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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **JAN 08 2015** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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

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,

A handwritten signature in black ink, appearing to read "R. Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Texas Service Center Director (director) denied the preference visa petition and the petitioner’s subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary in the United States as its chief executive. 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 beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (2) the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (3) that the petitioner had the ability to pay the proffered wage at the time the Form I-140 petition was filed.

I. THE LAW

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

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

* * *

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

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

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

In addition, 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. U.S. Employment in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity in the United States.

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's Form I-140, Immigrant Petition for Alien Worker, indicated that the petitioner was engaged in cell phone retail sales, employed three individuals, and grossed an estimated \$213,230.00. The petitioner provides a description of the beneficiary's job on the form's addendum, stating that the beneficiary "will work very closely with the Sales and Marketing Director to establish sales goals and establish relationships with vendors." The description further indicates that the beneficiary will work regularly with managers to ensure the effective operation of the company. The petitioner stated that the beneficiary's primary purpose is to oversee and direct financial operations, and the business expansion, selection of location for retail operations, and oversee the productivity of the other executive staff.

The petitioner described the beneficiary's duties as follows: (1) 30% of his time would be spent staying updated on industry trends and marketing developments while gathering market intelligence and providing feedback to the parent company; (2) 25% of his time would be spent attending meetings with managers regarding budget issues, managing financial issues, monitoring employees work, communicating to supervisors and exercising authority over personnel matters; (3) 25% of his time would be spent serving as marketing consultant to achieve revenue goals, developing new advertising capabilities, building and managing relationships, designing solutions, managing accounts, implementing and executing strategic plans and policies, developing and administering sales goals and objectives, developing budgets, participating in meetings and keeping staff informed, developing strategic planning input and options and overseeing productivity of the sales team; and (4) 20% of his time would be spent managing subordinates by recruiting, training and motivating a leading management team.

The record shows that the petitioner submitted a letter with its Form I-140 that includes a different description of the beneficiary's duties than the one listed on the Form I-140. In this letter, the petitioner said that the beneficiary "guides and directs the Staff in the development, production, promotion, and sales of the shops' products and services." The petitioner stated that the beneficiary would allot at least one hour per day to "non-executive functions" with the rest of his time allocated as follows:

25% of time will be spent:

The Director is responsible for maintaining the standard financial reporting as follows:

All employees/staff are required to use standardized forms to enter refunds given to customers and show credits for mistakes made. These forms always require the Director's approval. This form includes the time, date, amount and the employee's signature.

The General Manager [GM] will serve as the Director in his absence. The Director is responsible to maintain the opening and closing cash, used to make change for the customers, the same all of the time. [sic] They must ensure that the money is counted at opening and closing and is dated and signed by the employee.

All paid-outs are entered on a form with the time, date signature and receipt stapled to it. All paid-outs are deducted from a petty cash fund, not from the daily deposits or cash drawers.

A cash drop is performed at the close of the business day. The Director is responsible for the bank deposits. The G.M. must [maintain:] a log with the amount of the deposit, [and total sales] for the day [with] date, time and signature; and, make a drop into the safe.

The Director maintains the key and safe combination access.

The Director is responsible to have written standard cash register procedures. The register has a cumulative register reading. The receptionist/cashier is required to incorporate this reading into the daily sales report. All sales are always rung up at time of the transaction and a service receipt is always offered to the customer.

The GM must do a Z reading¹ each day to clear the register of the previous day's sales. This reading is required to be attached to the daily cash report.

The GM will submit the daily financial reports to the Director and she reviews these reports for accuracy. These reports are vital to establish lines of credit with vendors, banks and other financial institutions which provide funding for future growth.

25% of time is spent:

The Director has mandated weekly meetings with the G.M. to collaboratively produce the following business reports:

- Sales reports
- Cash flow reports
- Reconciliation of financial variances, gains or losses
- Bank reconciliation
- Inventory Control
- Contractual Agreements w/vendors
- Financial agreements with banks and various other lenders
- Inventory control
- Loss prevention
- Advertising & Marketing events
- Employee retention, review, hiring or dismissing employees
- Initiating new product line
- Future plans for growth and development of the business

The President/Director² makes all final decisions on financial reporting, staffing, advertising, brand marketing, and all contractual agreements. The President's signature is required on any check written to maintain financial control of the spending.

25% of time is spent:

- Manages product category and produces marketing programs that leverage consumer insights to create strategically aligned sales growth

¹ A "Z" reading is a tally of sales from the first sale ever rung up on the register when it was just taken out of the box.

² The petitioner refers to the beneficiary's position as both president and/or director.

- Develops and builds product-level expertise through industry and competitive trend analysis and by analyzing program impact.
- Identifies growth opportunities within product lines by understanding consumer wants, needs and beliefs.
- Develops product-focused programs to create growth supported by a compelling business case, including sales and profit forecasts that create top-line growth and franchise profitability.

15% of time is spent:

- Responsible for developing strategic brief for merchandising materials, and promotions of the business.
- Manages miscellaneous marketing projects.

10% of time is spent:

- Evaluating recommendations for promotions and PR activities for product programs.
- Effectively evaluates the staffing levels for the operation to achieve objectives for labor efficiency.
- Oversees the personnel/HR issues including: hiring, reviews, recognition, disciplinary, attendance, and grievance.

The petitioner stated that the beneficiary relied upon financial reports to make executive decisions and that he is accountable to the foreign entity's president.

The director issued a request for evidence (RFE) instructing the petitioner to provide further evidence that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director requested the beneficiary's detailed daily duties and a list of all employees who would report directly to the beneficiary along with their job title, duty description, educational level and status as part-time or full-time employees. The director also requested copies of the company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarter of 2012 and the first three quarters of 2013.

The petitioner responded with a letter, dated December 23, 2013, stating that the beneficiary is "responsible for all operations and decisions of the Joint Venture and will be compensated for providing various services." Regarding its employees, the petitioner stated that the beneficiary initially only hired contract workers in 2012. The petitioner stated that in 2013 it hired three employees and continued to use contract labor "during peak seasons." The petitioner stated that the beneficiary and his wife co-own the petitioning entity and will "take financial draws from the company. They will not establish themselves as employees of the business."

The petitioner provided a "proposed organizational chart" for 2013 depicting the beneficiary as the petitioner's president. The chart depicts the beneficiary's wife, [REDACTED] as the general manager (GM), reporting

directly to the beneficiary. Supervisor, [REDACTED] supervises two named sales employees and reports directly to the GM. The petitioner claimed three employees on its IRS tax forms for the first and second quarters of 2013. The petitioner's 2013 Texas employer quarterly report for 2013 indicates that the petitioner paid wages to two employees at the time this petition was filed.

The director denied the petition, finding that the beneficiary's duty description failed to adequately describe what the beneficiary did on a daily basis, or indicate that he had sufficient staff to carry out operational duties.

The petitioner filed a motion asking the director to reopen and reconsider his decision. The petitioner provided an explanation and a 12 point bullet list of additional qualifying and non-qualifying duties to be performed by the beneficiary. The director determined that the motion did not meet the requirements of a motion to reopen or reconsider.

On appeal, the petitioner asserts that the director failed to consider that the beneficiary's wife, as general manager, would oversee the daily operations, relieving the beneficiary from primarily performing non-qualifying duties. The petitioner also asserts that the director failed to consider the beneficiary's vital fiduciary responsibilities.

2. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

We note that the petitioner initially provided two different duty descriptions for the beneficiary each including different allocations of time and different duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Each of the beneficiary's duty descriptions indicate that he will be involved in a number of day-to-day operational activities that do not typically qualify as managerial or executive. For example, one description indicates that the beneficiary will ensure that employees respond promptly to corporate requests for information, develop new advertising capabilities, analyze data, implement plans, and train the management team. The other description indicates that the beneficiary would spend at least one hour each day on non-qualifying duties and he would make daily bank deposits, maintain keys and safe access, make all final decisions on financial reporting, advertising, brand marketing, and develop and build product level expertise. Non-qualifying tasks such as these are included in both descriptions and it cannot be determined how much time the beneficiary will spend engaged in them. Based on the current record, we are unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. Although the petitioner provided the percentage of time per week the beneficiary spends on duties, as mentioned above, the duties are described in broad terms that potentially include both qualifying and non-qualifying duties. A single percentage of time given to vague a description that includes qualifying and non-qualifying activities is insufficient to establish how the beneficiary spends the majority of his time. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). While performing non-qualifying tasks necessary to produce a product or provide a service will not automatically disqualify the beneficiary, as long as those tasks are not the majority of the beneficiary's duties; the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; see also *Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008).

Many of the beneficiary's proposed duties are described in broad terms potentially encompassing both qualifying and non-qualifying daily activities. For example, the petitioner states that the beneficiary's duties include: manages product category and produces marketing programs, develops product focused programs to create growth, manages miscellaneous marketing projects, and meets with the GM to collaboratively produce a variety of business reports. These vague descriptions fail to explain the beneficiary's daily duties and activities with enough specificity to determine whether the activities qualify as managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724

F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

The petitioner failed to resolve inconsistencies regarding its employees or provide sufficient evidence to establish who it employed at the time this petitioner was filed. The petitioner initially claimed to have three employees at the time the petitioner was filed but then provided evidence to show that it had two employees. 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* at 582. The petitioner provided insufficient evidence to show that it employed additional workers and it did not reconcile its staffing with the "proposed" organizational chart submitted in support of the petition. Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." We have long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, 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. 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 Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

On appeal, the petitioner reiterated points made on motion including the assertion that the beneficiary had additional duties not previously assigned. However, these additional duties primarily focus on the beneficiary's role performing non-qualifying tasks such as accounting, record maintenance, billing, handling taxes, attending trade shows, selling products and performing buyer duties.

Accordingly, the appeal will be dismissed, as the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act.

B. Employment Abroad in a Managerial or Executive Capacity

The second issue is whether the evidence establishes the beneficiary's employment abroad was in a qualifying managerial or executive capacity.

1. Facts

Having provided no evidence relating to the beneficiary's employment abroad, the director's RFE instructed the petitioner to provide the same evidence relating to the beneficiary's duties abroad as requested for the beneficiary's proposed duties in the United States. The petitioner responded with a letter dated December 20, 2013 from the foreign entity, [REDACTED] describing the beneficiary as its vice president who mandated monthly meetings with his account manager and sales manager, met with the president to review all financial reports, and made final decisions on staffing, advertising, brand marketing, and all contractual agreements. The letter also indicated that the beneficiary allocated 5% of his time to employee performance evaluation matters and 25% of his time to meetings with the foreign entity's president. Another 50% of the beneficiary's time was allocated to "strategies" which included tasks such as developing and implementing programs to ensure quality customer service; establishing and maintaining customer relations and monitoring performance on operational and customer service metrics. The remaining 20% of the beneficiary's time was allocated to meeting with managers, a category that included overseeing staff budgetary reports, administering company policies, ensuring consistent application of company policies to promote team problem solving, application of best management practices, planning and directing state-wide work assignments, and assisting with employee development.

Among other documents, the petitioner included the foreign entity's organizational chart depicting a sales manager and an accounting manager who directly reported to the beneficiary in his role as vice president.

The director denied the petition finding that the beneficiary's duties were vague and failed to sufficiently establish that the beneficiary had been employed abroad in a primarily managerial or executive capacity.

2. Analysis

In general, when examining the executive or managerial capacity of a given position, we review the totality of the record, starting first with the description of the beneficiary's job duties for the position in question. See 8 C.F.R. § 204.5(j)(5). Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In this matter, the petitioner has provided a job description that fails to list the specific daily tasks the beneficiary performed during his employment abroad. Instead, the job description included the beneficiary's responsibility to "collaboratively produce" 13 different monthly business reports and to sign every check written over \$300.00 in order "to maintain financial control of the spending." In addition, 95% of the beneficiary's time was allocated to categories of duties that included both qualifying and non-qualifying duties. While the petitioner claimed that the beneficiary was ultimately responsible for the organization and thus had the discretionary authority to determine how the organization would be run, the petitioner failed to describe the beneficiary's job duties in his former position abroad with any degree of specificity, thus providing no real insight as to the proportion of the beneficiary's time that was spent performing qualifying executive tasks versus non-qualifying tasks. 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 in his former position abroad 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).

Here, the petitioner failed to provide a detailed description of the actual job duties the beneficiary performed on a daily basis or to establish what portion of the beneficiary's time was allocated to non-qualifying tasks. Despite the foreign entity's organizational chart depicting the beneficiary near the top of the company's organizational hierarchy, the record does not support the claim that the beneficiary's time was primarily allocated to tasks within a qualifying managerial or executive capacity. The petitioner did not address this matter on appeal.

We find that the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity therefore, for this additional reason this petition cannot be approved.

C. Ability to Pay the Proffered Wage

The next issue addressed by the director is whether the petitioner established its ability to pay to the beneficiary a proffered wage of \$32,000 per year.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner indicated on the Form I-140 that it had an estimated gross annual income of \$213,230 and an estimated net annual income of \$141,350. The director requested additional evidence from the petitioner to demonstrate its ability to pay the proffered wage. The petitioner provided bank statements, quarterly wage reports, and unaudited financial statements for 2013.

The director determined that the petitioner did not establish its ability to pay the beneficiary's proffered wage of \$32,000 per year as of the August 29, 2013 priority date. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, we will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In this matter, we find that the petitioner did not establish that the beneficiary was paid the proffered wage. Further, we agree with the director's conclusion that the petitioner's bank statements provide only a snap shot of the petitioner's assets, omit liabilities, and do not sufficiently establish its ability to pay the proffered wage. The petitioner did not submit documents to demonstrate the beneficiary's pay as requested in the director's RFE and 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). Instead, the petitioner explained that the beneficiary and his spouse, as owners, would take "financial draws" from the company but would not establish themselves as employees. Subsequently, the director properly denied the petitioner's motion to reopen or reconsider the decision in which the petitioner provided additional bank statements and unaudited financial statements to demonstrate its ability to pay the proffered wage.

On appeal, the petitioner asserts that its financial documentation was prepared by a certified public accountant and that the director erroneously disregarded its financial documentation that demonstrates its ability to pay the proffered wage.

Upon review, the petitioner's assertions are not persuasive. In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time of filing. 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. Here, the petitioner provided no documentation to establish that it was paying a wage equal to or greater than the proffered wage of \$32,000 per year. In fact, the petitioner stated that the beneficiary and his wife would not establish themselves as employees or draw a salary.

As an alternate means of determining the petitioner's ability to pay, we next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As the petition's priority date falls on August 29, 2013, and the petitioner's tax return for 2013 has not been made available, we would examine the petitioner's tax return for 2012, had it been provided. The petitioner failed to submit its tax return for 2013 or 2012, so it failed to show it had sufficient net income or net current assets to pay the proffered wage.

The petitioner asserts that consideration should be given to other documentation provided, such as unaudited profit and loss statements and bank statements. According to the regulation at 8 C.F.R. § 204.5(g)(2), evidence of the employer's ability to pay shall be either in the form of copies of annual reports, federal tax returns or audited financial statements. The petitioner failed to submit acceptable evidence of its ability to pay the proffered wage; therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date/filing date. Accordingly, the appeal will be dismissed.

III. BEYOND THE DIRECTOR'S DECISION

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the instant petition. The petitioner submitted some documentation to indicate that it was engaged in business; however, the petitioner stated in its August 5, 2013 letter in support of this petition that: "[t]he actual sales and services for the business didn't begin until the year end of 2012." Based on the petitioner's own assertion, it has not been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for at least one year as of its filing on August 29, 2013. For this additional reason the petition may not be approved.

IV. CONCLUSION

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

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

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

ORDER: The appeal is dismissed.