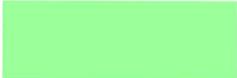


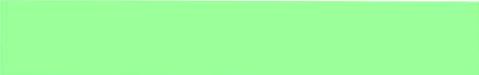


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: NOV 13 2014 OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

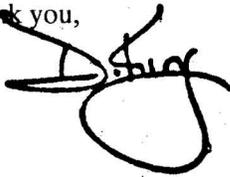
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)



INSTRUCTIONS:

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

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

Thank you,  


Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Texas Service Center Director denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner, a Texas corporation, is engaged in the design, engineering and manufacture of machinery and equipment utilized in the semiconductor industry and claims to be a branch of [REDACTED], the beneficiary's former employer in Japan. The petitioner seeks to continue to employ the beneficiary as its general 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, and 2) that the petitioner had the ability to pay the proffered wage.

On appeal, the petitioner asserts that the director clearly erred regarding his conclusions based on the record. The petitioner submitted two legal briefs and additional evidence in support of the appeal.

#### 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.

## II. Facts and Procedural History

The petitioner filed the Form I-140 on July 29, 2013. The petitioner states that the foreign entity specializes in the design, engineering and manufacture of machinery and equipment utilized by the semiconductor industry. The petitioner states that it is a branch of the foreign entity. On the Form I-140, the petitioner indicated that it had a consolidated gross income of \$54 million in 2011. The petitioner is registered to conduct business in Texas and wishes to continue employing the beneficiary as its general manager. The petitioner states that it is engaged in sales/marketing, distribution and customer service activities for the foreign entity's line of products. The petitioner further states that it currently has two employees including the beneficiary and also retains independent field service engineers. The petitioner states that its revenue is consolidated with the foreign entity's revenue and that as general manager, the beneficiary will be in charge of managing and directing overall day-to-day business operations in the United States. Further, the petitioner states that the beneficiary was selected to fill the petitioner's most senior management position in the United States because of his "extensive experience in designing and developing complex clean room systems, as well as managing manufacturing and technical support operations for customers located in Asia and the United States." The beneficiary was admitted to the United States in L-1B status in 2008 prior to his admission in L1-A status in 2013. The beneficiary's proffered wage is \$66,000.00 per year.

In a supporting letter, the petitioner describes the beneficiary's duties in the United States as: "developing and implementing strategic business objectives, establishing and executing strict customer project management practices, and by developing and overseeing marketing activities and customer operational enhancement management procedures" and "coordinating the preparation and presentation of important periodic financial reporting" to the foreign entity. The petitioner further states that the beneficiary would "direct the development and implementation of action plans and sales strategies for the United States" and "assumes responsibility for establishing a budget and multi-year business, as well as directives by which to implement them." The petitioner states that the beneficiary "manages and directs all day-to-day business operations and oversees employee matters, including hiring and firing, personnel administration, recruitment of key local U.S. employees, and compensation matters."

In addition, the petitioner further describes the beneficiary's role as general manager in the United States:

[The beneficiary] is also responsible for overseeing and coordinating the transfer of proprietary clean room development technology and developing, evaluating and maintaining essential technical support processes used by our clients, including [REDACTED] in semiconductor production in the United States, as well as development of training programs

for our customers' engineering and technical support teams regarding our company's technology. In that regard, he ensures the proper integration of our company's technology in our customers' semiconductor development processes in the United States, and provides technical guidance to our customers' engineering and technical support teams on the application, use and maintenance of equipment based on his knowledge of [foreign entity's] management of technical support processes and business development for semiconductor clean room systems. Lastly, he serves as an important liaison between our U.S. customers and the [foreign entity's] engineering department concerning design and development of semiconductor cleaning devices that meet specific customer requirements in order to increase sales of products. Hence, [the beneficiary] manages an essential function within our organization, our branch office operations through which we conduct business in the United States.

The petitioner provided a chart listing three function areas managed by the petitioner: 1) overall business operations; 2) technical support management; and 3) business development. The petitioner listed the beneficiary's duties on the chart and they are similar to those already discussed above.

The beneficiary's resume listed his current position as the petitioner's general manager but it did not refer to concurrent duties abroad or oversight of employees abroad. The beneficiary stated that he is responsible for all of the "sales business" in the United States and he is "project manager for new semiconductor equipment system and maintenance work under the service contract with [redacted] semiconductor."

The petitioner submitted a number of documents in support of the petition including a company profile that identified the petitioner as the foreign entity's American sales branch. The petitioner's June 5, 2013 organizational chart depicted the beneficiary as general manager overseeing the "USA office" and having a single administrative assistant. The chart also lists a supervisor named [redacted] who is actually a [redacted] manager overseeing a group of engineers at its [redacted] Texas location but he is not employed by, or contracted by, the petitioner. The petitioner's evidence demonstrated that the beneficiary provided guidance and training as an instructor of technical skills on the petitioner's behalf to this group of engineers.

The petitioner submitted the foreign entity's unaudited Financial Report for the period beginning January 1, 2012 through December 31, 2012. The report was not fully translated and it did not include an entry for payroll expenses. Because the petitioner failed to submit a complete certified translation of the document, we cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The director issued a request for evidence (RFE), instructing the petitioner to provide evidence to establish that the beneficiary had been and would be employed in a managerial or executive capacity and that the petitioner had the ability to pay the proffered wage as of the date the petition was filed. Among other things,

the director specifically requested information relating to employees such as pay documentation and the petitioner's federal tax returns.

In response to the RFE, the petitioner stated that while the beneficiary was employed abroad he “managed and controlled” 20 employees including another manager and other professionals within the Machinery Installation Department. The petitioner provided a list of named employees who previously reported to the beneficiary along with a short description of their duties. The petitioner did not include payroll documentation but did include an organizational chart, dated May 1, 2013, of the management support department abroad that depicts two process engineers, [REDACTED] and the beneficiary, who are both subordinate to the deputy manager of manufacturing technology. The 20 employees referred to above are also listed as subordinates to both Mr. [REDACTED] and the beneficiary. The beneficiary was also identified as a department manager on a separate spreadsheet listing these 20 employees. The petitioner asserts that the beneficiary continues to have managerial duties with the foreign entity abroad; however, the beneficiary’s duty descriptions do not support that claim.

The petitioner stated that the beneficiary “will be in charge of managing and directing the overall Technical Support Management function, in addition to the incidental duties performed in managing” the petitioner’s overall business operation. The petitioner asserted that although it has only one other employee, the beneficiary would also provide oversight to its customer’s engineers. Finally, the petitioner asserted that “the majority of the day-to-day non-managerial tasks associated with the technical support function” that the beneficiary manages are performed by [REDACTED] team of 15 engineering professionals and technicians.” The petitioner stated that the beneficiary would require “continued oversight and reliance on the support of the parent company’s international team, as well as constant interface and liaison with the foreign entity’s headquarters in Japan in order to implement the company’s technical support management goals for the U.S. marketplace. The petitioner concludes that “it is reasonable that [the petitioner] will continue to rely on [the beneficiary] to direct and coordinate with technical personnel at [the foreign entity’s] technical headquarters concerning the transfer of proprietary company technology and equipment to the United States, and will direct technical support operations for the company’s U.S. clients.” Nevertheless, the petitioner did not provide a description regarding the beneficiary’s specific reliance on the Japanese employees abroad nor was this clearly discussed in the beneficiary’s duty description for the petitioner.

The petitioner provided a letter from [REDACTED] Director at [REDACTED] who stated that the beneficiary was “charged with the Technical Support Management function” in connection with [REDACTED] use of the petitioner’s technologies and he is to “provide critical and technical guidance to our engineering operations team.”

The petitioner submitted a second financial report titled “The Fourth Period - January 1, 2012 through December 31, 2012” indicating a current net loss of ¥230,661. The petitioner submitted a letter stating that this report was prepared by an independent auditor on February 13, 2013.

Regarding wages paid, the petitioner provided the beneficiary's Form W-2 Wage and Tax Statement for 2012 depicting the petitioner's payment to the beneficiary of \$31,367.28. The petitioner also submitted a document titled "2012 Certification of Income Salary" indicating a "payment amount" to the beneficiary in the amount of ¥3,825,700, with a "Net Amount after deductions" of zero, and no amount for deductions or taxes. The Japanese wage amounts to approximately \$33,690.00.<sup>2</sup> The document is a translated copy of an original Japanese document but the translation appears incomplete. The petitioner provided similar documentation depicting the beneficiary's wages earned in 2011. The petitioner asserts that when the beneficiary's wages paid by the petitioner and the foreign entity are combined, it demonstrates that the beneficiary is being paid the proffered wage.

The petitioner demonstrated that it paid a salary of \$29,752.50 to its administrative assistant in 2012 but it provided no evidence of payments to any independent contractors despite the assertion that it had issued Form 1099s the year.

The petitioner submitted the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2012 in which the beneficiary claims wages of \$79,296.00 and identifies himself as an engineer. The beneficiary's pay stubs from January 2013 through October 2013 indicate year to date earnings of \$23,356.99, amounting to approximately \$2,335.00 per month from the petitioner. The petitioner submitted original and translated payroll documents that represent payment by the foreign entity to the beneficiary from January to October 2013. The last payment amount indicates a gross of ¥276634 or approximately \$2,412.00.

In addition to the previous description, the petitioner included a breakdown of the beneficiary's duties in the United States divided into five areas of responsibility, as follows:

- 1) MANAGEMENT OF [REDACTED] BUSINESS (15%)
  - Represent [REDACTED] in Governmental and Private Business + Legal Affairs (5%)
    - Represent [REDACTED] in federal, state and local regulatory matters
    - Represent [REDACTED] in commercial negotiations with existing and potential customers
  - Manage All Financial Transactions: taxation +IRS matters, budgeting, cost and custom controls, capital expenditures (5%)
    - Ensure compliance with tax law
    - Ensure compliant and economically efficient implementation of national and supranational Export Control and Customs processes
    - Review and controlling of Export Control and Customs activities within scope of legal entities, including reporting to responsible executives at [REDACTED]
  - Analyze Business Operations (3%)

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<sup>2</sup> The proffered wage is \$66,000. The petitioner asserts that in 2012, it paid the beneficiary approximately \$31,367 and the foreign entity paid \$33,690, totaling \$65,157.28, slightly less than the proffered wage.

- Ensure new customer targets have the financial stability to do business with [REDACTED]
  - Provides feedback and areas of concern in the financial analysis
- Develop Budget and Multi-Year Business Plans (2%)
- Develop mission statements, prepare executive summaries, describe product and service offerings, define target market, create marketing plan, perform industry and competitive analysis and prepare pro forma financial statements
- 2) MANAGEMENT OF [REDACTED] CAPITAL AND HUMAN RESOURCES (10%)
- Oversee Employee Matters: recruitment, hiring, firing and personnel administration (3%)
- Ensure increasing levels of employee satisfaction while improving the overall operations
  - Manage conflict and solve personnel problems
- Recommend Changes to Enhance Productivity (3%)
- Establish budgets, short- and long-range objectives and criteria for monitoring progress and measuring success
- Optimize Resources and Reduce Working Capital (2%)
- Manage engineering and marketing resources for [REDACTED] and optimize overall business efficiencies
- Maximize Long-Term Operating Profile (2%)
- Develop and implement the strategic business plan, and drive organizational results to attain defined business growth plan, product roadmaps, and business sales forecasts
- 3) MANAGEMENT/DEVELOPMENT OF TECHNICAL SUPPORT OPERATIONS (45%)
- Design and Develop Customer Technical Support Operations (10%)
- Provide technical leadership and guidance to the client's operations
  - Develop software Graphical User Interfaces (GUIs) to enable customer-friendly cleaning tool operations systems
  - Support customer's use of Application Programming Interface (API) software for [REDACTED] wet etching cleaning machines
- Establish Effectual Customer Project management Practices (10%)
- Provide project management and collaborative and develop wet etch cleaning process with other site process engineering managers at client, [REDACTED]
  - Answer customer's technical questions regarding [REDACTED] wet etching cleaning machines
- Develop Sound Management Control Systems (5%)
- Develop documentation to support customer designs, such as data sheets, application notes and test reports
- Develop Training Programs for customer's Teams of Engineers and Technicians (15%)

- Determine the training needs of client's engineering managers, engineers and technicians
- Determine the scope of client's training needs and resources available to perform training
- Develop specific objectives for the training
- Develop the content of the training session
- Decide of a format for the training
- Oversee and monitor training programs for engineering managers, engineers and technicians on the integration, use and troubleshooting of [REDACTED] wet etching cleaning machines
- Assess trainings through review of surveys and feedback from client's staff

Operations Research and Production Planning (5%)

- Be a tool owner taking full responsibility of wet etch tools in production wafer fab (PR-strip, Organic- Strip, Niteride-Strip)
- Write operation specs necessary for production for installation by [REDACTED] engineering mangers, engineers and technicians
- Perform design of experiments to optimize etch process
- Develop new wet etch process for new requirements or new product

4) EVALUATION AND MODIFICATION OF TECHNICAL SUPPORT MANAGEMENT (25%)

Evaluate Technical Support Management (5%)

- Maintain etch-related Statistical Process Control charts to evaluate technical support operations

Develop and Recommend Customer Operational Enhancement (5%)

- Work with maintenance personnel to troubleshoot [REDACTED] wet etch cleaning machines hardware and software issues
- Identify and solve any wet etch process issues
- Work closely with client's integration engineers for better performance or optical devices with respect to etch process
- Work with equipment engineers to improve tool performance, reduce expenses, etc
- Participate in code reviews and offer alternative design concepts
- Assist with hardware and software debug
- Advocate safety and environmental stewardship

Optimize Logistics Management Processes to Meet Client Expectations (10%)

- Work with client's process engineering managers and engineers to improve process in general
- Develop and direct execution of plans for the control of process output, budget spending, material efficiency, engineering effectiveness, customer service, and order entry efficiency
- Provide occasionally production support during off-hours, including weekend

Recommend Policy Changes and Modification to Facilitate Business Expansion for Client (5%)

- Make continuous recommendations to improve yield and process capability

5) DEVELOPMENT OF STRATEGIC BUSINESS OBJECTIVES AND ACTION PLANS (5%)

Develop and Implement sales Plans of Action (2%)

- Develop overall U.S. business plan and sales strategy for the market that ensures attainment of company sales goals and profitability
- Prepare action plans for effective search of sales leads and prospects
- Create customer penetration strategies and the deployment of such for new accounts
- Assist in the development and implementation of marketing plans as needed
- Executes the marketing function, identifying the key marketing outlets and competitive strategies

Evaluate Business Development (1%)

- Conduct reviews with clients to build more effective communications, to understand training and development needs, and to provide insight for the improvement of sales and activity performance

Report to Company's Board of Directors to Recommend Business Development Policy Modifications to Facilitate Business Expansion (1%)

- Provide timely, accurate, competitive pricing on existing clients and all completed prospect applications submitted for pricing and approval, while striving to maintain maximum profit margin
- Maintain accurate records of all pricings, sales, and activity reports

Ensure Continued Profitability (1%)

- Create and conduct proposal presentations and RFP responses
- Review and analyze invoices to control expenses to meet budget guidelines

The petitioner concluded that the beneficiary's "responsibilities will be primarily managerial duties associated with the technical support function of [REDACTED] semiconductor manufacturing clean room systems and the development of the U.S. market." The foreign entity's president further stated that the beneficiary "is a member of our senior management team, working closely with [the foreign entity's] executives, including myself, in determining the direction of the business in the United States."

The petitioner submitted additional business documentation to include another financial report for the year 2012. The petitioner asserted that the report is audited but it does not specifically refer to payroll expenses or provide a comparative review from previous years.

The director denied the petition, concluding that the petitioner had two employees; 1) an administrative assistant who was neither a supervisor nor a professional; and 2) the beneficiary who appeared to be heavily

involved in providing rather than managing technical support for his client. The director also found that the petitioner's evidence was insufficient to establish it had the ability to pay the proffered wage of \$66,000.00.

On appeal the petitioner asserts that the director erred by focusing on the limited number of its employees instead of considering the totality of the circumstances to include the reasonable needs of the organization in light of the overall stage of development, as required by the regulations. The petitioner suggests that the director simply concluded that the beneficiary would perform all of the duties of the "new office" without the help of staff members working for the foreign entity in Japan. The petitioner asserts that the beneficiary's managerial duties require delegation to staff members and human resources in the United States and Japan to carry out responsibilities that he must manage.

The petitioner cites to the three alternative methods of providing the ability to pay a proffered wage discussed in the USCIS 2004 memorandum issued by Associate Director of Operation William Yates. The petitioner asserts that it met the requirements by proving evidence that the beneficiary was actually being paid the proffered wage of US \$66,000.00. The petitioner asserts that the wages paid to the beneficiary in the United States and in Japan, when combined, exceed the proffered wage of US \$66,000.00. The petitioner asserts that its translated certification of income salary documents from Japan bear authentic markings, corporate seal and address. Alternatively, the petitioner asserts that the petitioner's "net current assets would have been sufficient to offset any perceived deficiencies." In support of these assertions the petitioner provided a new audited financial report for the period of January 2013 through December 2013.

The petitioner supplemented his appeal with a second brief asserting that the service already determined the beneficiary's eligibility as a general manager in his position when he was granted L1-A status in prior petition. Citing unpublished AAO decisions, the petitioner asserts that the director mischaracterized the nature of the beneficiary's responsibilities and disregarded his placement within the corporate group's organizational hierarchy. The petitioner asserts that, as in the prior matter, the beneficiary in this matter manages the essential function of developing the group's presence in the United States, a role which reasonably requires him to rely on support from Japanese staff in the International Department whose duties directly related to the objectives and goals of the U.S. office. Counsel asserts that the director overlooked the staff in his decision. The petitioner asserts on appeal that although it has an administrative assistant, much of the day-to-day tasks are "being executed by a large team of engineering managers (12) abroad who individually oversee multiple engineers." The petitioner provided copies of the referenced unpublished AAO opinions.

### III. LEGAL ISSUES

#### A. Employment in a Managerial or Executive Capacity

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

When examining the executive or managerial capacity of the beneficiary, United States Citizenship and Immigration Services (USCIS) 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). We will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted, the size of the beneficiary's subordinate staff, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role in the organizational hierarchy of the entity in question. As noted by the petitioner, 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). 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 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *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 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 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.

The fact that the beneficiary has managerial control over all aspects or functions of the business does not establish that he qualifies as a function manager. While such authority is consistent with the statutory definition of managerial capacity, it is not sufficient to establish that the beneficiary is employed in a managerial capacity. Whether the beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. 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). Here, the petitioner has not established that the beneficiary's actual duties are within a managerial capacity.

Here, the petitioner's description of the beneficiary's duties in the United States are all encompassing and appear to include not only management of the branch functions, but also performance of those functions. The petitioner established that it had a second employee who performed duties as an administrative assistant but the record demonstrates that her duties were limited to clerical, recordkeeping, and other administrative tasks that would not contribute to the performance of the overall functions managed by the beneficiary. For example, the beneficiary was expected to implement business objectives, execute project management practices, and develop marketing objectives and management procedures rather than manage these functional tasks. In addition, the beneficiary was to oversee marketing activities and management procedures, as well as coordinate the preparation and presentation of financial reporting to the foreign entity yet there are no employees identified to perform this functional work other than the beneficiary. Furthermore, a significant aspect of the beneficiary's duties in the United States appears to be his development and implementation of training programs for petitioner's customers. In this role, the beneficiary not only assists its customer's employees with the petitioner's new technologies but he develops training programs and provides the actual instruction as indicated in the record. Based on the initial description, the beneficiary appeared to be responsible not only for the function but performance of the tasks within 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In response to the RFE, the petitioner provided a breakdown of the beneficiary duties, which highlight further the beneficiary's active role in the performance of the functions rather than merely managing the function, as claimed. The beneficiary's duty description refers to tasks that can be managerial or supervisory; however, without a staff to perform the functions it is reasonable to conclude that the beneficiary would necessarily perform them. The record does establish that the beneficiary guided and oversaw training and performance of at least 15 engineers but these individuals were employed by the petitioner's customer, [REDACTED]. Therefore, these engineers were not available to the beneficiary to perform functional tasks for the petitioner's United States branch office.

The petitioner asserts that the beneficiary obtained support with his functional tasks from the foreign entity's employees located in Japan. However, the record does not sufficiently support this claim. The petitioner's descriptions do not expressly refer to supervision or oversight of Japanese employees. The petitioner does refer to and indicate that there is some interaction with the foreign entity and its employees, but it does not provide sufficient evidence to establish that the Japanese employees were performing functional tasks for the beneficiary in the United States.

For the first time on appeal the petitioner submits a new undated organizational chart depicting the beneficiary as a supervisor overseeing several employees located in Japan as well as his employee in the United States. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the

petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

All companies, regardless of size, require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities. However, the record should support a finding that someone other than the beneficiary is available to perform the company's non-managerial tasks. Again, the fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44) of the Act. Here, the record fails to establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. Accordingly the appeal will be dismissed.

We acknowledge that USCIS had approved an L-1A classification petition filed on behalf of the beneficiary prior to denying the instant immigrant petition. Each visa petition filing is a separate proceeding with a separate record and a separate burden of proof. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

We note that I-140 immigrant visa petitions are frequently denied after USCIS approves prior nonimmigrant visa petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and the present immigrant E-13 visa petition, which would permit the beneficiary to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Here, the petitioner states on appeal that the beneficiary relies upon United States employees and employees abroad to perform functional tasks under the beneficiary's authority, thus establishing him as a functional manager. The petitioner cites to a non-precedent decision in which the AAO determined that a beneficiary qualified as a function manager where he managed employees in the United States and abroad to perform functions for the petitioning company but the petitioner has provided insufficient 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.

The petitioner has failed to overcome this basis for the director's decision.

#### B. Ability to Pay

The second issue to be addressed is whether the petitioner established that it has the ability to pay the beneficiary's proffered wage of \$66,000.00 per year.

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

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 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.

In this matter the petitioner has not provided sufficient evidence to establish that it has paid the beneficiary the proffered wage as claimed. The petitioner submitted a Form W-2 indicating that it had paid less than half the proffered wage to the beneficiary in 2012. The petitioner asserts that the foreign entity has also paid the beneficiary a concurrent wage that, when added to the petitioner's wage, amounts to more than the proffered wage. However, the petitioner's evidence is insufficient to establish the claim. The documentation regarding the Japanese wages does not appear complete since it does not reflect net pay or deductions for taxes. Further, the beneficiary's Form 1040 does not include supporting documentation to establish the source of his total income in the United States. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

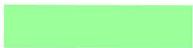
As an alternate means of determining the petitioner's ability to pay, we will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining 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).

The petitioner did not provide its federal income tax return so we lack a basis for determining its ability to pay the proffered wage by examining its net income; therefore, we will consider the petitioner's net current assets. The petitioner must have net current assets greater than the proffered salary to establish the ability to pay. 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 we are 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. In this matter, however, the foreign entity provided a second financial report for the year 2012 that appears less detailed than the first unaudited version. It is not entirely clear that the statements are complete since there are missing entries such as payroll expenses. 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).

Therefore, the petitioner has not provided sufficient evidence to establish the petitioner's ability to pay the proffered wage. For this additional reason the appeal must be dismissed.

The petitioner refers to several unpublished AAO decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity. The petitioner has not established that the facts of the instant application 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.

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).



## **II. Conclusion**

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.