



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: DEC 30 2014 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:  
[REDACTED]

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 U.S. entity engaged in golf publications and property investments. It seeks to employ the beneficiary in the United States as president and 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: (1) that in the three years preceding the beneficiary's entry as a nonimmigrant, the beneficiary was employed for at least one year in a managerial or executive capacity with a qualifying organization; (2) that the beneficiary would be employed in the United States in a managerial or executive capacity; (3) that the petitioner had been doing business for at least one year prior to filing this petition; and (4) that the petitioner had the ability to pay the proffered wage at the time the petition was filed.

#### 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.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

## II. Issues on Appeal

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

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

#### 1. Facts

On May 31, 2013, the director issued a request for evidence (RFE) instructing the petitioner to provide additional evidence to establish that the beneficiary had been employed abroad in a managerial or executive capacity. The director requested evidence including all of the beneficiary's specific daily duties and the percentage of time spent on each duty. The director also requested additional information regarding subordinate managers/supervisors and employees who reported directly to the beneficiary including their job title, a description of their duties, educational level and whether they worked on a part or full time basis.

In response to the RFE, the petitioner submitted a letter, dated March 20, 2012, prepared in support of a prior LIA petition for the beneficiary's temporary employment as the petitioner's president/CEO. The petitioner identified the foreign entity as [REDACTED] but added that the foreign entity had two "sister" companies in Mauritius; one identified as [REDACTED] and the other, identified as [REDACTED]

The petitioner stated that the beneficiary had been employed abroad as the foreign entity's CEO since 2008 and described his duties as follows:

- Develop policies and direction of the business.
- Oversee all business activity.
- Manage, direct and maintain complete authority over day-to-day operations.
- Determine company's future plans and establish goals and projections.
- Prepare company's annual plan and financial budget.
- Hold complete authority over hiring and firing decisions with supervision of approximately 14 employees.
- Hold primary responsibility for the financial control of the company.

- Review financial accounts, status reports and sales figures to determine progress in achieving financial and sales goals.
- Make determinations regarding need for funding initiatives.
- Negotiate new contracts on behalf of company.
- Direct business development activities, including development of strategic initiatives and affiliations with related businesses.
- Serve as Publisher for [REDACTED] magazine.
- Through supervision of subordinate staff, ensure that [REDACTED] printing and distribution deadlines and advertising quotas are met.
- Liaise with clients and ensure client satisfaction.
- Ensure that overall corporate targets, standard milestones and deliverables are met.

The petitioner stated that the beneficiary's staff included: a general manager, an executive assistant, an operations manager, sales/business development, a media manager, editors, a golf director, a design team, a media tech/cameraman, a driver, and other personnel including outsourced contractors to handle some magazine related tasks. The petitioner provided payroll documents for various months between 2010 and through 2012 and an organizational chart depicting the structure of one of the foreign entity's "sister" companies.

The director denied the petition, concluding that the evidence did not establish that the beneficiary would be primarily engaged in qualifying duties.

On appeal, the petitioner asserts that the beneficiary was employed as CEO of its parent company, [REDACTED], and was therefore, employed for at least one of the last three years abroad in a qualifying managerial or executive capacity.

## 2. Analysis

When examining the executive or managerial capacity of the beneficiary, we review the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed 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 will then consider this information in light of other relevant factors, including job descriptions of the beneficiary's subordinate employees, the nature of the business that is conducted, the subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the foreign company. While an entity with a limited support staff will not be precluded from the immigration benefit sought herein, it is subject to the same burden of proof that applies to a larger entity with a moderate or large subordinate staff. In other words, regardless of an entity's size or support staff, the foreign entity must be able to provide sufficient evidence showing that it had the capability of maintaining its daily operations such that the beneficiary was relieved from having to primarily perform the operational tasks.

In this matter, upon review of the totality of the record, the evidence does not support a finding that the beneficiary allocated his time primarily to the performance of tasks that are within a qualifying managerial or executive capacity.

The petitioner's description of the beneficiary's duties is vague and the petitioner failed to present sufficient evidence to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties would include vague responsibilities such as "oversee all business activity;" "hold primary responsibility for the financial control of the company;" "direct business development activities, including development of strategic initiatives and affiliations with related businesses;" and "serve as publisher for [REDACTED] magazine." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of 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).

The petitioner also failed to indicate the percentage of time that the beneficiary dedicated to any of his responsibilities. This failure is important since the beneficiary's duties included non-qualifying tasks such as preparing budgets and publishing, and it cannot be assumed that the beneficiary would dedicate his time primarily to the performance of tasks within a qualifying capacity without adequate supporting evidence. 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. While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner maintains the burden of establishing that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Regarding the foreign entity's evidence relating to its employees, the petitioner's list of staff positions, several payroll rosters for various months in 2010 through 2012, and an organizational chart for a different company do not provide sufficient information for us to determine that the beneficiary has an adequate staff to relieve the beneficiary from performing primarily non-qualifying duties. 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)). Furthermore, despite the director's request for specific employee evidence the petitioner did not provide it. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R.§103.2(b)(14).

Therefore, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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

The second issue to be addressed is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

##### 1. Facts

The petitioner filed its Form I-140 on January 25, 2013 and indicated that it was established on October 17, 2011, and is engaged in golf publications and property investments. The petitioner claims to have nine employees and a gross annual income of \$2.16 million. The petitioner will employ the beneficiary as president/chief executive officer (CEO) with a proffered wage of \$120,000.00.

On May 31, 2013 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 requested, among other things, the beneficiary's detailed duty description including the percentage of time spent on each duty and a list of employees, to include contractors, along with their duties, educational level, salary, and status as part or full time.

In a letter, dated March 30, 2012, which was prepared in support of a prior L1A petition, in which the petitioner explained that the foreign entity was engaged in business development and growth that involved the launch of a golf magazine and the investment and property development of golf resorts. The petitioner explains that it "is structured around internal editorial, sales and administrative functions while the production, printing and distribution functions are outsourced." The petitioner explained that its dual purpose is "to provide a marketing platform to manufacturers of goods and services and to provide an informative and entertaining magazine to golf minded people." The petitioner stated that the foreign entity's magazine activity would shift to the United States.

The petitioner asserts that the beneficiary's duties in the U.S. will "mirror" those performed for the foreign entity, as discussed in the previous section of this decision. The petitioner provided notes for several of its staff meetings held in 2012 and 2013. The petitioner's staff meeting notes dated January 2, 2013, identify the attendance of the beneficiary; [REDACTED] as director of IT; [REDACTED] as operations executive; [REDACTED] in executive sales; and [REDACTED] as executive assistant. The petitioner provided the meeting minutes for January 21, 2013, that indicated that the petitioning company would be bankrupt if not for the beneficiary's financial support. Further, the minutes indicated that "going forward" the beneficiary would be "concentrating on making sales for this company." Another employee, executive of events, [REDACTED] was present for this meeting

The petitioner provided the list of its management team and provided a brief description of each position as reflected in its business plan, as follows: (1) senior operations manager, [REDACTED]

works to ensure the success of the magazine and staff and oversees the business when the beneficiary is absent; (2) executive assistant, [REDACTED] oversees budget, payroll, taxes, insurance, and manages staff meetings; and (3) sales manager, [REDACTED] manages a team of sales and marketing staff and is responsible for marketing and sales of advertising space. The petitioner also claimed to have hired [REDACTED] as the company's exclusive agent.

The petitioner provided two undated organizational charts both listing the beneficiary as CEO. In the first chart, senior project and administrative manager, [REDACTED] and company ambassador for Louisiana and Texas, [REDACTED] report directly to the beneficiary. Ms. [REDACTED] has no subordinate employees. Mr. [REDACTED] directly supervises an executive sales manager position that is vacant and a media manager position that is vacant. Sales and marketing employee, [REDACTED] is subordinate to exclusive agent [REDACTED] who, in turn, is directly subordinate to the vacant executive sales manager position. The vacant media manager position has several subordinate positions that simply identify the foreign entity. The petitioner's second undated organizational chart identifies senior operations manager, [REDACTED] as a direct report to the beneficiary. Executive assistant, [REDACTED], executive sales manager, [REDACTED] and a vacant media manager all report directly to [REDACTED] Exclusive agent, [REDACTED] reports to [REDACTED] and a vacant sales/marketing position reports directly to [REDACTED]. All positions under the vacant media manager position are vacant and three outsourced positions are vacant.

The petitioner's payroll roster for the month ending December 2012 identifies six employees: (1) the beneficiary; (2) [REDACTED]; (3) [REDACTED] (4) [REDACTED] (5) [REDACTED]; and (6) [REDACTED]. Another payroll roster created on May 10, 2013 listed the same six employees though four were listed as terminated and a fifth as inactive. The petitioner submitted additional payroll rosters but most employees were listed as inactive or terminated and the rosters were not dated. Finally, the petitioner's leased space of two suites totaling 365 square feet allows for a maximum occupancy of six individuals.

In his decision, the director denied the petition observing that the petitioner relied upon the foreign entity's duty description and the petitioner's assertion that the position would be temporary.

On appeal, the petitioner asserts that the beneficiary would be performing primarily qualifying duties and refers to a letter dated July 19, 2013<sup>1</sup> and prepared by [REDACTED] that asserts that the beneficiary will have the following duties: "manage the accounts of the Blue Chip corporate clients both locally and nationally in the USA, further manage the negotiations with prospective investors, further manage and negotiate golf travel package contracts for corporate client and negotiate corporate sponsors." The petitioner further states that the beneficiary "would also direct sales and marketing, organize and direct senior projects and administration management and be directly in charge of all marketing and promotions."

<sup>1</sup> The letter that the petitioner refers to is not included in this record though it may have been included in a separately filed L1A extension request.

## 2. Analysis

First, the petitioner's letter offering a temporary position as its CEO is not sufficient to establish eligibility under this petition that requires a job offer for a permanent position.

Second, the petitioner's reliance upon the beneficiary's duty description abroad is insufficient since we have found that the beneficiary's responsibilities were vague and broad and the petitioner failed to allocate the beneficiary's time to any of them as requested. 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).

Third, the petitioner's evidence did not establish the number of employees or their duties at the time the petition was filed as requested. *Id.* The petitioner's submission of conflicting organizational charts and other vague employee information failed to establish who was employed when the petition was filed and who the beneficiary could rely upon to primarily perform qualifying 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). Furthermore, 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)).

Finally, a review of the evidence submitted indicates that the petitioning company has been struggling and that, as of January 2013, the beneficiary would focus on making sales for the company. Thus, the beneficiary's primary focus will be on making sales, a non-qualifying duty.

Therefore, the petitioner has not established that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

## C. Doing Business

The third issue addressed by the director is whether the petitioner has satisfied 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to provide evidence establishing that it has been doing business for at least one year prior to filing the Form I-140.

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In this matter, neither the evidence submitted by the petitioner initially in support of the Form I-140 nor the evidence submitted in response to the director's request for additional evidence is sufficient

to establish that the petitioner had been doing business since January 25, 2012, or one year prior to the date the Form I-140 was filed. Therefore, the director denied the petition, concluding that the petitioner failed to establish that it satisfied the filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(D).

After reviewing the evidence, we find that the evidence is insufficient to establish that the petitioner had been doing business for at least one year prior to filing the instant petition.

Neither bank statements nor tax returns are sufficient to establish that an entity is or has been engaged in business activity on a “regular, systematic, and continuous” basis as defined at 8 C.F.R. § 204.5(j)(2). Rather, where an entity's business involves sales, purchases, and/or importing and exporting of goods, the submitted evidence should demonstrate that the petitioner has been engaged in these specific business activities on a regular, systematic, and continuous manner. Evidence of this nature would include copies of purchase and sales invoices, shipping documents, customs forms, or other similar documents that would be generated in the daily course of business.

The petitioner provided staff notes, bank statements, unaudited financial statements, a tax return, a lease commencing March 2012, and photographs of the leased property. Therefore, we are unable to conclude that the petitioner had been doing business beginning January 25, 2012 and continuously until filing this petition in January 2013. As the petitioner has failed to satisfy this requirement that is specified at 8 C.F.R. § 204.5(j)(3)(i)(D), this petition cannot be approved.

#### D. Ability to Pay

In determining the petitioner's ability to pay the proffered wage, we 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 submitted the beneficiary's IRS Form 1040 U.S. Individual Income Tax Return for 2012 indicating that the beneficiary reported wages and salary income of \$15,000.00 and business income of \$55,762.00. The beneficiary listed the petitioning company on his Schedule C, Profit or Loss from business in 2012. Based on this evidence, the petitioner did not establish that it had paid the beneficiary the \$120,000.00 annual proffered wage.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 January 25, 2013, we must examine the petitioner's tax return for 2012. As noted, the petitioner submitted the beneficiary's IRS Form 1040 for calendar year 2012 with Schedule C that presents the petitioner's net taxable income \$33,462.00. The petitioner could not pay a proffered wage of \$120,000 per year out of this income or pay the remaining \$64,238.00 owed after deducting the amount the beneficiary claimed as business income.

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.

Generally, when an LLC has only one member, the IRS will disregard or ignore the fact that it is an LLC for the purpose of filing a federal tax return. Note though that this is only a mechanism for tax purposes, and does not change the fact that the LLC is legally a separate entity from the member. Similarly, even though most multiple member LLCs file a Form 1065 partnership tax return, the LLC is still, legally, a separate entity.

In this matter, the beneficiary disregarded the entity and reported all of the petitioning LLC's income and losses on his personal tax return. The petitioner did not provide sufficient evidence to allow us to determine net assets. We note that the petitioner did provide unaudited financial documents but they will not be considered.

In analyzing a petitioner's ability to pay the proffered wage, the fundamental focus is whether the employer is making a "realistic" or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm'r 1977). We may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612.

Here, the record establishes that the beneficiary funded the petitioning company in 2012 to “keep the business open.” The petitioner also presented evidence relating to other companies owned by the beneficiary and their ability to pay the proffered wage. The petitioning LLC infers that since the beneficiary is its sole shareholder, the beneficiary’s personal assets and personal liabilities may be considered in determining the petitioner’s ability to pay the proffered wage. It is an elementary rule that an LLC or a corporation is a separate and distinct legal entity from its owners and shareholders.. See *Matter of M*, 8 I&N Dec 24, *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec 530, and *Matter of Tessel*, 17 I&N Dec 631. Furthermore, a petitioner may not make a material change to a petition or evidence in an effort to make a deficient petition conform to our requirements. See *Matter of Izummi*, 22 I&N Dec 169, 176 (Assoc. comm’r 1988) Consequently, the personal assets or other enterprises or corporations cannot be considered in determining the petitioning LLC’s ability to pay the proffered wage. The court stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” See *Sitar v. Ashcroft*, 2003 WL 22203713. Therefore, we may not look to the assets, including real estate, of the LLC’s owners or of other entities to satisfy the LLC’s ability to pay the proffered wage.

The petitioner infers that its cash balances should be considered in assessing its ability to pay the proffered wage, and submits a copy of its bank statements. Contrary to the petitioner’s claim, reliance on the balances in the petitioner’s owner’s bank account is misplaced. First, the bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

On appeal, the petitioner submitted a notarized but unsigned statement from tax professional, [REDACTED] stating that the beneficiary received at least \$120,000.00 in wages from the petitioner in 2012. This evidence was provided for the first time on appeal and presented as a notarized affidavit despite the lack of the affiant’s signature. 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).

In assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

For this additional reason the appeal will be denied and the petition dismissed.

### III. Conclusion

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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.