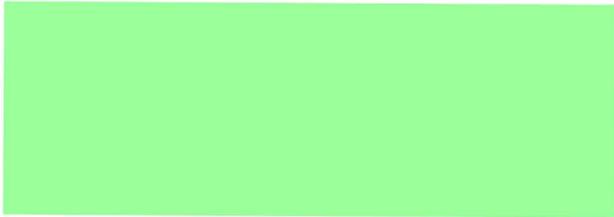


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

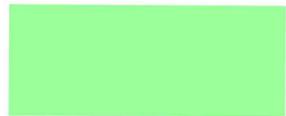


U.S. Citizenship
and Immigration
Services

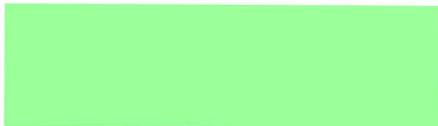


DATE: **JAN 22 2014** OFFICE: NEBRASKA SERVICE CENTER

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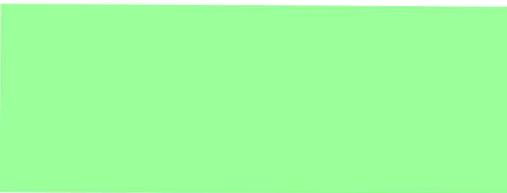


IN RE: Petitioner:
Beneficiary:



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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) subsequently rejected the appeal. The AAO now reopens its original decision *sua sponte*, on Service motion, pursuant to 8 C.F.R. 103.5(a)(5), in order to consider the merits of the petitioner's appeal. The appeal will be dismissed.

The petitioner is incorporated in the State of Nevada and states that it operates an internet services, promotions, and advertising business. The petitioner states that it is an affiliate of [REDACTED] located in the United Kingdom. The petitioner is seeking to employ the beneficiary as its "CRM Manager." 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, finding that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the director "failed to take into account the definition and role of the beneficiary as a 'functional' manager which places more emphasis on management of an essential function rather than size of the company. INA § 101(a)(44)." The petitioner contends that the beneficiary "directs an essential function at a senior level" while subordinate personnel and independent contractors execute the non-managerial duties associated with the function.

I. The Law

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

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

* * *

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

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

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

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

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

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;

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

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

I. The Issues on Appeal

A. U.S. employment in a managerial or executive capacity

The sole issue addressed by the director is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In denying the petition, the director noted that the petitioner claimed only one other employee, and therefore had not demonstrated that the beneficiary would spend a majority of his time performing executive duties. Further, the director concluded that the beneficiary had not established that the beneficiary would manage a subordinate staff of professional, managerial or supervisory personnel as necessary to qualify the beneficiary as a manager as defined by the Act.

On appeal, counsel asserts that the director failed to consider that the beneficiary qualifies as a function manager. Counsel cites non-precedent AAO decisions in which this office concluded the beneficiary in each case qualified as a function manager. Counsel states that the beneficiary directs an essential function, consistent with a function manager, and that he delegates the non-qualifying operational duties of the business to his subordinate personnel and independent contractors utilized by the petitioner.

The AAO does not find counsel's assertions persuasive. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner states that it is a web design and internet development company. In an "operational summary" submitted in support of the petition, the petitioner asserted that it is engaged in providing web design, e-commerce, and hosting services, as well as sales of an internet technology called [REDACTED]. The petitioner noted that [REDACTED] is a "unique and proprietary software system that replaces the firmware supplied with WiFi routers" from various technology companies. The petitioner further explained that "when [REDACTED] software is] combined with the software deployed on the company's web servers, these WiFi routers become [REDACTED] WiFi

Hotspots that allow anyone with a laptop, smartphone or other WiFi enabled device to connect to it for free and to gain access to the Internet." As such, the petitioner is strongly engaged in further developing and expanding this proprietary technology. Further, the petitioner stated that it provides web design, development and hosting professional services, along with internet and web consultancy professional services to various small businesses. In a support letter provided with the petition, the petitioner referenced twenty-six companies to which it provides web development services. For instance, the petitioner provides evidence indicating that it has a close relationship with [REDACTED] to which it provides ongoing web development and website maintenance services in exchange for its use of this company's facilities and secretarial staff.

The petitioner also explained its business model, noting that the beneficiary meets with clients, draws up specifications for the client, and then bids out the work to perform the web development and other professional IT services to various independent contractors. The petitioner asserts that the beneficiary oversees these activities and assures compliance with the client's needs. In response to the director's RFE, the petitioner stated that "[the beneficiary] is the sole paid employee of the corporation," but that it "intends to recruit more staff member[s] once [the beneficiary's] petition is approved." The petitioner noted that "[the beneficiary] undertakes a management and executive role with the company on a day-to-day basis, managing the many 3rd party developers and contractors that the company uses to develop the products and services sold."

On appeal, counsel contends that the beneficiary qualifies as a function manager, asserting that he manages an essential function through his oversight of contractors providing goods and services to the petitioner's clients. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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).

In order to determine whether the beneficiary would be employed in a qualifying managerial capacity, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The

petitioner submitted a detailed description of the beneficiary duties in response to the director's request for evidence (RFE), which will not be repeated in its entirety here. The following are the general duty categories provided for the beneficiary in his proposed capacity as CRM manager, including the percentages of time he will spend on each area of responsibility:

1. Create business solutions that employ unique strategies, business processes, and applications to help clients understand, manage and maximize the value of their customer's relationships. (30% of the time)
2. Design and create new and unique means of interacting in a highly targeted way with consumers across and increasing number of hotspot providing clients and advertisers with additional revenue streams. (5% of the time).
3. Design and create unique products and technologies which assist clients integrating across multiple customer touch points and underlying functional areas such as sales force automation, marketing and customer interaction. (7.5% of the time)
4. Design functional models, templates and formats for reports and tools to be used by offshore entities and service accounts, in order to better customer needs, pricing, new services to be offered and related issue. (20% of the time)
5. Interact with major ad agencies, in order to keep abreast of new product development, increasing the ad impact, informing business partners of new advertising methods and provide fixed for reoccurring issues, supporting training seminars and the like (5% of the time)
6. Establish goals and policies of the CRM function within the company, exercising the widest of latitude in discretionary decision making. (5% of the time)
7. Oversee and direct the collection of data and research, in order to formulate unique processes and procedures to develop new products and services to complete with those offered by competitors across various markets and industries (10% of time)
8. Present and demonstrate unique and innovative proposed solutions to high level clients and industry conference [*sic*] attends (2.5% of time)
9. Provide direction and specialized knowledge in applying the technology and applications to client businesses. Meet with clients and provide training as needed (5% of time)
10. Provide project management support, requirements gathering, design, analysis and functional support. (10% of the time)
11. Position the [REDACTED] concept among companies as a more competitive advertising tool and continue to develop and improve the [REDACTED] concept and market the idea to the rest of the world. (2.5% of time)
12. Discuss [REDACTED] with potential partners and design solutions for integration into products in anticipation of technical issues which will arise during the implementation of dSpot worldwide. (2.5% of time)

The petitioner has not established that the beneficiary will be employed as a function manager as the duty description presented includes primarily non-qualifying operational duties. For instance, the twelve areas of responsibility set forth above include many duties related to the direct provision of services such as assisting clients with integration, designing functional models, templates and formats for reports and tools, providing project management, requirements gathering, and design, analysis and functional support. Further, additional duties provided within the categories set forth above further indicate that the beneficiary is primarily engaged in non-qualifying duties related to the direct provision of goods and services and the day-to-day operation of the business. These duties include dictating and directing functional specifications to improve customer websites, designing and writing functional specifications for Internet based technologies, providing day-to-day consultancy based on the beneficiary's unique expertise, developing sales materials for customers, providing field sales and training to businesses, installing dSpot hardware at customer locations, designing and writing functional specifications for customers, providing telecom support, providing training to clients, creating and shipping dSpot demonstrators, and working with contractors and developers to test solutions.

In total, the duties provided for the beneficiary suggest that he is primarily engaged in the performance of non-qualifying duties, whereas with respect to qualifying duties, such as "establishing goals and policies of the CRM function within the company," the petitioner has provided few specific examples. The beneficiary's job description suggests that the beneficiary, as the sole employee, is necessarily involved in all operational functions of the company rather than devoting the majority of his time to managing a single function. Here, while the petitioner indicates that the beneficiary allocates some portion of his time to overseeing contractors and "the CRM function," the petitioner's description of the beneficiary's duties indicates that he directly provides consulting services on a day-to-day basis, and is solely responsible for marketing and selling the petitioner's services. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Therefore, despite the decision-making authority the beneficiary possesses as the company's sole employee, the petitioner has not established that his actual duties are primarily managerial or executive in nature. 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).

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 a complete understanding of a beneficiary's actual duties and role in a business. The petitioner has not submitted sufficient evidence to support its claim that it regularly engages contractors who would relieve the beneficiary from primarily performing non-qualifying duties related to the provision of goods and services.

The petitioner provided an organizational chart that lists eighteen contractors from various companies and countries. However, the petitioner did not submit evidence to demonstrate the engagement of these contractors, such as contracts with, invoices from, or payments made to these contractors. Although the petitioner states in its operational summary that it utilizes IRS Form 1099 employees to provide services, it fails to produce this tax documentation to support its regular engagement of independent contractors. In fact, the financial records submitted do not support the petitioner's wide scale utilization of contractors to perform services. For instance, a statement attached to the petitioner's most recently submitted IRS Form 1120 U.S. Corporation Income Tax Return from 2010 indicates that the petitioner paid only \$4,700 in "outside services and independent contractors" during this entire year. Additionally, an "Interim Profit and Loss Statement" for the period from September 2011 to May 2012 reflects that the petitioner paid \$0 to "1099 contractors" and only \$2,200 to "overseas contractors." The petitioner has not adequately supported its claims that contractors are available to relieve the beneficiary from performing non-qualifying duties on a day-to-day basis. 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)).

Counsel 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. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As it has not submitted evidence of the engagement of independent contractors, the petitioner has not established that it has sufficient operational staff to perform the breadth of services reflected on the record, including professional IT services being provided to twenty-six separate clients. The lack of evidence regarding the petitioner's engagement of independent contractors stands in contradiction to its assertion that these contractors primarily relieve the beneficiary from performing non-qualifying duties. Further, in light of the operational nature of the beneficiary's duties, the preponderance of the evidence suggests that the beneficiary is the primary service provider for the petitioner, and therefore, is not primarily engaged in the performance of managerial duties. 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). Here, the petitioner's description of the beneficiary's duties indicates that they will be comprised of primarily non-qualifying tasks.

Finally, further refers to non-precedent decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity, or as a function manager, for L-1 classification even though he was the sole employee or managed a small staff. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For the foregoing reasons, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity, or as a function manager. Accordingly, the appeal will be dismissed.

B. Qualifying relationship between the petitioner and foreign employer

Although not addressed in the director's decision, the evidence of record is insufficient to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

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 pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines "affiliate" and "subsidiary" as follows:

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;

* * *

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.

The regulations at 8 C.F.R. § 205.5(j)(2) further provide that "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.

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 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 present matter, the petitioner asserts that its 1,575 shares are owned by the following parties: (1) the beneficiary - 1,000 shares, (2) [REDACTED] - 500 shares, and (3) [REDACTED] - 75 shares. Further, the petitioner stated that the beneficiary is the sole owner of the claimed foreign affiliate. However, the petitioner did not submit any supporting documentation to corroborate this assertion.

In the RFE, the director noted that the petitioner had failed to document the beneficiary's claimed ownership in the foreign employer and requested that the petitioner "submit additional documentation to show your company has a qualifying relationship to the foreign entity claimed." In response to the RFE, the petitioner provided no additional documentation of either company's ownership. 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). As such, without any evidence of the foreign entity's ownership, such as a company registration, articles of organization or incorporation, stock certificates or membership certificates, meeting minutes or other relevant corporate documents, the actual ownership in the foreign employer cannot be determined. As such, it cannot be concluded that the petitioner and foreign employer are affiliates.

Further, in order to satisfy the regulatory definition of "multinational," the petitioner must establish that the beneficiary's foreign employer continues to do business. Doing business is defined as 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. *See* 8 C.F.R. § 204.5(j)(2).

The petitioner states a number of times on the record that the foreign employer is minimally active as a business. For instance, in a submitted operational summary, the petitioner states that the "[foreign employer's] income has dropped off significantly and it generates very small amounts of income today." Additionally, the petitioner provided an organizational chart for the foreign employer listing only the beneficiary and one other employee in the role of "assistant services." Given that the beneficiary has been in the United States on an L-1A nonimmigrant visa since 2005 and that he is one of the foreign entity's two claimed employees, the petitioner has not established that the foreign employer is still doing business as defined in the regulations. Further, the petitioner did not submit any documentation to corroborate the foreign employer's continued operations. As such, the petitioner has also not established that the foreign employer is still providing goods and/or services in a regular, systematic, and continuous fashion.

In conclusion, the petitioner has not established that the petitioner has a qualifying relationship with the foreign employer. For this additional reason, the appeal will be dismissed.

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).

C. Ability to pay

Another issue not addressed by the director is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage.

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.

The petitioner states that it will pay the beneficiary an annual salary of \$40,000.

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 not submitted documentation to demonstrate that it employed and paid the beneficiary the full proffered wage at the time of filing or subsequently. The petitioner paid the beneficiary a salary of \$30,000 in 2011 and continued to pay him a salary of \$2,500 per month as of July 2012 when the petition was filed. This amount is \$10,000 less than the proffered wage. Thus, the petitioner must demonstrate that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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

In *K.C.P. Food Co., Inc. v. Sava*, precedent case law, the court held that USCIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. The petitioner submitted its 2010 IRS Form 1120 for the fiscal year ended on August 31, 2011. As the petition was filed in July 2012, prior to the end of the company's 2011 fiscal year, this was the most recent tax return available at the time the petition was filed. The petitioner reported taxable income of \$0. Therefore, the petitioner did not have sufficient net income to pay the \$10,000 difference between the beneficiary's actual wages and proffered wage.

Additionally, if the petitioner does not have sufficient net income to pay the proffered salary, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

To find the difference between current assets and current liabilities, USCIS looks to the IRS Form 1120, Schedule L Balance Sheets. Schedule L of the petitioner's IRS Form 1120 for 2010 reflects that the petitioner had \$2,343 in net current assets for the year ended on August 31, 2011. This amount is insufficient to pay the \$10,000 difference between the beneficiary's actual salary and proffered salary.

The petitioner has submitted unaudited interim financial statements, including a profit and loss statement and balance sheet for the period September 1, 2011 through May 2012. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, the petitioner has not established that the petitioner has the ability to pay the beneficiary's proffered wage. For this additional reason, the petition cannot be approved.

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).

III. Conclusion

The appeal will be dismissed 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, that burden has not been met.

ORDER: The appeal is dismissed.