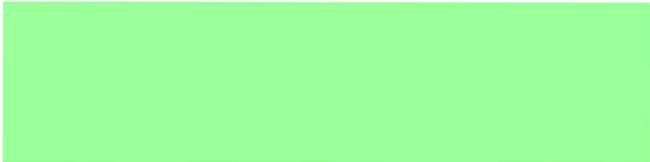




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 11 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:

SELF-REPRESENTED

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

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a Florida corporation engaged in the commercialization, distribution, training programs and technical support of security systems, claims to be a subsidiary of [REDACTED] the beneficiary's former employer in Venezuela. The petitioner seeks to employ the beneficiary in the position of General Manager.

The director denied the petition on March 13, 2013, based on four independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; (2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (3) that it has a qualifying relationship with the beneficiary's foreign employer; and, (4) that it had the ability to pay the beneficiary's proffered wage at the time the Form I-140 was filed.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us for review. On appeal, counsel submits a brief disputing the director's adverse findings. Counsel contends that the director misinterpreted key evidence, thus resulting in an erroneous conclusion regarding the petitioner's eligibility.¹

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

¹ On appeal, the petitioner submits a brief, dated May 10, 2013, from [REDACTED]. The petitioner appears to be represented; however, on May 5, 2014, we received a letter from [REDACTED] stating that he has a pending case of temporary suspension ordered against him and he wishes to withdraw from all cases pending before us. Thus, the current petition will be considered self-represented and furnished only to the petitioner. The entire record was reviewed and considered in rendering this decision.

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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. THE 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 foreign company employed the beneficiary 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.

Finally, 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.

1. Facts

In a letter dated July 19, 2010, the petitioner explained that prior to the beneficiary's transfer to the U.S., he was the President of the foreign subsidiary company since October 2003. The petitioner stated the following regarding the beneficiary's employment abroad:

He was responsible for overseeing and directing the company's business and operations and created policies and procedures aimed at improving the efficiency of the projects of the company. In addition, [the beneficiary] supervised subordinate employees in charge of engineering projects in areas related to security systems; he also supervised procurement activities for the materials required for the projects. He established the company's short and long term goals and carried out periodic evaluations regarding the completion of these goals. He supervised daily operations, made recommendations, and created courses of actions to make necessary improvements if necessary.

The petitioner submitted an organizational chart of the foreign company that indicated stock holders, board of directors, and the general manager, who in turn supervises the sales and operation manager, who in turn supervises the operation assistants and the technical supervisor, who in turn supervises full time independent contractors. The general manager also supervises the administration manager, who in turn supervises the administration assistant. The organizational chart lists the beneficiary as a member of the board of directors and as general manager.

The director denied the petition, in part, concluding the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary primarily did on a day-to-day basis. The director also noted that the petitioner did not provide a job description for the beneficiary's subordinates. In addition, the director noted inconsistent information in the organizational structure of the foreign company as stated in the current petition and in an I-140 petition previously submitted by the same petitioner on behalf of the beneficiary.

2. Analysis

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In the present matter, an analysis of the record does not lead to affirmative conclusion that the beneficiary was employed abroad in a qualifying managerial or executive capacity. With regard to the foreign position, the petitioner provided a description of the beneficiary's job duties, which included broadly stated job responsibilities, and did not provide a percentage breakdown for each duty. Due to the overly general information included in the job description, we are unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The beneficiary's job description is deficient in that it fails to provide credible and detailed information about the actual tasks the beneficiary performed when working with the foreign company. Namely, the petitioner failed to establish what specific tasks the beneficiary performed while he was "responsible for overseeing and directing the company's business and operations and created policies and procedures aimed at improving the efficiency of the projects of the company;" "established the company's short and long term goals and carried out periodic evaluations regarding the completion of these goals;" and, "supervised daily operations, made recommendations, and created courses of actions to make necessary improvements if necessary." The petitioner did not define the petitioner's goals and policies, or clarify the role of the general manager. 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. at 1108. The petitioner's description of the beneficiary's position does not identify the actual duties performed, such that they could be classified as managerial or executive in nature.

Although the petitioner submitted an organizational chart of the foreign company, the petitioner did not submit a job description for the employees of the company. Thus, it is not clear if the subordinate employees would relieve the beneficiary from performing operational 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)).

The director also noted several inconsistencies between the foreign company's organizational chart submitted with this petition and organizational charts submitted in prior I-140 filings by the petitioner on behalf of the beneficiary. For example, a previous organizational chart listed several employees as independent contractors but in the current chart they are listed as Operation Assistants. The director also noted that the beneficiary overlapped in employment with the petitioner and the foreign company for several years and it was unclear how the beneficiary could work for both companies at the same time.

On appeal, counsel contends that the important information is that "ALL company charts or other evidence indicate that the applicant was in fact the Chief Executive." Counsel also stated that the independent contractors that were later listed as Operation Assistants "makes no difference" since "either way such persons can count as persons supervised by the beneficiary." We disagree with

counsel because inconsistent information may doubt cast of the petitioner's proof. 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). Counsel did not provide sufficient information on appeal to overcome the director's concerns in his denial decision.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary performed. The petitioner failed to provide a breakdown of the percentage of time the beneficiary spent on various duties, and the petitioner has not articulated a list of duties performed by the beneficiary and whether each duty is managerial or executive. In addition, the petitioner did not provide sufficient evidence regarding the inconsistent evidence of the foreign company's organizational structure. For these reasons, the appeal will be dismissed.

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

The next issue to be addressed is whether the petitioner established that it will employ the beneficiary 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.

Finally, 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.

1. Facts

The petitioner has offered the beneficiary the position of General Manager. In a letter dated July 19, 2010, the petitioner described the beneficiary's duties as follows:

As General Manager of [the petitioner], [the beneficiary] has the discretionary power to determine the development and direction of all operative and administrative activities of the business with an emphasis on implementing the operations policies, creation of quality standards and implementation of a total customer service system in order to meet the customers' needs and expectations.

[The beneficiary] is also responsible for overseeing the entire company's operations. Analyze, determine and control the execution of purchases from wholesalers, exporters and distributors to ensure an optimal purchase power and competitive prices. He has the authority to represent the company's shareholders in all banking matters and loan procurements, and represent the company before all authorities and private parties. Control and supervise first line managers' activities in charge of the day-to-day operations of the company. Also, by having established the organizational interests, he monitors the progress of goals and objectives of the Corporation and is permanently updated with information, legislation and policies that impact the business. Moreover, he has the last word in regards to budgeting matters and corporate expense allotment for the different activities.

In addition, [the beneficiary] has the power to hire, fire and promote the company's staff. He also makes necessary changes to company policies based on market

demands and company's capability. Negotiate contracts on behalf of the corporation and deal with suppliers of credits. Finally, he plays a key role for developing the company's long-term goals and objectives for expansion into the U.S.A. and South America.

The petitioner also submitted an organizational chart, dated June 2010, which listed the stock holders, the board of directors and the general manager. The general manager supervises the sales and support manager, who in turn supervises the technical support, training and sales representative, who in turn supervises the "direct sales channels" in 5 countries. The general manager also supervises the administrative manager who in turn supervises the general assistant. The general manager also supervises the external legal advisor and the certified public accountant.

In response to the director's request for evidence, the petitioner explained that the beneficiary supervises two managers, indirectly supervises two other employees holding technical assistant and clerical positions, and "controls and supervises the outsourcing of the legal, accounting, and freight forwarding services." The petitioner provided a brief job description of the two managers directly supervised by the beneficiary, the administrative manager and the sales and technical support manager. The petitioner also provided a list of the beneficiary's duties with the percentage of time he will spend on each duty as follows:

Duties or Responsibilities	% Executed
Establish the company's long-term goals.	12%
Supervise all projected budget-related operations, such as approval of loans and guarantees on behalf of the company, strategically addressing their short and long-term financial needs, identifying and reporting to the Board of Directors on any available or potential new sources of funding for the company.	8%
Creation of the yearly budget for Board's approval.	5%
Supervise all financial matters such as sign loans and checks, as well as control of cash flow.	4%
Evaluate and review the policies and services provided by the company to ensure quality standards and customers' satisfaction.	10%
Overview sales quotas execution and determine the appropriate changes to boost performance.	6%
Review supplier's proposals (delivery time frame, costs, payment options, etc.).	4%
Represent the company before the governmental authorities and private parties, having the authority to negotiate, enter into business agreements and sign them on behalf of the company.	3%
Control and coordination of first line managers in charge of the administrative and operations departments in the company.	7%

Coordinate and schedule work loads and staff retention by exercising discretion over the day-to-day operations and determining any human resources needs.	8%
Provide for selection, training, development, and work evaluation of staff; as well as company's policy compliance.	3%
Monitor and assess employee performance as well as have the power to hire, promote, dismiss or take any other personnel action.	3%
Continuously monitor the productivity of the employees not only to ensure optimal output, but also to create new procedures or re-organize existing processes, to lead them in new challenging directions; such as actively seeking to expand the client database in order to meet revenue targets.	9%
Develop initiatives and strategies intended to increase customer retention, as well as attract potential new accounts.	8%
Oversee the development and implementation of strategic plans aimed at increasing profitability and process efficiency.	10%
Total % of Execution	100%

The petitioner also submitted an updated organizational chart, dated October 2010, which indicated the stock holders, the board of directors and the general manager. The general manager supervises the sales and support manager, who in turn supervises the technical support and sales representative, who in turn supervises the "direct sales channels." The general manager also supervises the administrative manager, who in turn supervises the general assistant. The general manager also supervises the external legal advisor and the certified public accountant. This second organizational chart differs from the previously submitted chart because this new chart no longer has the sales representative position, and the person that held the position of sales representative in the prior chart now holds the position of general assistant.

Finally, the petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first, second and fourth quarters of 2010 which indicates that it employs 5 or 6 employees.

The director denied the petition, in part, concluding the petitioner failed to establish that the beneficiary would be employed by the petitioner in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner provided an overly broad job description that failed to convey an understanding of what the beneficiary will primarily do on a day-to-day basis. In addition, the director noted inconsistent information in the organizational structure of the petitioner in the current petition and another I-140 petition previously submitted by the same petitioner on behalf of the beneficiary.

On appeal, counsel contends that the petitioner provided a "highly detailed description of duties." Counsel also explained that the change in the organizational chart is a reassignment within an organization.

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 proposed 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). The AAO 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 petitioner's subordinate staff, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioning entity. 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 petitioning entity must be able to provide sufficient evidence showing that it has the capability of maintaining its daily operations such that the beneficiary would be relieved from having to primarily perform the operational tasks.

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

Looking to the job description the petitioner provided in response to the RFE, we observe that the petitioner assigned a percentage breakdown to groups of actions rather than to individual tasks. For instance, the beneficiary will "establish the company's long-term goals;" "supervise all financial matters;" and, "evaluate and review the policies and services provided by the company." The petitioner did not, however, define the petitioner's goals and policies, or clarify the financial responsibilities and goals of the organization. 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 her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will "represent the company before the governmental authorities and private parties, having the authority to negotiate, enter into business agreements and sign them on behalf of the company;" "develop initiatives and strategies intended to increase customer retention, as well as attract potential new accounts." It appears that the beneficiary will be in charge of market research, marketing, and negotiation rather than directing such activities through subordinate employees. 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. at 604.

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive.

While the AAO acknowledges that 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 will perform are 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'r 1988).

The director noted in his decision several discrepancies between the organizational chart submitted when the petition was filed and from an organizational chart submitted in response to the RFE. On appeal, counsel for the petitioner explained the changes in the organizational charts and provided sufficient evidence to overcome the director's concerns.

In light of the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity and on the basis of this second adverse conclusion, this petition cannot be approved.

C. Qualifying Relationship

The next issue to be addressed in this proceeding is whether the petitioner established a qualifying relationship with the entity where the beneficiary was employed abroad. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the present matter, the petitioner claims to be a subsidiary of [REDACTED], where the beneficiary was employed prior to coming to the United States to work for the petitioner. This claim is based on the assertion that the foreign company owns 80% of shares of the U.S. petitioner. The petitioner submitted two stock certificates for the U.S. company. The first stock certificate is numbered 2 and it certifies that the foreign company owns 80 percent of the petitioner's shares. The second certificate is numbered 3 and it certifies that [REDACTED] owns 20 percent of the petitioner's shares.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner submitted stock certificates, numbered 2 and 3, but did not submit stock certificate numbered 1. Thus, the petitioner did not submit all the relevant information necessary to determine

ownership. In addition, as noted above, the two stock certificates are not sufficient evidence to establish a qualifying relationship between the petitioner and the foreign company.

Moreover, the director determined that the petitioner provided information on Schedule K of its 2009 IRS Form 1120, U.S. Corporation Income Tax Return, that is not consistent with the petitioner's claimed ownership. Specifically, the director pointed out that the petitioner marked the box for "no" in response to no. 3, no. 4a of IRS Form 1120, Schedule K, which asks the petitioner to indicate whether an individual or estate owns directly 20% or more of its voting class stock, or owns directly or indirectly 50% or more of its voting class stock. The director determined that by responding "no" to this query the petitioner contradicted the information provided in its share certificate, which names the foreign company as the owner of 80 percent of the issued shares of the petitioner's stock. In addition, in question number 10, asking for the number of shareholders, the petitioner indicated one even though the stock certificates submitted by the petitioner indicated two shareholders. On appeal, counsel did not discuss this issues at all, thus, counsel did not provide evidence to overcome the director's concerns.

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). Given that ownership of the petitioning entity is germane to establishing the existence of an affiliate relationship between the petitioner and the beneficiary's employer abroad, the petitioner's failure to provide consistent and reliable evidence to identify its owner(s) precludes us from concluding that the petitioning U.S. employer and the beneficiary's employer abroad are commonly owned and controlled. See *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In light of this unresolved inconsistency, the petitioner has not established that it maintains the requisite qualifying relationship with the beneficiary's foreign employer and on the basis of this initial adverse conclusion the instant petition cannot be approved.

D. Ability to Pay

The final topic to be addressed in this discussion is the petitioner's ability to pay the beneficiary's proffered wage.

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

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.

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.

The petitioner has offered the beneficiary a wage of \$48,000 per year. As the petition was filed on August 20, 2010, the petitioner must establish its ability to pay the beneficiary the proffered wages as of this date.

The petitioner submitted Form W-2 for 2010 that stated the beneficiary received an annual salary of \$44,000.

On appeal, counsel for the petitioner stated that the "beneficiary received a benefit in the form of paid medical insurance in the amount of \$4,400." In addition, counsel stated that the "beneficiary took a total of one month's unpaid vacation during the pertinent time period." However, the petitioner did not submit any documentation evidencing that the beneficiary took a one month unpaid vacation in 2010. In addition, the petitioner did not submit documentation evidencing the claimed medical insurance. 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)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that 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 the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The current petition was filed on August 20, 2010. As of that date, the petitioner’s 2009 federal income tax return is the most recent return available. The petitioner’s tax returns stated its net income as detailed in the table below.

In 2009, the petitioner’s IRS Form 1120S stated net income of \$-7,564.

Therefore, for the year 2009, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$48,000 or the difference between the wages actually paid to the beneficiary and the proffered wage which would be \$4,000.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.² The petitioner’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 the petitioner’s end-of-year net current assets and the wages

² According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 tax returns stated its net current assets as \$34,534 and its liabilities as \$2,068. Thus, the net current assets were \$32,466. Therefore, at the time the current petition was filed, the petitioner established that it had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage which would be \$4000.

The evidence submitted established that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Thus, we will withdraw this portion of the decision.

III. CONCLUSION

The petition will be denied and the appeal dismissed 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.