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

(b)(6)

DATE: JUN 0 5 2015

FILE #:
PETITION RECEIPT #:

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:

NO REPRESENTATIVE OF RECORD

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner, a provider of shipping and receiving services, seeks to employ the beneficiary in the United States as its president. The petitioner filed Form I-140, Immigrant Petition for Alien Worker, seeking to classify the beneficiary as an employment-based immigrant under 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 had not established that the beneficiary's duties have been, or will be, primarily managerial or executive in nature.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner submits a statement, seeking to address the stated grounds for denial. The petitioner attributes the denial to "discrimination against a small business owner."

I. 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 the alien 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 only to those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, 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 letter must clearly describe the duties to be performed by the alien.

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

(A) 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.

(B) 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.

II. Issue on Appeal

A. Managerial or Executive Capacity

The two primary issues addressed by the director are whether the petitioner established that it had employed or would employ the beneficiary in a primarily managerial or executive capacity.

1. Facts

The petitioner filed the Form I-140 petition on October 25, 2013. In an introductory statement, the petitioner indicated that the petitioning United States employer is a wholly-owned subsidiary of a similarly-named corporation in Canada, which the beneficiary owns. He incorporated both entities in .

In support of the petition, the petitioner provided a job offer letter which described the beneficiary's U.S. duties under the heading "Executive Duties":

> [The beneficiary] functions at an executive level, setting the company strategy, developing policies and overseeing the company's financial systems. [The beneficiary] approves expenditures; oversees and approves the Budget; approves and reviews the Monthly Profit and Loss. [The beneficiary] manages the company regulatory compliance, oversees and assures compliance with the tax and industrial safety and fair employment regulators. He determines the parameters for and approves the company's contractual obligations. The president also sets the policies and is the approving authority for the company's human resources, employment, and personnel function, and is the approving authority for company hires and fires. The beneficiary also sets the policies and is the approving authority for the company's operational standards. [The beneficiary] reviews and approves all company policy and standard operating procedures for the cross border freight handling and brokerage services divisions. [The beneficiary] has been the appointed president of [the petitioner and its Canadian parent company] since inception, and has had 100% control of the operations. . . .
>
> Weighted time:
>
> - Establish policy, protocols, administrative standards for quality assurance, phasing of projects, new business development, financial cost analysis, and final management review and approval – 30%

- Formulate and oversee implementation of short and long range goals of the company's development plan 15%
- Formulate Personnel Policies and execute hiring, firing final authority. 15%
- Oversight and review of monthly profit statement 5%
- Formulate administrative standards and execute final decisional authority for investment decisions. 15%
- End stage contract negotiations, subcontracting, and final approvals 20%

The petitioner did not specify whether the above job description applies to the beneficiary's position abroad or in the United States. It appears to apply to both positions; the petitioner asserts that the beneficiary held the same title in both countries.

The petitioner submitted organizational charts for the Canadian and U.S. entities. In Canada, the beneficiary serves as president and as one of two office managers (the other is his spouse). Immediately below the two office managers are four positions, labeled "Retail Manager," "Book Keeper," "Marketing" and "Cross-Border Manager." The retail manager supervises two retail associates, and the cross-border manager supervises two drivers.

The organizational chart for the petitioning U.S. entity shows three levels. The top level consists of the beneficiary, as president, and his spouse, as secretary and treasurer. At the middle level is a general manager, who supervises a bookkeeper and two retail associates.

Finally, the petitioner submitted copies of its Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, for 2012. The petitioner paid a total of 11 employees in 2012, including the beneficiary ($4,583.37), the general manager ($28,476.49), the secretary and treasurer ($4,583.37), two retail associates ($1,656.40 and $8,579.18, respectively), and the book keeper ($3,145.95), as well as five additional employees not identified on the chart who earned $6,323.00, $4,741.40, $1,783.36, $2,100.00, and $4,825.90, respectively.

The director issued a request for evidence (RFE) on May 23, 2014. The director advised the petitioner that the initial evidence was insufficient to establish that the beneficiary would be employed abroad or will be employed in the U.S. in a qualifying managerial or executive capacity. The director stated that the petitioner had not provided sufficiently detailed job descriptions for the beneficiary's former or current positions. The director instructed the petitioner to submit additional information and evidence in this regard.

In response, in a letter dated August 10, 2014, identified as the "Operations General Manager" of the Canadian parent company, repeated the percentage breakdown submitted with the initial filing, and stated:

> [The beneficiary] has furnished the US operation its strategic direction. He has set the goals and metrics – revenue goals, revenue growth goals, strategic marketing goals, measurement of team member performance, financial performance reviews

> such as income statement reviews for the US subsidiary. [The beneficiary] is in charge of strategic relationships, contracting, and compliance, including US Customs compliance issues which concerns cross-border mail and shipping and receiving services. [The beneficiary] provides supervisory input to all his direct reports on a recurring basis to assure industrial safety compliance, fair employment practices, and to monitor progress in meeting individual goals and corporate strategic goals and sales and revenue goals. [The beneficiary] is also responsible for US tax compliance and regulatory compliance issues and fair employment practice compliance. . . .
>
> We asked [the beneficiary] to produce his work diary for the week including July 15, 2014. . . . [The beneficiary] handled a variety of strategic relationship and compliance issues that week. He met with Federal and State officials about compliance issues. He met with local, business leaders to determine where strategic marketing enlargement opportunities existed for the company, and to determine what realistic metrics could be achieved in terms of revenue and sales goals and company strategies for meeting those goals. [The beneficiary] met with Customs and Border Protection agents to become educated about government procedures and compliance issues for the company which concerned customs rules and methods of referral of shipments handled cross border by [the petitioner]. He met with city officials regarding requirements and compliance with City bylaws; attended the city Chamber of Commerce meetings, and conferred with [the petitioner's] general manager regarding staffing; hiring, training and scheduling.

The petitioner indicated that, as of the time of the RFE response, the beneficiary had three subordinate employees at the petitioning company: "General Manager," "Customer Service," and "Shipping & Receiving." An organizational chart matches this description. An organizational chart for the Canadian parent company showed that the general manager supervised "Accounting" with one bookkeeper; "Retail Division" with two "Customer Service" workers; and "Commercial Division" with one driver and two "Import/Export" workers. The petitioner also submitted IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2014, reflecting four employees and wages paid of $24,481.90 and $31,093.77, respectively.

On both the U.S. and Canadian organization charts, the highest-level employee under the beneficiary is the general manager. The petitioner submitted a two-page "General Manager Job Description" relating to the position in Canada. The list of "Principal responsibilities / accountabilities" includes functions such as: "Translates business plans into action plans with appropriately allocated resources required for the achievement of the plan-objectives," "Cascades objectives, plans and targets formulated by the President down to each departmental level of the division," and "Proactively and regularly engages in the study of processes pertaining to project management and asset maintenance to improve the operational efficiency and reduce cost." In contrast, the general manager of the petitioning U.S. entity offered this description of his job on his own résumé: "Manager, responsible for retrieving customer packages, contacting customers when packages arrives [*sic*], shipping packages for customers, unloading freight with a forklift."

The director denied the petition on September 15, 2014, stating that the petitioner had not established that the beneficiary's duties in the U.S. or abroad qualify as managerial or executive. Specifically, the director stated that the petitioner had not adequately described the beneficiary's duties either abroad or in the United States; that the petitioner ascribed some managerial functions and some executive functions to the beneficiary, but did not show that the beneficiary's duties primarily comprised all the required traits of either type of capacity; and that the petitioner had not shown that his subordinate staff consists of professional, managerial, or supervisory personnel.

On appeal, the beneficiary, acting in his capacity as president of the petitioning entity, states that the denial resulted "from a severe application of the 'law' that discriminates against the small business owner," and that the director, in the RFE, did not request job descriptions for the workers at the parent company in Canada.

2. Analysis

Upon review, and for the reasons addressed herein, the petitioner has not established that the beneficiary would be employed in the United States or had been employed abroad 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. § 204.5(j)(5). 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 either in an executive or managerial capacity. *Id.* A detailed job description is crucial, as 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).

The petitioner asserts that, with respect to the description of the beneficiary's duties, "vagueness . . . is the reality of the day" for "a small business." The most detail that the petitioner has provided was in the form of the diary that listed a number of meetings with various third parties. The petitioner submitted no statements or evidence from the parties with whom the beneficiary had met, to establish the nature of those meetings described above. Furthermore, the petitioner did not establish that the activities thus described represented the beneficiary's typical, day-to-day duties. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1108.

Further, the petitioner has acknowledged that the beneficiary works "at times as a line worker." The petitioner has not established how much of the beneficiary's time is allocated to qualifying managerial and executive duties and how much time is allocated to non-qualifying duties associated with the company's day-to-day marketing, sales, shipping, and other functions.

Overall, while many of the duties broadly described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity and the beneficiary's admitted performance of additional non-qualifying duties raise questions as to the beneficiary's actual day-to-day responsibilities, as do the nature of the petitioner's business and the company's staffing levels as of the date of filing. Managing or directing a business does not necessarily establish the beneficiary's eligibility for classification as a multinational manager or executive within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the beneficiary may exercise discretion over the petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to submit a complete and detailed position description sufficient to establish that the beneficiary's actual duties, as of the date of filing, would be primarily managerial or executive in nature.

Beyond the required description of the job duties, USCIS reviews 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 understanding a beneficiary's actual duties and role in a business.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). The petitioner has not established that any of the beneficiary's subordinates work in a professional capacity or possess baccalaureate degrees. The résumés of the general manager and the employee responsible for shipping and receiving do not reflect education beyond high school.

Here, the petitioner has claimed that the beneficiary allocates at least 15% of his time to "formulat[ing] personnel policies and executing hiring, firing final authority," and that he works through a subordinate supervisor, the General Manager, who oversees the company's non-professional staff of two retail associates and a bookkeeper. The general manager's résumé does not reflect job duties consistent with a professional, manager, or supervisor. The general manager described his own duties in terms of performing, rather than overseeing, functions of the organization such as "retrieving customer packages" and "unloading freight with a forklift." Based on the evidence submitted, the beneficiary's subordinate employee is not a professional, manager or supervisor. Therefore, the record indicates that the beneficiary would be directly supervising non-

professional employees and the portion of time allocated to these duties would not be in a qualifying capacity.

On appeal, the petitioner asserts that the company should not be held to the same standard as "a where there is a clear distinction between an executive of the company and a manager over a certain department, division, or branch office." The statute provides only one standard for the immigrant classification that the petitioner seeks on the beneficiary's behalf. The petitioner states that it "is an error in interpretation" to hold it to a standard "that appears to be designed for Multi-national Corporation[s]." The immigration benefit that the petitioner seeks is intended for "multinational executives and managers," a phrase that appears in both the statute and the regulations.

The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. 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.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 178; *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15* (D.D.C. 2001).

The available evidence supports the conclusion that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. We will dismiss the appeal for this reason.

With regard to the beneficiary's job duties for the Canadian entity, the petitioner asserts that the beneficiary maintains executive authority over the Canadian organization. The petitioner offers a

general description of this authority, stating, for example, that the beneficiary "maintain[s] wide latitude in final decisions" and "[r]eceive[s] minimal supervision from the other stockholder of the company." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.), *citing Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1108. 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. 1108.

Year-end pay receipts from the Canadian entity identify a bookkeeper ($29,240); store clerk ($33,945.12); the petitioner's spouse ($49,999.92); delivery driver ($35,802); office manager ($35,802); two sales and billing clerks ($10,928.25 and $24,768, respectively); and a shipping clerk ($16,494). The titles shown on the pay receipts do not all correspond to the organizational chart. The person named as the "Retail Manager" on the organizational chart is called a "Store Clerk" on the pay receipt. The name on the "Office Manager's" pay receipt corresponds to the name of the "Cross-Border Manager" on the organizational chart. The pay receipts identify a "Sales and Billing Clerk" and a "Shipping Clerk" who are not named on the organizational chart, and the chart shows a second driver and a "Marketing" staffer not reflected on the pay receipts.

The petitioner asserts on appeal that "there was nothing in the [RFE] requesting job description of duties performed in [the] Canadian entity." The record does not support this assertion. On page 3 of the RFE, the director stated that the "[p]etitioner failed to provide sufficient position descriptions [showing] that the beneficiary has been or will be employed in a managerial and/or an executive position," and instructed the petitioner to submit "[l]etters from authorized officials of the foreign organization and the [United States] petitioner, clearly describing the beneficiary's actual job duties." The petitioner responded with the letter (discussed above) from identified as the Canadian entity's operations general manager.

Mr. indicated on his résumé that he received a "Business Management Diploma" from ; was a "Business Major" at ; and a "Religious Studies Major" at The petitioner did not show or claim that the Business Management Diploma is a baccalaureate-level degree. Mr. 's résumé shows duties at a higher level than those of his counterpart in the United States, but the description is brief, general, and does not break down the time spent on managerial versus non-managerial functions:

> Overseeing the day-to-day operations of the Canadian branch of [the petitioning company]. Working with owner to set goals and strategy for the company. Overseeing the staff. Hiring and releasing staff as necessary. Responsible for setting marketing goals and ensuring they are met. Working with accountant to ensure that cash flow is maintained along with a healthy balance sheet and income statement.

Mr. 's résumé indicated that he began working for the Canadian entity in July 2012, and also has been the owner of From 2001 to the present. Mr. did not specify which of these ventures occupies more of his time. The Canadian entity's payroll summary for January through November 2012 does not show Mr. 's name. The organizational chart for the Canadian entity, submitted with the initial filing in October 2013, did not identify a general manager or operations general manager. It did, however, include entries marked "Marketing / " and "Driver 2 / " The organizational chart omits most surnames, and therefore it is not clear whether either, or both, of the references to " " on the organizational chart refer to The second organizational chart, submitted in response to the RFE, showed as the general manager and identified no other " " The record, therefore, is inconsistent as to the nature and extent of Mr. 's involvement in the Canadian entity. Because the petitioner's description of the beneficiary's duties rests heavily on the attestations Mr. in his claimed capacity as general manager, these discrepancies diminish the weight afforded to that description. Doubt cast on any aspect of the petitioner's proof may 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 582, 591-92.

For the reasons discussed above, we agree with the director's finding that the petitioner has not established that the beneficiary's duties, both in the United States and abroad, qualify as managerial or executive under the relevant statute and regulations.

III. Additional Issue: Ability to Pay

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[1] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Soneg*awa, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On Form I-140, the petitioner claimed four employees; gross annual income of $125,631.00; and net annual income of $4,827.00. The petitioner also asserted that the beneficiary would receive a salary of $50,000 per year. The petitioner submitted a Form W-2 for the beneficiary indicating he was paid $4,583.37 in 2012, and failed to submit its most recent IRS Form 1120, U.S. Corporation Income Tax Return, preventing us from determining whether its net income and net current assets, when added to the wages paid to the beneficiary, were equal or greater to the proffered wage. Further, the petitioner failed to establish that factors similar to *Soneg*awa existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

IV. Additional Issue: Qualifying Relationship

Also, beyond the decision of the director, the petitioner has not established that a qualifying relationship exists with the beneficiary's employer in Canada. 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); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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 visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity

[1] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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 claims to be a wholly-owned subsidiary of the Canadian entity bearing the same name. The petitioner submitted copies of the Certificate of Incorporation for the Canadian entity, filed with the Province of and the petitioner's Articles of Incorporation, filed with the State of

The name and signature of attorney appear on the articles of incorporation of the Canadian entity, and the February 8, "Company Act Memorandum" states that Mr. took one common share of the entity. The documentation lists no other subscribers who received shares, and does not indicate that Mr. transferred his share to the beneficiary or to anyone else.

A facsimile message from attorney dated July 3, 2008, states: "The Corporation is the only shareholder of the Corporation." The facsimile message includes a reproduction of a share certificate for the petitioning U.S. entity. The certificate, numbered "2," has blank spaces for the owner's name, number of shares held, and date. A copy of a ledger indicates that the Canadian entity holds certificate #1, but the record does not show the certificate itself.

In the RFE, the director stated that the relationship between the petitioner and the Canadian entity was not clear, and that the evidence of common ownership was insufficient. In response, the petitioner stated that the initial submission included "the articles of incorporation . . . with the share registries illustrating ownership." The petitioner resubmitted copies of these materials, with additional documentation.

The petitioner also submitted copies of several documents relating to the Canadian entity. One "Register of Members," and also an "Index of Members," indicated that the beneficiary, his spouse, and two other individuals each held 25 common shares of the Canadian entity. The documents also indicated that Mr. transferred his one common share to the beneficiary.

A copy of an annual report filed with the Province of on February 28, 1985, struck the

names of two of the four named directors, leaving the beneficiary and his spouse as the two remaining directors. Another "Register of Members" reflects this arrangement, stating that the beneficiary and his spouse each own 50 common shares of the company.

The "Register of Members" and a "Register of Allotments" referred to share certificates numbered 1 through 5, but the petitioner did not submit copies of these certificates or explain their absence.

The petitioner has submitted incomplete evidence to establish the beneficiary's ownership of the Canadian entity, and the Canadian entity's ownership of the petitioning U.S. employer. Therefore, the petitioner has not met its burden of proof in this respect.

IV. Conclusion

We will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.