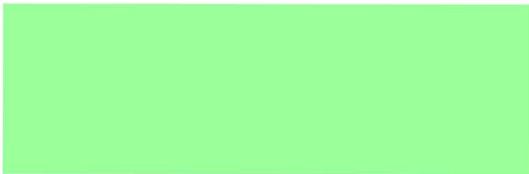




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 25 2014** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Texas Service Center Director denied the employment-based immigrant visa petition, which 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 Texas corporation, is engaged in the import and distribution of hunting and fitness products, and claims to be a subsidiary of [REDACTED] the beneficiary's former employer in China. The petitioner seeks to employ the beneficiary in the position of General Manager and Director.

The director denied the petition on January 31, 2014, based on five independent and alternative grounds, concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (3) that the foreign entity is doing business abroad; (4) that the petitioner is actually doing business in the United States; and, (5) 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.

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.

Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been doing business for at least one year. In turn, 8 C.F.R. § 204.5(j)(2) provides that "[d]oing business means 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."

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. Qualifying Relationship

The first 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 98% of shares of the U.S. petitioner. The petitioner submitted two stock certificates for the U.S. company. The first stock certificate is numbered 00001 and it certifies that the foreign company owns 98 percent of the petitioner's shares. The second certificate is numbered 00002 and it certifies that [REDACTED] owns 2 percent of the petitioner's shares.

Moreover, the director determined that the petitioner provided information on Schedule K of its 2012 IRS Form 1120, U.S. Corporation Income Tax Return, which is inconsistent with the petitioner's claimed ownership. In Schedule G, under Part II where it requests information of individuals owning the corporation's voting stocks, [the beneficiary] is listed as the owner of 100 percent of the voting stock. Moreover, Form 5472 of the Form 1120 states that [the beneficiary] is listed as the 25% foreign shareholder.

On appeal, counsel for the petitioner asserts that the Certificate of Formation states that the petitioner is authorized to issue a total of 100 shares and thus, this establishes the claim that the foreign entity is a majority owner of the petitioner. Also on appeal, counsel submits a copy of the petitioner's amended 2012 tax returns listing the foreign entity as the owner of 98 percent of the petitioner's stock, and [REDACTED] as the owner of 2 percent of the petitioner's stock. The petitioner did not

provide any explanation as to why the first tax documents contained incorrect information of the petitioner's ownership. In addition, the petitioner did not provide any evidence to show that the amended tax return was properly filed with the Internal Revenue Services. 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)).

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).

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.

In the current case, the petitioner submitted two stock certificates and the petitioner's certificate of formation. 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 has not established that it maintains the requisite qualifying relationship with the beneficiary's foreign employer and thus, 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.

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 and Director. In a letter dated June 4, 2013, the petitioner described the beneficiary's duties as follows:

- Managing the operations of the company;
- Presiding over and providing management for the company and operations;
- Leading company strategic development in the U.S. based on the partnership agreements with [REDACTED]
- Recruiting and training staff;
- Deciding the marketing niche and leading sales development;
- Meeting and negotiating contracts with existing and potential customers; and
- In charge of overall administrative management including daily supervision of company operation, developing and modifying as needed a budget that is consistent with operational and strategic planning, and monitoring employee performance and designing methods of incentives, etc.

The petitioner also explained that "during the first six months of operation in 2012, we hired three full-time employees (one Sales Manager, one Finance/ Sales Coordinator, and one Clerical and Administrative Assistant) and one part-time order entry person in the U.S."

The petitioner submitted an organizational chart which listed the beneficiary as General Manager and Director who supervises one sales coordinator, one order entry employee, one executive assistant and one board member. The chart also indicated that the petitioner own 55% of [REDACTED] and 33% of [REDACTED]. The petitioner submitted Forms W-2 for three individuals: the sales coordinator, the board member and the executive assistant.

The petitioner submitted Form 941, Employer's Quarterly Federal Tax Return, for the second and third quarters of 2013 that indicated the petitioner employed three individuals. The Form I-140 was filed on June 5, 2013, thus according to the Form 941 submitted by the petitioner, the petitioner employed three individuals at the time of filing.

In response to the director's request for evidence, the petitioner provided a percentage break down for each duty the beneficiary will perform in the proffered position as follows:

- Managing the operations of the company; (15%);
- Presiding over and providing management for the company and operations (15%);
- Leading company strategic development in the U.S. based on the partnership agreements with [REDACTED] (10%);
- Recruiting and training staff (5%);
- Deciding the marketing niche and leading sales development (5%);
- Meeting and negotiating contracts with existing and potential customers (5%);
- In charge of overall administrative management including daily supervision of company operation, developing and modifying as needed a budget that is consistent with operational and strategic planning, and monitoring employee performance and designing methods of incentives, etc. (15%); and
- Managing the operations of [REDACTED] (30%).

The petitioner also explained that the petitioner "was established in an effort to expand sales and business opportunity in the U.S. from [REDACTED] base manufacturing operation located in Taishan, China." The parent company "primarily produces items made of aluminum and steel such as hunting tree stands and small exercise fitness and specialty items." The petitioner also explained that the beneficiary invested in two companies that are now a joint venture with the petitioner. The petitioner stated that the petitioner's employees in 2012 included a sales coordinator, a director, an executive assistant and an internet sales employee. The petitioner also explained that in 2013 it hired additional employees, including two sales employees and a new product development manager. The petitioner provided a one sentence explanation of the duties performed by each employee.

On appeal, counsel contends that the "Service failed to notice that the petitioner had hired 3 additional employees in 2013 and that the beneficiary would spend 30% of his time managing the operation of [REDACTED] with a staff of approximately 100 employees." On appeal, counsel for the petitioner submits Forms W-2 for six 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.

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 is responsible for "managing the operations of the company," "presiding over and providing management for the company and operations," and "managing the operations of [REDACTED]". 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 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 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 is responsible for "leading company strategic development in the U.S. based on the partnership agreements with [REDACTED]" "deciding the marketing niche and leading sales development," and, "meeting and negotiating contracts with existing and potential customers." 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.

Furthermore, only in response to the director's request for evidence does the petitioner state that the beneficiary will spend 30 percent of his time managing the operations of the foreign entity. In addition, on appeal, counsel for the petitioner contends that the beneficiary will manage 100 employees that are located at the foreign entity. In the initial filing, the petitioner never mentioned that the beneficiary will spend 30 percent of his time managing the operations of the foreign entity and its employees. In addition, the petitioner did not provide any explanation of what is entailed in

managing the operations of the foreign entity. 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 purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

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).

In addition, at the time of filing the Form I-140, the petitioner employed a director, an executive assistant and a sales coordinator. As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, at 165.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

In the current case, the petitioner did not explain which employee would handle customer service, shipping and ordering, marketing, budgeting, accounting, inventory and customs operations. It is not clear how a board member, sales coordinator and executive assistant would provide all of these functions.

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. Foreign Entity Doing Business

Third, the director denied the petitioner concluding that the record lacks evidence to establish that the foreign entity is doing business abroad. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In regards to the foreign entity, the petitioner provided a business license, dated January 6, 2011, and a tax return for the foreign entity, dated January 11, 2011. In response to the director's request for evidence, the petitioner submitted the payroll for the foreign entity, dated September 30, 2013, an electricity bill dated October 2013, and, a water bill dated October 2013. On appeal, the petitioner submitted the payroll for the foreign entity, dated January 31, 2014.

The record provided sufficient evidence to establish that the foreign entity is still doing business, and we will withdraw this portion of the director's decision.

D. The Petitioner Doing Business

Fourth, the director denied the petitioner concluding that the record lacks evidence to establish that the petitioner is doing business in the U.S. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "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." The director noted that "business transactions involving its affiliate companies are not indicative of business transactions between the petitioner and a third party."

The director's finding that the petitioner did not submit evidence of doing business with "independent corporations or entities" implies a requirement that a petitioner must transact directly

with an unaffiliated third party. However, the definition of "doing business" at 8 C.F.R. § 204.5(j)(2) contains no requirement that a petitioner for a multinational manager or executive must provide goods and/or services to an unaffiliated third party. Neither the plain language nor the regulatory history of the "doing business" provision supports such a requirement.

Here, the petitioner has provided sufficient evidence to establish that it is doing business. For example, the petitioner provided several invoices; bank statements; Form 1120, U.S. Corporation Income Tax Return for 2012; Form W-2 for 2012 and 2013; and, Form 941, Quarterly Employer's Quarterly Federal Tax Returns for the second and third quarters of 2013. The petitioner provided sufficient evidence to establish that it is still doing business, and we will withdraw this portion of the director's decision.

E. 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 \$120,000 per year. As the petition was filed on June 5, 2013, the petitioner must establish its ability to pay the beneficiary the proffered wages as of this date. The petitioner did not submit any evidence to establish that the beneficiary received an annual salary of \$120,000 at the time of filing or after, such as paystubs or Form W-2 to indicate the salary received by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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).

The current petition was filed on June 5, 2013. As of that date, the petitioner's 2012 federal income tax return is the most recent return available. The petitioner's IRS Form 1120S stated its net income as \$-6,372. Therefore, for the year 2012, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$120,000.

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.¹ 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 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 \$35,695 and its liabilities as \$18,067. Thus, the net current assets were \$17,628. Therefore, the petitioner has not established that it had sufficient net current assets to pay the beneficiary's salary of \$120,000.

On appeal, the petitioner provided a statement of asset, liabilities and net worth of the petitioner as of December 31, 2013. According to that statement, the petitioner's net worth as of December 2013 was \$75,319.02, thus, the petitioner did not establish that it has the ability to pay the beneficiary's salary of \$120,000.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

¹ 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.

F. 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.