, the director requested a copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2012.

In response to the RFE, the petitioner submitted a Form W-2 for one employee, who is listed as the "assistant" on the U.S. organizational chart, and received \$11,447.00 in wages in 2012. The petitioner also submitted its IRS Forms 941 for the fourth quarter of 2012 which indicated one employee. The petitioner provided an organizational chart that identified ten employees by name and position title, as well as one sales position. The petitioner offered no explanation for the discrepancy

and did not provide evidence that the employees name on the organizational chart are contractors. 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 did submit IRS Forms W-2 for seven additional individuals who appear on the organizational chart. However, the employer listed on those forms is [REDACTED] and not the petitioning company. According to the petitioner's lease, [REDACTED] is the petitioner's landlord and the petitioner has rented an 80 square foot space on [REDACTED] premises. The record also includes a number of invoices issued by [REDACTED] for freight and handling services provided to the petitioner. The petitioner provided no explanation of the relationship between the companies or for its inclusion of [REDACTED] employees on its own organizational chart. As noted by the director in the denial decision, the petitioner cannot simply claim the employees of another company as the beneficiary's subordinates. For example, the individual identified as the "Director" subordinate to the beneficiary on the petitioner's organizational chart provided a reference letter in his capacity as director of [REDACTED] in which he identifies the petitioning company as a "client and associate." The employees of the petitioner as listed on Form I-140 are the only employees that will be considered for the instant petition. Based on the limited evidence provided, the petitioner has established that it employed only the beneficiary and an assistant in 2012 when the petition was filed.

Although the petitioner was put on notice of the discrepancies in the record regarding the company's staffing levels, counsel for the petitioner did not discuss this issue on appeal and the issue remains unresolved. 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)).

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. According to the documentation submitted, it appears that the beneficiary supervises one assistant although the petitioner stated that the beneficiary supervises nine employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). 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'r 1988).

In summary, 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. Foreign Employment in a Managerial or Executive Capacity

The third issue is whether the petitioner provided sufficient evidence to establish that the beneficiary had been employed abroad in a managerial or executive capacity. In the decision dated June 10, 2013, the director denied the petition, in part, based on a finding that the petitioner failed to establish that the beneficiary had been employed abroad in a managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to submit a detailed description of the beneficiary's duties despite the director's request for such evidence.

On appeal, neither counsel nor the petitioner has addressed the issue of the beneficiary's employment capacity with the foreign entity.

Upon review of the beneficiary's duties for the foreign entity, the petitioner provided a very brief job description with overly general duties such as: "established sales department goals"; "supervises sales and supported personnel"; "generated reports"; and, "interface in marketing department." The petitioner also provided a very brief job description for the employees supervised by the beneficiary, and did not provide evidence that the subordinate employees were professionals. 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)).

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 duties the beneficiary performed 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Upon review of the limited information submitted, the director properly found that the record contains insufficient evidence to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

D. Doing Business Abroad

The fourth issue is whether the petitioner provided sufficient evidence to establish that the foreign entity is doing business abroad. The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as 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 of office. In addition, the term

"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. 8 C.F.R. § 204.5(j)(2).

As noted by the director in his decision, the documents submitted by the petitioner as evidence that the foreign company is doing business were not properly translated. In addition, on appeal, the petitioner provides tax returns and bank statements for the foreign companies that are not translated at all. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner failed to provide sufficient evidence that the foreign entity is engaged in the regular, systematic, and continuous provision of goods and services. For this additional reason, the appeal will be dismissed.

E. 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 \$60,000.00 per year. The petitioner must establish its ability to pay this wage as of December 3, 2012, the filing date of the petition.

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, although the petitioner claims the beneficiary as a current employee, the petitioner did not submit evidence that it has been paying her wages.

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 December 3, 2012, the director initially reviewed the petitioner's IRS Form 1065, U.S. Return of Partnership Income, for the 2011 tax year, a partial copy of which was provided at the time of filing. The Form 1065 identified [REDACTED] as the preparer and is dated March 10, 2012. The petitioner reported ordinary business income of \$3,472.

In the RFE, the director advised the petitioner that the submitted Form 1065 did not establish the petitioner's ability to pay the proffered wage. The petitioner requested a complete copy of the petitioner's Form 1065 with all accompanying schedules, annual reports or audited financial statements.

In response, the petitioner submitted a copy of a Form 1065 for 2011 prepared by [REDACTED] of [REDACTED] and dated April 10, 2012. On this Form 1065, the petitioner reported net income of \$65,676. A comparison of the two Forms 1065 reflects that the petitioner submitted the same figure for gross receipts or sales. On the March 2012 version of the form, the petitioner reported \$651,544 in cost of goods sold, \$20,058 in salaries and wages, \$1,809 in taxes and licenses, and \$85,328 in other expenses. On the April 2012 version, the petitioner reported \$661,723 in cost of goods sold, no salary and wage expenses, no taxes and licenses expenses, and only \$34,810 in other deductions.

In denying the petition, the director noted these discrepancies and emphasized that the petitioner failed to establish that the latter version was an amended filing, or to provide any other explanation for its submission of two different tax returns for the same tax year. Because of these inconsistencies, the director advised the petitioner that USCIS could rely on neither Form 1065 to establish the petitioner's ability to pay.

On appeal, counsel for the petitioner does offer any explanation as to why the petitioner submitted two different Forms 1065 for 2011. 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). 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). Accordingly, neither of the submitted Forms 1065 provides credible evidence of the petitioner's ability to pay the proffered wage.

Instead, the petitioner submits an IRS Form 1040, U.S. Individual Tax Return, for the beneficiary and her husband for 2011. Counsel states that "[t]hey make well over \$94,000 per year." The individual tax return is not sufficient documentation to establish the petitioner's ability to pay the proffered wage. The petitioner must submit documentation from the petitioner evidencing that it can pay the offered salary to the beneficiary.

In addition, the petitioner submits a profit and loss statement for [REDACTED]. The profit and loss statement is in Spanish and since the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. In addition, it appears that the profit and loss statements are for the foreign entity and not the petitioner. It is the prospective United States employer that must establish its ability to pay the proffered wage and not the foreign company. Thus, this evidence does not overcome the director's concerns. 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.

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 petitioner has not established its ability to pay the proffered wage. The appeal will be dismissed for this additional reason.

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.