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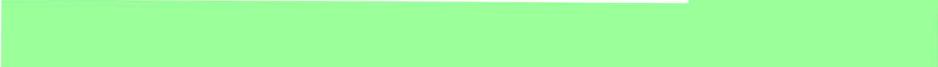


U.S. Citizenship
and Immigration
Services



DATE: **JUL 09 2014** OFFICE: TEXAS SERVICE CENTER

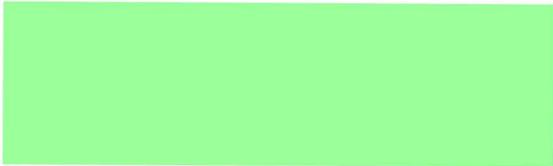
FILE: 

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

The petitioner is a foreign corporation established in Mexico. It seeks to employ the beneficiary in its Texas-based branch office as its 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: (1) the foreign entity continues to do business abroad; (2) the petitioner and the beneficiary's foreign employer have a qualifying relationship; (3) the beneficiary was employed abroad in a qualifying managerial or executive capacity; (4) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (5) the petitioner has the ability to pay the beneficiary's proffered wage.

I. The Law

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

II. Procedural History

The record shows that the petition was filed on August 13, 2012 and was accompanied by a supporting statement, dated August 6, 2012, which described the petitioning entity as a provider of corporate and

language solutions. The petitioner refers to the U.S. entity as a wholly owned subsidiary, claiming that the subsidiary was incorporated in the State of Texas. The petitioner claimed that the beneficiary took steps to expand its U.S. operation by design a marketing and branding campaign, promoting the petitioner's services through social media, and maintaining a strong presence at trade shows, and creating corporate translation packages. The petitioner also provided information about the beneficiary's employment abroad as well as in her proposed position with the U.S. office and indicated that the beneficiary's proffered wage under an approved petition would be \$60,000 per year.

On February 4, 2013, the director issued a request for evidence (RFE), instructing the petitioner to address various deficiencies in the record. Although the petitioner provided a response, which included a statement, dated March 15, 2013, the director determined that the petitioner failed to establish that the beneficiary is eligible for the immigration benefit sought herein based on the five grounds for denial enumerated above.

The petitioner subsequently filed an appeal, acknowledging four of the five grounds for denial and asserting that the director's decision is incorrect. With regard to the director's adverse finding concerning the petitioner's failure to show the existence of a qualifying relationship between the beneficiary's foreign and proposed employers, the record contains evidence, including a Texas-issued certificate of authority and certificate of filing, effective June 15, 2005 and July 5, 2005, respectively, which show that the beneficiary's foreign obtained authorization to conduct business in the State of Texas under a fictitious name - [REDACTED]

[REDACTED] These documents indicate that the Texas-based office is a branch of the beneficiary's foreign employer. In essence, the beneficiary's employer in Mexican and the Texas-based office are part of the same entity with offices in two different locations.¹

Given that the evidence of record establishes that the beneficiary's employers abroad and in the United States are technically "the same employer," as provided at section 203(b)(1)(C) of the Act, the petitioner has the requisite qualifying relationship with the beneficiary's foreign employer. Accordingly, the director's conclusion that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer is hereby withdrawn. From here on, this discussion will focus on the four remaining grounds for denial.

III. Issues on Appeal

The four issues to be addressed are: (1) whether the foreign entity continues to do business abroad; (2) whether the beneficiary was employed abroad in a qualifying managerial or executive capacity; (3) whether the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (4) whether the petitioner has the ability to pay the beneficiary's proffered wage.

¹ See 8 C.F.R. § 214.2(l)(1)(ii)(J) for definition of a branch office in the nonimmigrant context of an L-1 intracompany transferee. Although the term "branch" is not expressly defined within the immigrant context of a multinational manager or executive, the applicability of this term is implied by reference at section 203(b)(1)(C) of the Act, which provides for situations where the petitioner is "the same employer" and the foreign entity. The Act distinguishes the concept of "the same employer" from that of a subsidiary or affiliate. As applied to the facts in the matter at hand, the U.S. office is, in effect, "an operating division or office of *the same organization* housed in a different location." (Emphasis added).

A. The Foreign Entity Doing Business

In order to classify the beneficiary in the immigrant category of a multinational manager or executive, the petitioner must establish that it operates as a multinational entity, which requires the qualifying entity, or its affiliate, or subsidiary, to conduct business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). The term "doing business" is defined 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. *Id.*

In the RFE, the director expressly stated that the record contains insufficient evidence to show that the foreign entity continues to do business through its foreign office, which is located in Mexico. Accordingly, the director instructed the petitioner to provide additional supporting evidence, including receipts, invoices, and reports, which show that the foreign office continued to provide goods and/or services. Although the petitioner responded to the request, providing invoices and evidence of business transactions that date back to 2005, these documents all pertain to the business activities of the petitioner's U.S.-based office. None of the documents provided in response to the RFE indicate that any of the documented business transactions involved the petitioner's foreign office in Mexico.

On appeal, the petitioner provides a statement, dated October 5, 2013, from its accountant, who indicated that she has filed tax returns for the foreign office and further noted that the tax returns showed net profits for 2012, the third party statement from the petitioner's accountant does not, in and of itself, constitute the type of documentary evidence the director requested in the RFE. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the foreign entity's submission of a document showing the foreign office's registration status as "Active" is not sufficient to meet the definition of doing business, which requires more than evidence of an entity's existence as an agent or office. The definition requires evidence of actual business transactions showing the regular, systematic, and continuous provision of goods and/or services. Despite efforts to overcome the director's adverse finding, the evidence presented in the matter at hand show only that the petitioner's U.S.-based office continues to provide its services on a regular, systematic, and continuous basis. The same cannot be said of the petitioner's efforts to show that its base office in Mexico continues to do business. Therefore, the petitioner has failed to establish that it operates as a multinational entity and on the basis of this initial finding the instant petition cannot be approved.

B. Employment Abroad in a Qualifying Capacity

The next issue to be addressed in this proceeding is the beneficiary's employment abroad and whether the petitioner provided sufficient evidence to establish that the beneficiary's employment abroad was in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In 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. See 8 C.F.R. § 204.5(j)(5). Published case 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). Also critical to this analysis are factors such as staffing size, job descriptions of the beneficiary's subordinates and other employees who carried out the petitioner's daily operational tasks abroad, the nature of the business conducted, and any other facts that may contribute to a comprehensive understanding of the beneficiary's prior role within the petitioning organization's foreign office.

In its initial supporting statement, dated August 6, 2012, the petitioner stated that the beneficiary served as president of its office, which is based in Mexico, from 2003 until 2005, when the beneficiary relocated to assume her current position with the petitioner's U.S.-based branch office. The petitioner stated that the beneficiary's "responsibilities included day-to-day management, decision-making, as well as generating new

business development." Although the petitioner provided further evidence of the beneficiary's qualifications for her prior and proposed positions, the initial supporting evidence did not provide any further discussion of the beneficiary's employment in Mexico. Accordingly, the RFE addressed this lack of evidence pertaining to the beneficiary's former employment abroad, instructing the petitioner to provide a definitive statement from the foreign entity listing the specific job duties the beneficiary performed and the percentage of time the beneficiary allocated to each of her previously assigned duties. The director also asked the petitioner to provide an organizational chart depicting the beneficiary's placement within the foreign office's organizational hierarchy and the staff the beneficiary managed. With regard to the beneficiary's subordinates, the director asked the petitioner to provide their respective position titles, brief job descriptions, and educational levels.

The petitioner's response contained a statement, dated March 15, 2013, addressing the issues in question. With regard to the beneficiary's employment abroad, the petitioner stated the following:

[The beneficiary] exercised all executive and managerial capacities as granted in the Testimony of Public Deed of Incorporation of [the petitioner] in Mexico. She designed our corporate image, our [p]roduct [c]atalogue, legal contracts and agreements and negotiated important deals with national and international statements and created new business strategies to bring new accounts to the company. Such was the case of translation, language courses and marketing contracts As President of the Board of Directors, [s]hareholder, CEO and [a]dministrative [m]anager, she did not receive any supervision, but supervised all company management, [s]ales [and m]arketing included. She exercised all discretionary powers as granted in the [i]ncorporation document.

[The beneficiary] was also in charge of incorporating the U[.]S[.] Company, has entered and negotiated agreements, has designed new business strategies and created working opportunities for contractors in the U[.]S[.] in the last years.

Despite the director's RFE instructions, the above job description does not list the beneficiary's specific daily tasks with time constraints indicating what percentage of time the beneficiary allocated to the individual tasks that were assigned to her during the course of her former employment with the foreign entity in Mexico. Rather, the petitioner provided a general overview of the beneficiary's responsibilities, failing to cite her actual daily activities. For instance, it is unclear what actual role the beneficiary assumed or what her daily job duties were with regard to designing the foreign entity's corporate image. In other words, the petitioner did not explain how the beneficiary designed the corporate image in terms of the actual tasks performed and her contribution to the overall design.

The petitioner was similarly vague in failing to state the beneficiary's precise role with regard to the company's product catalogue. Moreover, if the beneficiary took an active role in designing the catalogue, it is unlikely that her role encompassed managerial or executive tasks. Further, claiming that the beneficiary was charged with legal contracts, brokering "important deals," and creating new business for the company fail to disclose actual managerial or executive job duties. While all three job responsibilities indicate that the beneficiary had discretionary authority with respect to the petitioner's business matters in Mexico, they indicate that the beneficiary's underlying job duties may have been non-qualifying to the degree that the beneficiary may have dealt directly with customers in order to finalize deals and she may have actually sought out customers in an effort to expand the customer base and bring in new accounts.

While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary performed were only incidental to the position in question. 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). In the matter at hand, the petitioner has failed to state precisely how much of the beneficiary's time was allocated to managerial- or executive-level tasks, nor has the petitioner even identified the beneficiary's former tasks within any degree of specificity. As previously stated, the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Given that the petitioner failed to comply with the director's express instructions asking for a list of the beneficiary's former job duties and the percentage of time allocated to each duty, it has precluded the conveyance of highly relevant information without which no conclusion can be made as to what portion of the beneficiary's time was allocated qualifying tasks versus tasks that are non-qualifying.

Furthermore, we note that the petitioner also failed to comply with the director's request for the submission of an organizational chart depicting the beneficiary in her former position with the foreign entity. Although the petitioner provided an organizational chart depicting the combined hierarchies of the petitioner's U.S. and foreign offices, the chart does not depict the beneficiary in her former position abroad, but rather is more current as suggested by the fact that it depicts the beneficiary in her current position with the U.S. office. Thus, regardless of the fact that the chart illustrates the foreign office's organizational hierarchy, the document lacks probative value for the purpose of establishing whether the beneficiary was employed abroad in a qualifying managerial or executive capacity. 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). Here, the petitioner failed to provide an organizational chart depicting the requested information and provided no information about the beneficiary's subordinates, if any, or the people who purportedly carried out the foreign entity's operational tasks during the beneficiary's employment abroad.

Accordingly, based on our review of the totality of evidence that has been presented in support of the matter at hand, we find that the petitioner failed to comply with the director's specific RFE instructions, which asked for highly relevant information pertaining the beneficiary's former job duties and the hierarchy within which she worked during her employment abroad. Given the considerable evidentiary deficiencies discussed above, the petitioner has failed to establish that the job duties the beneficiary performed during her former employment abroad were primarily within a qualifying managerial or executive capacity and on the basis of this adverse finding the instant petition cannot be approved.

C. Managerial or Executive Employment in the United States

The next issue to be addressed in this discussion is the beneficiary's proposed employment with the branch office located in the United States.

A review of the appeal shows that the petitioner failed to acknowledge or dispute the finding that the beneficiary would not be employed in the United States in a qualifying managerial or executive capacity. As such, the petitioner effectively concedes this ground as a basis for denial. However, notwithstanding the petitioner's failure to address the beneficiary's proposed employment on appeal, the record does not contain

sufficient evidence to establish that the beneficiary would be employed in the petitioner's U.S.-based office in a qualifying managerial or executive capacity.

In the supporting stated, dated August 6, 2012, the petitioner provided the following description of the beneficiary's proposed employment:

[The beneficiary's] position in the United States involves senior managerial responsibilities in the operation of the company. [She] is charged with the responsibilities as chief technical coordinator for the company and VP of U[.]S[.] Operations. [She] is also in charge of the development and expansion of the U.S. client base. She is in charge of designing and implementing the company policies and business strategies. In her capacity of CEO of our U[.]S[.] subsidiary, [the beneficiary] controls all the U[.]S[.] operations, negotiates executes agreements, supervises, trains and directs employees. One of [the beneficiary's] most important roles is to assure customer satisfaction and to strongly position our company name in the U[.]S[.] market.

[The beneficiary] will continue having broad discretionary decision-making authority in directing and overseeing the United States business operations. She will continue making decisions relative to financing these operations and the development of [a] new client base, as well as managing the day-to-day business operations. In summary, the position of General Manager requires extensive managerial experience and demonstrated business acumen within our parent company [The beneficiary] is the key [m]anager within the organization who possesses the expertise and experience necessary to carry out and develop these functions.

The petitioner also stated that the beneficiary's "renewal employment offer" will require the beneficiary to perform the following job duties:

- Executive discretionary decision making authority
- Execute agreements
- Strategic business planning and policy implementation
- Design company procedures and manuals
- General control and supervision of employees
- Oversee the general operation of the company
- Train employees and teachers
- Draft and implement marketing campaigns
- Supervise execution of plans and campaigns

The director found that the above job description was insufficient to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director addressed this evidentiary deficiency in the RFE, instructing the petitioner to provide a list of the beneficiary's specific daily job duties and indicate the percentage of time the beneficiary would allocate to each individual job duty. The director also asked the petitioner to provide a copy of its organizational chart depicting the beneficiary's position as well as the positions of the beneficiary's subordinates. The petitioner was instructed to include job titles, job descriptions, and educational levels of the beneficiary's subordinates and to indicate whether each employee works on a full- or part-time basis.

In its response statement, dated March 15, 2013, the petitioner provided the following percentage breakdown and list of duties:

[The beneficiary's] primary activity (80%) is to exercise core executive responsibilities for the company that include, in an [sic] 80% the following:

- Direct the management of the organization
- Establish goals and policies
- Exercise wide latitude in discretionary decision making
- Be part of the [petitioner's] Board of Directors . . . and represent [the U.S.-based office] as [its] CEO
- Design new business strategies
- Negotiate and enter business agreements
- Perform financial analysis, planning and design
- Design and plan language courses
- Engage in networking, public relations and prospecting
- Draft customer agreements and forms
- Develop sales strategies
- Review and design manuals
- Research opportunities and obtain vendor numbers with public organizations
- Customer service

As *secondary activities* [the beneficiary] does or reviews some translations, trains teachers and instructors, consulting and bookkeeping.

[The beneficiary] directs the management of the organization by overseeing each of [the U.S. office's] three divisions: language, consulting[,] and marketing.

(Emphasis added in the original). Despite the director's specific instructions, the petitioner failed to assign time constraints to the individual job duties and instead, generally indicated that 80% of the beneficiary's time would be allocated to executive job responsibilities.

In addition, the petitioner provided an organizational chart showing the respective hierarchies of the petitioner's foreign and U.S. offices. The U.S. office's chart shows the beneficiary at the top of the hierarchy, subordinate to the petitioner's president, with an administrative assistant and a sales account executive as the beneficiary's two direct subordinates. The chart shows a teacher/translator at the bottom of its staffing hierarchy, subordinate to the administrative assistant. The petitioner also provided IRS Forms 1099-Misc issued to individuals to whom wages were paid in 2012. The record shows that the petitioner paid \$10,011 and \$4,855 to its sales account executive and its administrative assistant, respectively, in 2012. The record further shows that the petitioner issued additional Form 1099-Misc to three other employees – [redacted] who was compensated \$1,143.25, [redacted] who was compensated \$610, and [redacted] who was compensated \$1,680 – in 2012. However, as these individuals were not included in the petitioner's organizational chart, nor was any additional information provided with regard to these three employees, it is unclear what job titles they possessed or what job duties they performed. Furthermore, we note that the petitioner also failed to provide job descriptions or disclose the educational levels for either of the beneficiary's subordinates, despite the fact that this information was expressly requested in the RFE. As

previously stated, the petitioner's 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 the present matter, the director denied the petition, citing the petitioner's failure to establish that the beneficiary's job duties fit the criteria of executive capacity as one of the grounds for denial. As previously noted, the petitioner failed to address this issue on appeal. Based on the evidence provided, we concur with the director's decision.

Despite the additional job description the petitioner provided in response to the RFE, a considerable portion of the description is comprised of broad statements – direct the management of the organization, establish goals and policies, exercise discretionary decision-making authority, and act as the petitioner's CEO – which merely paraphrase the statutory criteria for executive capacity. Although the petitioner lists other job duties in the description, these job duties cannot be readily identified as those performed within a qualifying managerial or executive capacity. Without further explanation clarifying the qualifying nature of certain job duties, it cannot be concluded that negotiating contracts, designing and planning language courses, engaging in networking and public relations, and drafting customer agreements are qualifying tasks that would be performed within a qualifying executive capacity as the petitioner asserts. Rather, these job duties indicate that the beneficiary would perform tasks that are necessary to produce a product, i.e. the content for language courses and manuals, or tasks that required to provide services, i.e. drafting and negotiating customer contracts, conducting research to find vendors, and carrying out customer service tasks. Due to the petitioner's failure to allocate specific time constraints to individual tasks, as instructed in the RFE, no conclusion can be made as to the amount of time that the beneficiary would allocate, cumulatively, to these, and possibly other, non-qualifying tasks.

In light of the deficiencies catalogued above, we find that the petitioner has failed to establish that the beneficiary's proposed position meets the statutory definition of the term "executive capacity," which focuses on a person's elevated position within an 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.*

While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the beneficiary has not been shown to be employed in a primarily executive capacity. Despite the petitioner's claims, the petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. While the petitioner claims that the beneficiary is and would continue to be employed as an executive, the petitioner failed to establish that any of the beneficiary's listed job duties fall within the

statutory parameters of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Moreover, in reviewing the evidence within the scope of the statutory definition for managerial capacity, we further conclude that the petitioner fails to meet the statutory criteria. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary's 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 look to see 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).

In the matter at hand, the record shows that the petitioner retained the services of several contract workers in 2012. However, due to the petitioner's failure to provide requested information about the specific services the contract workers provided and the job duties they carried out, we are unable to understand precisely how these contractor workers, whose wages indicate that they were not providing their respective services on a full-time basis, would be able to relieve the beneficiary from having to allocate the primary portion of her time to carrying the petitioner's non-qualifying operational tasks.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive

operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner claims that the beneficiary allocates her time primarily to the performance of qualifying executive tasks. However, the petitioner's limited support staff indicates that the petitioner does not have the organizational complexity to manage the organization or carry out the policies the beneficiary would set in her claimed executive capacity. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As the petitioner has failed to properly define the beneficiary's actual daily job duties or to establish that it has the ability to relieve the beneficiary from having to allocate her time primarily to the petitioner's operational tasks, we find that the record lacks the evidence that is necessary to support the finding that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

D. The Petitioner's Ability to Pay

The final issue to be addressed in this discussion is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage.

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

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

As previously stated, the petition was filed on August 13, 2012. The petitioner is therefore required to establish that it had the ability to pay as of that date. In the August 6, 2012 supporting statement, the petitioner stated that the beneficiary would be compensated a base salary of \$65,000 annual plus commission to be determined at an unspecified time. Based on the commission structure described in the supporting statement, both the foreign office in Mexico and the petitioner's U.S. branch office would be responsible for paying the beneficiary's salary. We note that the proffered wage indicated on the Form I-140 itself is not consistent with the supporting statement, indicating that the beneficiary would be compensated an annual salary of \$60,000.

The petitioner's supporting evidence included a 2011 federal tax return, which shows that no wages were paid in 2011. In response to the director's RFE, the petitioner provided additional evidence, which included the petitioner's U.S. federal tax return for 2012, showing no wages paid, as well as the beneficiary's personal tax returns, IRS Form 1040s, showing that the petitioner's U.S. office paid the beneficiary wages totaling \$7,127 and \$8,415 during the 2011 and 2012 tax years, respectively. The petitioner did not provide an explanation for the inconsistency between its U.S. tax returns – which showed no wages paid in 2011 or 2012 – and the beneficiary's personal tax returns – which indicate that the petitioner's U.S. branch office compensated the beneficiary during both tax years. 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). Here, the petitioner neither acknowledges, nor provides evidence to resolve, the inconsistency created by the various tax returns submitted in support of the petition.

In addition, 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, while the petitioner established that the beneficiary was employed at its U.S.-based office at the time of filing, the record shows that the beneficiary was compensated far below the proffered wage and thus did not provide *prima facie* proof of its ability to pay either through its U.S.-based or its foreign office.

As an alternate means of determining the petitioner's ability to pay, we will also 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.

The petitioner's IRS Form 1120 for calendar year 2012 presents a net taxable income of \$8,822. This information indicates that the petitioner could not pay a proffered wage of \$60,000 or \$65,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, we 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. Net current assets are determined by finding the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2012 tax return shows that the petitioner had negative net current assets totaling \$1,640 during the year in question.

Accordingly, in light of the above analysis of the only financial documents the petitioner submitted in this proceeding, we find that the petitioner failed to provide evidence establishing its ability to pay the beneficiary's proffered wage. Therefore, on the basis of this additional adverse finding, the instant petition cannot be approved.

IV. Conclusion

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, 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.