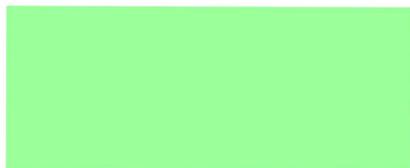




U.S. Citizenship  
and Immigration  
Services

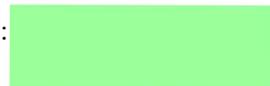
(b)(6)



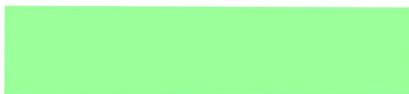
DATE: DEC 05 2014

OFFICE: TEXAS SERVICE CENTER

FILE:

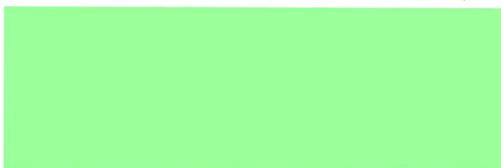


IN RE: Petitioner:  
Beneficiary:



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 Texas Service Center Director denied this preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation engaged in the sales of telecommunications services and equipment. It seeks to employ the beneficiary in the United States as its chief executive officer (CEO). 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, concluding that the petitioner failed to establish: that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and that the petitioner had the ability to pay the proffered wage.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the director erred in his decision. The appeal contains a legal brief and additional documents.

#### I. The Law

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

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

\* \* \*

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

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

## II. Issues on Appeal

The two issues addressed by the director are as follows: (1) whether the petitioner established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (2) whether, at the time the petition was filed, the petitioner had the ability to pay the beneficiary the proffered wage.

### A. Employment in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

The petitioner filed the instant Form I-140 on February 26, 2013, stating that it employed five individuals and grossed \$532,000.00. The beneficiary's proffered wage is \$8,000.00 per month.

The petitioner states that the beneficiary will perform executive functions and that he "dedicates his time exclusively to executive duties; he will not perform non-executive functions." The petitioner identifies those executive functions and provides a percentage of time devoted to each function along with a short discussion of the tasks required, as follows:

**Management and Discretion[ary] Functions (40%): Formulate plans[,] oversee growth and direct the operations of the company at the highest level of authority.** Specifically, the beneficiary will establish internal controls[,] procedures and supervise the professional team; will coordinate and establish strategies and policies for the company to achieve its financial short and long term goals; determine all executive decisions concerning operations of the company; exercise discretion and make all decisions concerning operations of the directions [sic] and management; establish goals and policies in order to expand operations and clients in Latin America; will hire and fire professional employees who work in the corporate office and distribution area of the company; will analyze the operations of the company to evaluate the performance of the company and its staff, increase productivity and maximize returns for the company, and supervise the recruitment of third party professionals who will be contracted to provide services to Panamproject USA Corp. in the United States.

In addition to his executive duties, the beneficiary will continue to directly manage and supervise the work of our Administrative Assistant, and the Operations Manager. The Operations Manager manages the work of our Engineering Director, Regional Sales Director, Accountant, Marketing Manager and daily operations decisions affecting directly or indirectly the goals of our company to ensure that [our] professionals stay abreast of the leading-edge tools to identify new business opportunities to assist our company to enter new markets, increase revenues in existing markets, improve operational performance and deliver our products and services more effectively and efficiently. He will continue to ensure that our professional team provides our customers with innovative business strategies so they can perform at the highest level and create sustained value for their customers. The beneficiary will continue to determine staffing and needs based on business' demand.

**Development Functions (20%): Manage, control, supervise and lead the overall development of the business in the United States.** The beneficiary will be responsible for establishing and maintain[ing] commercial relationships with individuals and companies to

develop our company's operations and wholesale business. He will direct the negotiations with distributors and oversee the development of their business. He will enter into distribution agreements with major U.S. manufacturers and suppliers and will attend tradeshows with sales and marketing staff. The beneficiary will confer on a daily basis with professional employees to ensure development of the company as planned

**Financial Functions (20%): Supervise and oversee the financial operations of the company.** The beneficiary will review financial statements and confer with Operations Manager to ensure that the company's financial objectives are achieved; he will oversee accounts receivable and accounts payable; he will obtain and arrange for funds for a variety of uses of the company, he will direct the building of relationships with financial institutions, supervising the preparation of financial statements; and overseeing the preparation of all appropriate federal and local taxes.

**Marketing Functions (20%): The beneficiary will direct the marketing objectives and programs of the company since it is a crucial factor for the success and development of Panamproject USA Corp. in the U[.]S.** He will supervise the marketing director and the marketing sales assistant who direct the study of potential markets and factors affecting the sales of our insurance products.<sup>1</sup> The beneficiary will identify new value added services to be offered to customers based on his experience and transmit those ideas to the marketing team in order to promote such services. He will direct the negotiation of contracts on behalf of the company with major US companies.

The petitioner states that the beneficiary will be in charge of the overall operation of the company, make executive decisions and manage the professional employees. In a letter dated February 7, 2013, the petitioner further states that it "currently employs a total of eight (8) professional employees, including External Marketing Consultant, External IT Consultant, Administrative Director, CEO, CEO Assistant, Regional Sales Director, Accounting External Consultant and Sales and Marketing Managers.

The petitioner's letter identifies six employees whom will be directly supervised by the beneficiary, as follows:

1) Operations Manager, [REDACTED] works 40 hours per week supervising sales, purchasing, and distribution operations; 2) Human Resource, [REDACTED] has a bachelor's degree in Business Administration and works 40 hours per week earning \$5,000.00 per month; 3) Director of Engineering, [REDACTED] has a bachelor's degree and works 40 hours per week performing duties that include research and development of new technologies for the company's product line; 4) Regional Sales and Marketing agents [REDACTED] will handle client contacts for sales; and 5) Accountant, [REDACTED] performs accounting duties.

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<sup>1</sup> The petition did not indicate that it sold insurance products in the instant Form I-140.

The petitioner's undated organizational chart depicts a total of nine employees, including the beneficiary, and three external consultants. The chart depicts the beneficiary as CEO directly supervising an administrative assistant and an operations manager. In turn, the operations manager will supervise engineer director, [REDACTED] and marketing manager, [REDACTED]. Mr. [REDACTED] will supervise regional sales director, [REDACTED]. The external accountant reports to the operations manager, an external marketing consultant reports to the marketing manager, and an external IT consultant reports to the engineer director.

The director issued a request for evidence (RFE), informing the petitioner that the record lacks sufficient evidence to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. The director noted that the wage documentation submitted did not establish that all of its employees were working on a full time basis. Accordingly, the director instructed the petitioner to provide evidence to establish that the beneficiary will primarily perform duties that are managerial or executive in nature. The director advised the petitioner that the evidence should consist of a definitive statement describing the beneficiary's job duties, including all specific daily duties; percentage of time spent on each duty; an organizational chart showing the number of subordinates who report directly to the beneficiary. The director advised the applicant to include a complete description of the beneficiary's subordinates' job titles, duties, education level and whether they work full or part-time.

In response to the RFE, the petitioner provided a description of the beneficiary's daily duties, dividing them into six general areas of responsibility. The petitioner also provided a brief description for five employees' jobs, reiterated that the beneficiary would directly supervise all five professional employees, and identified three of those employees as having college degrees. In the RFE response letter, the petitioner asserted that it had included Quarterly Wage Reports for all quarters of 2012 and 2013.

In review, we note that the petitioner submitted proof of employee wages for 2011 and 2012 in the form of W-2s for three employees, pay stubs for employee [REDACTED] covering June, July, and August of 2013, and checks made out to [REDACTED] for the first two quarters of 2013.

The petitioner also provided two Forms RT-8A, titled "Correction to an Employer's Quarterly or Annual Domestic Report" for the State of Florida. These documents depict both the original wages reported and the wages as corrected for each of the petitioner's employees during the period indicated on the form. The first form covers the period ending on March 31, 2013 and depicts the petitioner's employee wages as follows: 1) [REDACTED] - original gross wages of \$6,300.00 corrected to \$9,000.00; 2) [REDACTED] - original gross wages of \$2,310.00 were unchanged; 3) [REDACTED] - original gross wages of \$2,310.00 were unchanged; 4) [REDACTED] - original wages were not reported but were corrected to \$1,600.00; 5) Beneficiary - original wages of \$4,970.00 were corrected to \$12,000.00. The petitioner did not provide a reason for the corrections on this document.

The Form RT-8A relating to the period ending June 30, 2013 includes the same employees and depicts an increase of [REDACTED] wages from \$4,300.00 to \$7,500.00 and added wages not previously reported for [REDACTED] in the amounts of \$4,500.00, \$3,000.00, and \$4,500.00 respectively. The beneficiary's wages were corrected from \$2,310.00 to \$12,000.00. The petitioner provides

an explanation for the correction of this document as follows, "[w]ages were corrected by this period and were paid had not been paid."

The director concluded that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director's determination was based, in part, upon a finding that the petitioner's employees were part-time.

On appeal, the petitioner asserts that the decision was clearly erroneous because the director assumed facts in error and issued a decision "peppered with inaccuracies." The petitioner asserts that the director never requested "the hours the employees worked" but that they all worked full time and a portion of their salaries were paid by the foreign company. The petitioner now submits a summarized English translation of a business contract purportedly entered into by the petitioner with another company on August 28, 2012 to run 18 months until January 2014. The petitioner states that this contract provides that the foreign entity will pay 80% of the petitioner's employees hired for the "Level 3 project." The summarized English translation states that this is a four year contract beginning March 14, 2012 and ending December 14, 2015.<sup>2</sup> The petitioner also submits untranslated documents that appear to depict money paid to the petitioner's employees. The petitioner asserts that the director erred in concluding that the employees were part time because he did not request the information or allow the petitioner the opportunity to provide it.

The petitioner reiterated that the beneficiary would perform only executive duties, and asserts that it is unrealistic to expect the petitioner to provide a definitive list of the beneficiary's job duties given the wide range of his duties. The petitioner states that it has demonstrated that all of its employees are professional and that they can relieve the beneficiary from performing non-qualifying duties.

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's job duties for the position in question. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). We then consider the beneficiary's job description in the context of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role within the petitioning entity.

Turning first to the beneficiary's job description, we note that the petitioner initially allocated a percentage of the beneficiary's time into four functions but in response to the RFE, the petitioner reallocated the beneficiary's time into six areas of responsibility. While many of the general duties listed in these two versions are similar or tend to overlap, there are discrepancies. For example, the "financial function" to which

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<sup>2</sup> 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 beneficiary is to devote 20% of his time is not mentioned at all in the petitioner's second description of the beneficiary's job duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, both duty descriptions are vague and fail to offer insight into exactly how the beneficiary will allocate his time each day. For example, the petitioner stated that the beneficiary would "exercise discretion and make all decisions concerning operations of the directions and management." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). We note that the petitioner also offered a summary of an "average day" for the beneficiary that included conferring with the "Business Development Director," a position that does not exist, and engaging in tasks that are inconsistent with the previous two duty descriptions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The beneficiary's job descriptions include other responsibilities, such as establishing and maintaining commercial relationships to develop the company operations and wholesale business, directing negotiations, entering into distribution agreements and meeting daily with professional employees. Further, one of the beneficiary's duty descriptions indicates that the beneficiary is to review financial statements, oversee accounts receivable and payable, supervise preparation of financial documents and arrange for funding. Notwithstanding these expectations, the petitioner reiterates that that beneficiary will not be involved in any non-executive duties. The petitioner has not resolved the conflicts and inconsistencies raised by these claims since all of these duties are non-executive and non-qualifying. Furthermore, the petitioner has not established that the beneficiary is not primarily engaged in non-qualifying duties since the percentages of time discussed in his duty descriptions incorporate non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Turning to the petitioner's staffing we note that there are unresolved discrepancies regarding the number of staff employed by the petitioner at the time the petition was filed. The petitioner's Florida State wage documents indicate that the petitioner initially paid four employees during the first quarter of 2013 but corrected that document in August 2013 by increasing the amount of wages paid to two employees and adding a fifth employee. The petitioner did not provide an adequate reason for the correction and it provided no additional documentation to demonstrate when during the quarter each employee earned their particular wages. 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). Also, it appears that the petitioner included three contractors among its employees on its organizational chart but it did not provide sufficient evidence to show payment for their services. Therefore, the petitioner has not sufficiently established the number of individuals employed on the date this petition was

filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the petitioner's claimed organizational structure is unclear. The petitioner's organizational chart depicts only the administrative assistant and the operations manager reporting directly to the beneficiary with the remaining employees and contractors reporting to the operations manager. The petitioner's letter corroborates this structure. Nevertheless, the petitioner's letter also stated that the beneficiary would directly supervise the operations manager, the human resource employee, the engineering director, the regional sales agent, marketing agent and the accountant. 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 asserted that all of its employees were professionals directly supervised by the beneficiary but it claimed that only the operations manager, engineering director, and human resource employee had college degrees. The petitioner did not claim that the regional sales agent or the marketing agent had college degrees but did claim that both would report directly to the beneficiary. Although the beneficiary is not required to supervise personnel, if it is claimed that both his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the administrative/human resource work, operations work, marketing, or sales work as performed by the beneficiary's subordinates. Nor has the petitioner sufficiently shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the wages the petitioner claimed to pay its five employees during the first quarter of 2013, the petitioner has not established that the employees available would be sufficient to relieve the beneficiary from primarily performing non-qualifying duties. Presuming these quarterly wages were apportioned over 12 weeks, the amount of money paid to all but the beneficiary and [REDACTED] is insufficient for full time workers. For the first time on appeal the petitioner asserts that the petitioner's workers were paid 80% of their income by the foreign entity. The petitioner asserts that the director failed to ask for information relating to the number of hours worked by the petitioner's employees. Nevertheless, the record establishes that the petitioner claimed that its workers worked full time and in the RFE the director asked for additional information regarding work hours and wages paid. Therefore the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. We will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Accordingly, the petitioner had failed to establish that the beneficiary's proposed employment would be within a qualifying managerial or executive capacity and on the basis of this adverse finding this petition cannot be approved.

#### B. Ability to Pay

The remaining issue to be addressed is whether the petitioner established that it has the ability to pay the beneficiary's proffered salary of \$8,000 per month. *See* 8 C.F.R. § 204.5(g)(2).

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

*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 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. As previously noted, the petitioner initially claimed to have paid the beneficiary \$4,970.00 for the first quarter of 2013 and \$2,310.00 for the second quarter of 2013. The petitioner claimed to have corrected the amount of wages paid to \$12,000 for each quarter, or \$4,000 per month. The petitioner submitted the beneficiary's pay stubs for 2013 totaling \$58,880.00 indicating the following payments: 1) January \$2,100.00;

2) February \$5,390.00; 3) March \$2,100.00; 4) March \$7,030.00;<sup>3</sup> 5) April \$8,200.00; 6) May \$5,390.00; 7) June \$9,690.00; 8) July \$5,390.00; 9) August \$5,390.00; and 10) September \$8,200.00. We note that these payments are inconsistent with the wages previously claimed. The petitioner has not demonstrated its ability to pay the proffered wage of \$8,000.00 per month.

As an alternate means of determining the petitioner's ability to pay, we 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 petitioner's priority date falls on the date of filing, February 26, 2013, we must examine the petitioner's tax return for 2012. The petitioner's IRS Form 1120 for calendar year 2012 presents a net loss of \$-4,257.00. Although the petitioner had paid the beneficiary \$20,600 for the year, the petitioner has not established that it could pay the full proffered wage of \$96,000.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, we 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 we are 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. In this matter, the petitioner reported \$27,732 in net current assets. The petitioner must have net current assets greater than the proffered salary to establish the ability to pay. The petitioner has not established the ability to pay the proffered salary. For this additional reason the petition may not be approved.

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<sup>3</sup> The petitioner incongruously submitted two different paystubs for the beneficiary for the month of March.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed