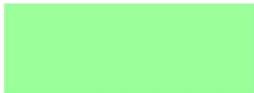


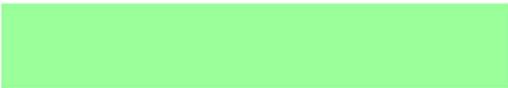
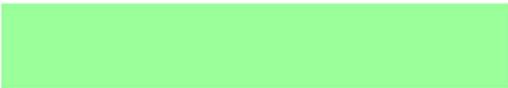


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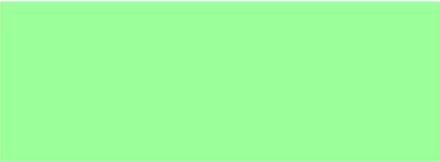
DATE: **SEP 17 2013** OFFICE: TEXAS SERVICE CENTER

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)

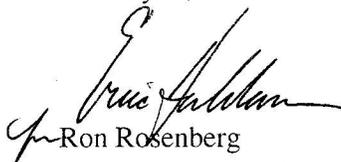
ON BEHALF OF PETITIONER:


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

The petitioner is Florida limited liability company engaged in the import and export of printing equipment. The petitioner states that it is a subsidiary of [REDACTED] located in Panama. The petitioner 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.

The director denied the petition based on four independent grounds of ineligibility, finding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the foreign employer has employed the beneficiary in a managerial or executive capacity for at least one year; (3) that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States, and (4) that the petitioner has the ability to pay the beneficiary's proffered wage. The petitioner subsequently filed a motion to reopen and the director issued a new decision affirming the denial of the petition based on these grounds.

On appeal, the petitioner states that it has submitted sufficient evidence to meet all eligibility requirements for the requested immigrant visa classification and contends that the director overlooked material evidence. The petitioner submits a brief in support of the appeal.

I. The Law

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives 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. Qualifying Relationship

The first issue to be discussed in the present matter is whether the petitioner has established that it has a qualifying relationship with the beneficiary's former 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 pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines a "subsidiary" as follows:

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.

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.

At the time the Form I-140, Immigrant Petition for Alien Worker, was filed, the petitioner identified [REDACTED] as its parent company. However, the petitioner failed to submit copies of its membership certificates, operating agreement or other relevant documentation to support the claimed parent-subsidary relationship. In fact, the petitioner's initial evidence contradicted the petitioner's claim that it is owned and controlled by the foreign entity. The petitioner submitted copies of its 2009 and 2010 IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, with Schedule K-1, which identify the beneficiary as the sole owner of the petitioner. Additionally, the petitioner submitted an IRS Form 1040 U.S. Individual Income Tax Return for the beneficiary from 2010 stating that the beneficiary claimed full ownership of the petitioner as a closely held S corporation. The petitioner did not provide evidence of the foreign entity's ownership.

The director issued a request for evidence (RFE) in which he instructed the petitioner to provide evidence that it has a qualifying relationship with the foreign entity, including the petitioner's articles of organization, operating agreement, meeting minutes, and/or other such documentation establishing the foreign employer's ownership and control in the petitioner.

In response, the petitioner stated that it is an affiliate of [REDACTED]. The petitioner submitted its Florida Limited Liability Company articles of organization and its operating agreement. According to the operating agreement, the members of the LLC are [REDACTED] (representing [REDACTED]); the beneficiary (representing himself and [REDACTED]); and [REDACTED] (representing himself and [REDACTED] a Florida limited liability company). The operating agreement states that the petitioner was formed through a \$50,000 capital contribution from these three individuals; however, the agreement does not indicate the amount of contribution by each member and their resulting membership interests, and does not mention that the foreign employer has any direct ownership interest in the petitioner.

The petitioner also submitted meeting minutes for the foreign employer, dated September 2007, and for the petitioner, dated January 2012, but neither document identified the exact ownership of the respective companies. The shareholders meeting for the foreign entity identifies the shareholders and directors of the company as [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. According to the meeting minutes, the company authorized the beneficiary to open and manage a Florida limited liability company and that the company will be "of membership of [REDACTED]."

Further, the petitioner submitted a joint venture agreement between the petitioner and the foreign employer noting that the petitioner would act as a consulting company for the foreign employer in the United States. The joint venture agreement stated that the "companies would maintain in separate way their legal title of the business interest" and "the [petitioner] is for law effects under and total control of [REDACTED] his performer."

Finally, the petitioner provided a copy of its IRS Form 1120S for 2011 which indicates that the beneficiary wholly owns the petitioner, and a letter from the petitioner's accountant dated June 19, 2012 stating "[the beneficiary] is the member (shareholder), director, and officer of [the petitioner]." In sum, the petitioner's response to the RFE was contradictory and failed to provide a definitive statement in the form of articles of organization, operating agreement or company minutes to establish the company's ownership, as requested

by the director. 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 director denied the petition on August 1, 2012, determining that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. In denying the petition, the director acknowledged the submitted evidence, but found that the petitioner had failed to provide documentation of the actual ownership in the U.S. and foreign companies.

The petitioner subsequently filed a motion to reopen. On motion, counsel stated that the petitioner "is affiliated with [REDACTED] in Panama by the parent entity controlling the U.S. entity and by the joint venture agreement." In support of the motion, the petitioner submitted:

- Electronic Articles of Organization filed with the Florida Secretary of State on May 13, 2008, bearing a receipt stamp from that office. This document includes Articles I-VI.
- Two nearly identical documents titled "Others Articles of Organization" both dated May 13, 2008, which contain Articles VII – IX. According to Article VIII, the company is owned by the following "shareholders": (1) 50% by the foreign employer; (2) 40% by the beneficiary, and (3) 10% by [REDACTED]. One version of the document has a line identifying the "total of capital contribution" as \$50,000 and one does not. Neither document was stamped by the Florida Secretary of State.

The director determined that the petitioner's evidence failed to establish a qualifying relationship between the petitioner and foreign entity. The director emphasized that the petitioner's corporate tax returns for 2009, 2010 and 2011 state that the beneficiary owns 100% of the petitioning company, while the newly submitted Articles of Organization indicate that the foreign entity owns 50% of the company. The director observed that "the petitioner cannot claim one thing to USCIS and at the same time claim another to the Internal Revenue Service (IRS)."

On appeal, the petitioner states that it submitted sufficient evidence to establish the qualifying relationship, including articles of organization, operating agreement, a joint venture agreement, meeting minutes and organizational charts. The petitioner further states that "proof of the relationship also is the US Corporation sell the equipment to much of the Foreign Corporation Customers who provide installation and post-sale services locally in Panama, it is a mutual benefits (a profitable combination of both corporations), which could be verifiable directly with our customers." The petitioner provides a list of customers and associates in the United States and Panama, with names and telephone numbers for contacts. The petitioner further asserts that it submitted copies of its U.S. tax returns for 2010 and 2011 which "clarified the inconsistency USCIS was talking in the denial note in our first filing time I-140."

Upon review, the petitioner's assertions are not persuasive. The petitioner has made contradictory claims and has submitted contradictory evidence regarding its ownership, thereby precluding any determination that the petitioner is a subsidiary or affiliate of the foreign entity.

The petitioner IRS Forms 1120S from 2009, 2010, and 2011 and the beneficiary's IRS Form 1040 all state that the beneficiary wholly owns the petitioner. Additionally, the petitioner has submitted a statement from an accounting firm from 2012 noting that the beneficiary is the sole owner of the petitioner and a joint venture agreement between the foreign employer and the petitioner stating that the beneficiary wholly owns and controls the petitioner. Indeed, the joint venture agreement suggests that the petitioner is a separate legal entity not owned and controlled by the foreign employer. If the foreign employer had a controlling ownership interest in the petitioner as asserted, such an agreement to exact control over the petitioner would not be required. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner's operating agreement indicates that three individuals own the petitioner, but it is incomplete and fails to identify the ownership percentages held by them.

The only evidence that identifies the foreign entity as an owner of the petitioning company is the "Others Articles of Organization" which were submitted for the first time in support of the motion to reopen. This evidence is not persuasive for several reasons. First, although this document bears the same date as the petitioner's articles of organization filed with the Florida Secretary of State, it does not bear a receipt stamp from that office. In addition, although the petitioner is a limited liability company, it identified its owners as "shareholders" in this newly submitted document, while the company's operating agreement indicates that the company is owned by members. Further, the petitioner submitted two slightly different versions of this document on motion with no explanation. Overall, it appears that the petitioner has merely added a second page to its articles of organization in order to support its original claim that it is owned by the foreign entity. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). 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)).

In addition, the petitioner's assertion that the foreign employer has a 50% controlling interest in an S corporation is also a material discrepancy. As noted, the petitioner submitted copies of its U.S. Income Tax Return for an S Corporation (IRS Form 1120S) for the years 2009, 2010, and 2011. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code*, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the petitioner could not be 50% owned by the foreign employer. Again, this conflicting evidence has not been resolved by the petitioner. Again, 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. at 591-92.

Further, the record does not contain evidence of the foreign entity's ownership and does not support a finding that the two entities are owned and controlled by the same individual or group of individuals. 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)).

On appeal, the petitioner provides a list of customers and associates in the United States and Panama and asserts that these companies and individuals can verify the affiliation between the U.S. and foreign entities. While the AAO does not doubt that the companies may be involved in "joint market development" as contemplated by the joint venture agreement, the petitioner's eligibility for this classification is determined by evidence that the two companies are related through common ownership and control that must be verified through submission of credible company records. As discussed, the petitioner has not provided this type of evidence.

Specifically, as general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an 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.

Additionally, the petitioner also contends at various points in the record that the evidence submitted relevant to qualifying relationship was found adequate by USCIS to approve two previous L-1A nonimmigrant intracompany transferee visas for the beneficiary in 2008 and 2009 thereby suggesting that to conclude otherwise now is a contradiction. First, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged

errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Therefore, in conclusion, the petitioner has submitted insufficient and contradictory evidence regarding its ownership, and therefore has not established that it is an affiliate or subsidiary of the foreign entity. In fact, the preponderance of the evidence suggests that the petitioner is wholly owned by the beneficiary, and without a definitive statement or evidence as to ownership in the foreign employer, it cannot be determined whether there is a qualifying relationship between the petitioner and the foreign employer. For this reason, the appeal must be dismissed.

B. Foreign employment in a managerial or executive capacity

The next issue to be addressed is whether the petitioner has established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity for at least one year in the three years preceding his admission to the United States as a nonimmigrant in October 2008.

The director denied the petition based on the petitioner's failure to submit a description of the beneficiary's duties or information regarding the number of subordinates he supervised and their job duties. The director acknowledged that the petitioner submitted an organizational chart for the foreign entity, but found that there was insufficient evidence to support a finding that the beneficiary was employed in a qualifying managerial or executive capacity. The director affirmed this decision on motion.

On appeal, the petitioner asserts that it has submitted sufficient evidence to establish that the beneficiary has more than one year of experience with the foreign employer as an executive. The petitioner points to a submitted employment agreement between the foreign employer and the petitioner, certain documentation purporting to support the beneficiary's performance of executive duties with the foreign employer, the beneficiary's resume, and evidence supporting that the beneficiary holds the United States equivalent of a Master's degree in Business Administration (MBA). The petitioner further resubmits the beneficiary's foreign job duties and states that the beneficiary established goals and policies and only received direction and supervision from other high level executives with the foreign employer, thereby establishing that he was employed in an executive capacity.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5).

In support of the Form I-140 Petition for an Immigrant Worker, the petitioner did not submit a comprehensive listing of duties for the beneficiary's position with the foreign employer. The petitioner did complete and submit a U.S. Department of Labor (DOL) Employment and Training Administration (ETA) Form 750, Application for Alien Employment Certification in support of the petition. The beneficiary indicated on the Form ETA 750, Part B, that he was employed by the foreign entity from November 1998 until December 2006 as the "Manager of Finance and Investment," and stated that he "Managed Finance Dept. Managed, supervised, trained financial analysts." On his Form G-325A, Geographic Information, submitted in support of his concurrently filed Form I-485, Application to Adjust Status, the beneficiary indicated that he was employed by the foreign entity as "Commercial Director" from February 2006 until October 2008. The beneficiary provided this same information in his resume, noting that as Commercial Director he was responsible for "development for new accounts." The beneficiary also indicates in his resume that he was employed as the general manager of [REDACTED] from November 1998 until December 2006.

The petitioner provided a brief letter from the foreign entity indicating that the beneficiary "had been part of our corporation and their commercial activities from more than 4 years." Finally, the petitioner submitted an organizational chart for the foreign entity. The organizational chart is not dated, includes only job titles, and does not identify a "commercial director" or a "manager of finance and investment."

The director requested in the RFE that the petitioner submit a definitive statement from the foreign employer describing the beneficiary's job duties, including: (1) position title, (2) all specific daily duties (rather than categories of duties), (3) percentage of time spent on each duty, and (4) a detailed foreign employer organizational chart showing the subordinate managers and supervisors reporting to the beneficiary, along with a brief description of their job titles, duties and education. In response, the petitioner submitted the following description of the beneficiary's "role and responsibilities" with the foreign employer in his capacity as Financial Commercial Director from February 2006 until his entry into the United States in October 2008:

- Preparation of the annual budget and sales, with support and contribution of senior management
- Direct commercial financial decisions that will ensure the best performance of the company's resources
- Preparation and assessment of business goals.
- Prepare budgeting of costs of the commercial Department.
- Prepare, participate and establish policy and prices and qualities of product on the outcome of sales, [i]n support of senior management.

- Selection and direction of commercial staff
- Management of large accounts sales and accompaniment with sellers or coaching visits
- Maintenance of a continued relationship with customers to meet their needs or problems
- Supervision of commercial negotiations.
- Monitoring of business expenditures, in particular those of marketing and sales.
- Identification of indicators of the Department, measuring with a given frequency and establishment of corrective measures. Among them: visit ratios; incidents; merchandise returns; sales in excess risk; debt recovery and debt collection delays; customers of low profitability; relationship and continuous communication with suppliers; frequency of returns; maintenance and improvement of the quality of the procedures and financial protocols in the company.

The petitioner re-submitted the same organizational chart provided at the time of filing, which does not include the position of "commercial director" or "financial commercial director." The chart depicts a "Finance, Project and Consulting Manager" position with no subordinates which reports to the company's general manager.

The director concluded that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director observed that the petitioner's response to the RFE did not include the requested information regarding the number of employees the beneficiary supervised, their job titles and duties or their educational credentials. As such, the director determined that the petitioner failed to establish that he supervised a subordinate staff of managers, supervisors or professionals or that he was relieved from performing non-qualifying duties.

On motion, the petitioner identified the beneficiary's job title with the foreign entity as "Director of Board of Directors, Executive Project Manager and Commercial and Financial Manager." The petitioner indicated that he supervised: (1) a project assistant and sales director possessing an engineering degree; and (2) a director of accounting department with a C.P.A. degree. The petitioner provided job duty descriptions for both employees. The petitioner maintained that it had submitted "almost 90%" of the information requested in the RFE and that any "omitted or incomplete information were without any particular purpose." The director dismissed the motion, finding that the petitioner did not submit evidence to overcome the initial adverse determination.

On appeal, the petitioner asserts that the evidence of record, including the evidence submitted on motion, shows that the beneficiary was employed as Commercial and Finance Director for over two years and that he was responsible for "managing other high level Executives of the Foreign corporation."

Upon review, the petitioner has not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

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 duties offered by the petitioner, such as preparing annual budgets and sales, directing commercial financial decisions, preparing and assessing financial business goals, establishing policies of pricing and commercial conditions, managing large accounts, and maintaining customer relationships are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The duties, and the record generally, include no specific examples or documentation to support the beneficiary's vaguely described foreign duties. Further, the petitioner does not specifically describe the purported financial decisions made, business goals set, pricing policies established, or large customer accounts maintained by the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Overall, the petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Further, the petitioner did not submit, as specifically requested by the director, the percentage of time the beneficiary spent on each task to lend more probative value to the duty description. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, the petitioner submitted conflicting information regarding the beneficiary's job title and dates of employment with the foreign entity. Notably, none of the submitted job titles appears on the foreign entity's organizational chart, nor is the beneficiary identified by name on the chart, thus preventing the AAO from determining where the beneficiary's position was located within the company's management structure. 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)).

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 company'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 business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner asserts it has established that the foreign entity employed the beneficiary in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the petitioner has failed to corroborate its claims regarding the foreign entity's staffing and organizational structure as necessary to establish that the foreign entity employed the beneficiary in an executive capacity. The director specifically asked that the petitioner submit a full and complete organizational chart relevant to the beneficiary's qualifying foreign employment, including position titles, job duty descriptions and the education levels of the beneficiary's subordinates. However, the petitioner did not fully respond to the director's request and submitted a foreign organizational chart including only position titles. The submitted foreign organizational chart did not include material information such as the names, duties and education levels of those within the organizational chart, as was specifically requested by the director. Once again, 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).

In fact, as noted, the foreign organizational chart did not include the beneficiary's position of Financial Commercial Director. However, the foreign organizational chart did include a similar position titled "finance, project and consulting manager." But, the aforementioned position was shown to have no subordinate employees in the submitted organizational chart. As such, the petitioner has not established that the beneficiary was primarily engaged in directing other managers or establishing goals and policies. An individual will not be deemed an executive under the statute simply because they have an executive title; it is the petitioner's burden to submit a specific duty description, supporting evidence, and requested evidence regarding the foreign company's organizational structure. However, the petitioner has submitted little other than a vague duty description and organizational chart related to the beneficiary's foreign employment. 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.

The AAO acknowledges that the petitioner submitted information regarding the beneficiary's two claimed subordinates on motion. 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.*

Even if the petitioner had submitted information regarding the subordinate employees in response to the RFE, the evidence would have been insufficient to establish eligibility. The job titles of the newly claimed subordinates do not appear on the foreign entity's organizational chart. Further, the brief position description provided for the beneficiary does not include any hiring, firing or supervisory duties.

Therefore, the petitioner has not established with sufficient evidence that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal must be dismissed.

C. Employment with the petitioner in a managerial or executive capacity

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

On appeal, the petitioner points to the growth of the petitioner's business during the company's five years of operations under the management of the beneficiary and notes that without the beneficiary, the petitioner would be forced to close its operations. The petitioner states that the beneficiary is the only employee capable of managing its business operations in the United States.

The AAO does not find the petitioner's assertions persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established with a preponderance of the evidence that the beneficiary acts in a qualifying managerial or executive capacity with the petitioner.

Again, in order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the RFE, the director stated that the petitioner had failed to submit sufficient documentation to establish that the beneficiary would act in a qualifying managerial or executive capacity in the United States. As such, the director requested that the petitioner submit a more definitive statement from the petitioner describing the beneficiary's proposed job duties, including: (1) position title, (2) all specific daily duties (rather than categories of duties), and (3) the percentage of time spent on each duty. In response, the petitioner explained the beneficiary's duties in the United States as the Executive Director as follows:

- Organize and execute the business and activities.
- Manage the necessary documentation and form for the efficient, cost effective and lawful execution of all activities.
- Prepare the annual [sic] and manage it in the way was designed.
- Pay all bills, rent, contracts, taxes, licenses fees, or any company compromise on time.
- Plan and implement sells strategy and activities consistent with overall aims and requirements of the organization.

- Report to [the foreign employer] about projects, budget, regular activities, and projects and sell forecast at least each three months; and financial status at least two times a year.
- Maintain financial and currency processes and transactions in accordance with policy and local law, and to optimize cost effectiveness of activities.
- Communicate with customers and suppliers, in all relevant territories and countries as necessary to ensure efficient, positive and lawful relations, support and activities.
- Use personal judgment and initiative to develop effective and constructive solutions to challenges and obstacles in export activity and procedures
- Monitor, record, analyze and report on activities, trends, results, and recommendations relating to the activities.
- Prepare and submit relevant administration in a timely and accurate manner and be involved in a logistic way to give the best service to customers in their shipping schedules, inspections such as asking, packing, routing, transport and safety documentation.
- Investigate, plan and implement strategically effective and relevant transport methods, which meet the optimal needs of suppliers and customers.
- Plan and manage overseas sa[l]es through distributors and other relevant sales.
- Generate new business by maximizing existing client relationship and actively seeking new opportunities with new customers.
- Telemarketing and web marketing activities to obtain new prospects. Traveling to get direct sales and future opportunities.
- Consistently add-nn [sic] and up sell, convert prospects into customers and consistently obtain referrals.
- Preparing, presenting and following up on quotations.
- Close business negotiation and monitor all new client business.
- Follow with results to rank the satisfaction of customers.

Again, 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).

Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them stating "there is not a specific time in each duty described above, as they are performed on daily basics." This failure of documentation is important because several of the beneficiary's daily tasks, such as managing shipping schedules or requirements, garnering new sales opportunities,

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

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 company'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 business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner's supporting documentation, and a review of the totality of the evidence, supports a conclusion that the beneficiary is primarily performing non-qualifying day-to-day operational duties rather than qualifying managerial or executive duties. The petitioner submitted supporting invoices, shipping and packing information, and emails relevant to the petitioner's operations that confirm the beneficiary is involved in all operational aspects of the business. For instance, the evidence reflects that the beneficiary is performing various operational tasks such as receiving customer orders, purchasing items, paying vendor invoices, arranging for shipping and sending wire transfers. In fact, although the petitioner states in support of the original petition that it had three employees, the petitioner later concedes that the beneficiary is its sole employee and that he has no subordinates in the United States. Indeed, an IRS Form 941 Employer's Quarterly Federal Tax Return submitted from 2011 confirms that the petitioner has no employees. Therefore, the record indicates that the petitioner employs no operational employees who would relieve the beneficiary from primarily performing day-to-day non-qualifying operational duties. Since the beneficiary has no subordinates, he cannot be a manager of other managers, supervisors or professionals or an executive primarily dictating goals and policies to managerial subordinates.

In sum, and through the petitioner's own admission, the beneficiary is performing all operational functions for the petitioner. While he undoubtedly exercises a great deal of discretion as the company's sole employee, the record does not support a finding that his actual duties are primarily managerial or executive in nature. 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).

In conclusion, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. For this additional reason, the appeal will be dismissed.

D. Ability to pay

The last issue to be addressed is whether the petitioner has established that the petitioner has the ability to pay the beneficiary's proffered wage.

As noted, the director found that the petitioner had not demonstrated with sufficient evidence that the petitioner has the ability to pay the beneficiary's proffered wage. The director noted that the petitioner had

insufficient net income or assets, as reflected in its most recent IRS Form 1120S from 2010, to compensate the beneficiary the proffered \$50,000 salary reflected in the submitted Form I-140.

On appeal, the petitioner references documentation submitted on the record, including the company's IRS Forms 1120S, the beneficiary's personal income tax returns, and evidence of checks written to the beneficiary. The petitioner states that this evidence is sufficient to establish that the petitioner has the ability to pay the beneficiary. Further, the petitioner submits a statement from the beneficiary attesting to the fact that he received all wages due him since beginning work with the petitioner in October 2008.

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

First, an analysis of whether the petitioner can pay the petitioner's proffered wage is frustrated in this case by the petitioner offering varying salaries for the beneficiary in his proposed capacity as president of the petitioner. As noted, the Form I-140 states that the beneficiary will have a salary of \$50,000 per year. However, other portions of the record indicate that the beneficiary salary will be anywhere from \$24,000 to \$36,000 per year. As such, without clarification, the AAO will analyze the petitioner's ability to pay based upon the \$50,000 salary as stated in the Form I-140.

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 submit sufficient documentation that wages have been paid to the beneficiary during his time of asserted employment with the petitioner as an L-1A nonimmigrant intracompany transferee since October 2008. The petitioner submitted evidence of checks written to the beneficiary on the following dates and the following amounts: (1) \$500 on November 7, 2011, (2) \$900 on November 30, 2011, (3) \$400 on December 14, 2011, (4) \$1,200 on February 4, 2013, (5) \$600 on February 12, 2012, (6) \$1,002.71 on March 1, 2012, (7) \$480 on March 23, 2012, (8) \$1,002 on April 5, 2012, and (9) \$500 on June 15, 2012. However, the submitted payments fail to establish that the petitioner paid a regular salary to the beneficiary that would equate to an annual salary of \$50,000. The payments submitted reflect

varying amounts and unexplained gaps in payment, making it unclear whether the beneficiary has received salary payments from the petitioner in the past. Indeed, none of the petitioner's submitted IRS Forms 1120S note any salaries or wages paid or compensation paid to officers casting further doubt to whether the beneficiary has been paid his \$50,000 salary in the past. 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. at 591-92.

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 September 22, 2011, the AAO must examine the petitioner's tax return for 2011. The director initially reviewed the petitioner's IRS Form 1120S for 2010 as the 2011 return was not available. However, the director's analysis of the IRS Form 1120S for 2010 was hindered by the petitioner's submission of conflicting tax documentation. As noted by the director, the petitioner submitted two conflicting IRS Forms 1120S for 2010, one reflecting \$32,073 in net taxable income and another showing \$72,794 in taxable net income. Again, 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 has also submitted an IRS Form 1120S for 2011. The 2011 tax return reflects a net taxable income of \$31,859, which is insufficient to pay the beneficiary's proffered salary of \$50,000.

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.

To find the difference between current assets and current liabilities, USCIS looks to the IRS Form 1120, Schedule L Balance Sheets. The petitioner's IRS Form 1120S submitted for 2011 indicates only \$4,953 in net current assets.

Therefore, the petitioner has not established with sufficient evidence that the petitioner has the ability to pay the beneficiary's proffered wage of \$50,000. For this additional reason, the appeal must be dismissed.

V. 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.