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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

IN BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. Upon subsequent review, the director determined that the petition had been approved in error and revoked the approval. The Administrative Appeals Office ("AAO") reviewed the matter on appeal, withdrew the director's decision in part, and remanded the petition to the director for additional action and a new decision. After requesting additional evidence, the director entered a new decision revoking the approval of the petition and certified the matter to the AAO for review. The AAO affirmed the decision of the director. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO will be affirmed. The approval will remain revoked.

The petitioner is a California corporation that claims to be engaged in international trade. The petitioner asserts that it is a subsidiary corporation of Beijing Unitek Technology Uniteel Co. Ltd. ("Beijing Unitek"), located in the People's Republic of China. It seeks to employ the beneficiary as its financial manager. Accordingly, the employer has petitioned to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

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 petition was initially filed on July 1, 1997 and approved on March 26, 1999. On or about May 23, 2002, the director subsequently reviewed the petition at the time of adjudicating the beneficiary's application for adjustment to permanent resident status. At that time, the director determined that the petition had been approved in error, noting that the petitioner had not established that a qualifying relationship exists between the petitioner and the claimed parent company, or that the beneficiary had been employed in a managerial or executive capacity. The director issued a notice of intent to revoke and provided the petitioner an opportunity to rebut the proposed revocation.

On August 21, 2002, the director revoked the approval after reviewing the petitioner's rebuttal evidence. The petitioner appealed the revocation decision to the AAO. On April 15, 2003, the AAO

withdrew the decision of the director in part and remanded the petition for a new decision. The director issued a new notice of intent to revoke seeking to clarify the inconsistencies in the proceeding. On June 24, 2003, the director certified a new decision to the AAO for review. On July 31, 2003, the petitioner's previous counsel appeared before the AAO and presented an oral argument on behalf of the petitioner.

In a decision dated October 2, 2003, the AAO determined that the petitioner had not established that the claimed Chinese parent company owned a majority of the petitioner's issued stock. The AAO noted that the record contained conflicting evidence regarding the ownership of the U.S. company and that the petitioner had not submitted sufficient independent and objective evidence to clarify the inconsistencies. The AAO further noted that the petitioner had submitted evidence of its payroll that was discredited on examination, undermining the credibility of the petitioner's remaining evidence. Regarding the beneficiary's claimed managerial duties, the AAO determined that the petitioner had submitted five different position descriptions during the course of the proceeding, which were vague, paraphrased the statutory definition of "managerial capacity," and contained conflicting assertions.

On motion, the petitioner is represented by new counsel. Counsel asserts that the AAO decision was based on an incorrect application of established case law and regulations. The petitioner also submits additional statements and evidence that it asks the AAO to consider.

Because the law and facts were quoted and discussed in the previous AAO decision dated October 2, 2003 ("AAO Decision"), they will not be repeated in full in this decision. For the purpose of brevity, the AAO will provide citations to the applicable law and make reference to the specific discussion of facts in the previous decision.

The first issue in this proceeding is whether a qualifying relationship exists between the petitioner and the claimed parent company, as required by statute and defined at 8 C.F.R. § 204.5(j)(2).

The visa classification that the petitioner seeks is intended for multinational executives and managers. The language of the statute specifically limits this visa classification to those executives and managers who have previously worked abroad for at least one year in the preceding three for the overseas entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. In order to qualify for this visa classification, the petitioner must establish that there is a qualifying relationship between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company. 8 C.F.R. § 204.5(j)(3)(i)(C).

In the initial petition, the petitioner indicated that the foreign company owned 100 percent of the United States entity's issued stock, thereby qualifying the petitioning company as a subsidiary of the overseas company. In support of this claim the petitioner provided a copy of one stock certificate, representing 10,000 shares of common stock issued to the claimed parent company, Beijing Unitek, on September 16, 1994.

After the director requested additional evidence, the petitioner submitted documents that contradicted and confused the original claim. As requested, the petitioner submitted a copy of the company's stock transfer ledger that reflects that the petitioner issued an additional 10,000 shares of stock to Beijing Unitek on February 1, 1999, in exchange for \$10,000. The petitioner did not submit a copy of a stock certificate representing this issuance of stock. The petitioner also submitted a copy of its 1997 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, which indicated at Schedule L, line 22b, that the petitioner issued a total of \$20,000 in additional common stock during the 1997 tax year. The record of proceeding also contained a compiled financial statement for fiscal year 1998 that confirmed that the petitioner has issued a total of \$30,000 in common stock. Again, the petitioner did not submit stock certificates representing this additional issuance of stock or any evidence that would demonstrate the owner or owners of this common stock. In sum, at the time the director originally approved the petition, the record of proceeding contained conflicting evidence regarding the number of shares that had been issued and their actual ownership.

At the time the AAO reviewed the matter on appeal, the record remained confused on the issue of the claimed qualifying relationship. The AAO remanded the matter to the director to allow the petitioner to submit evidence to clarify the inconsistencies.

In response, counsel for the petitioner asserted that "any reference to any amount of stock above 20,000 is a clerical error predicated on a miscommunication between the corporation's outside accountant and its bookkeeping staff." The petitioner asserted that it had issued a total of 20,000 shares of stock, specifically issuing 10,000 shares in 1994 and 10,000 shares in 1999, all to the claimed parent company, Beijing Unitek. The petitioner's accountant asserted that the entries on the 1997 tax return and subsequent financial statements were a mistake that resulted after the petitioner's bookkeeper indicated that the company had received a capital contribution of \$20,000 during the 1997 tax year. The accountant stated that she had confirmed that the additional \$20,000 in issued common stock reflected on the company's financial statements was a personal loan from an officer and not a stock purchase. The petitioner submitted additional evidence in support of these assertions, including bank statements that purportedly documented the \$20,000 in wire transfers that were claimed as an "officer loan." (AAO Decision at 5-7.)

In its decision dated October 2, 2003, the AAO found that the petitioner had not adequately explained the inconsistencies in the record and had not established that a qualifying relationship existed between the petitioner and Beijing Unitek. (*See generally* AAO Decision at 3-12.)

On motion, the petitioner now submits a legal opinion, copies of two wire transfer statements, and a number of personal declarations in support of the petition. In addition, counsel asserts that the AAO erred in issuing its previous decision.

First, counsel asserts that the AAO erred in disregarding the petitioner's claim that the issue of ownership and control must be determined in accordance with California state law. Counsel asserts that the AAO erroneously relied on the petitioner's tax return to determine the ownership of the

company. Citing *Matter of Hughes*, 18 I&N Dec. 289, 292 (Comm. 1982), counsel asserts that "the Board of Immigration Appeals ('BIA') has already established that the Internal Revenue Code ('IRC') does not control to determine whether companies are 'affiliated' or 'subsidiaries,' since the IRC relates to the narrow issue of liability for federal taxes."¹ Instead, counsel states that California corporate law controls the determination of who owns and controls a company that is incorporated under the laws of the state. In support of this assertion, counsel submits an advisory opinion written by the Law Offices of Oscar A. Acosta, discussing the legal effect of the petitioner's corporate documentation pursuant to California state law. Referring to this legal opinion, counsel concludes: "Please note that based on California law, Petitioner is a wholly owned subsidiary of the foreign company by virtue of the fact that any and all issued shares of Petitioner's stock is owned by Beijing Unitek."

Second, counsel takes issue with the AAO's review of the evidence. Counsel observes that the AAO accepted the submitted evidence as conclusively establishing that the overseas entity made the initial investment of \$10,000 in 1994. Counsel asserts that similar evidence was submitted to establish that Beijing Unitek transferred an additional \$10,000 to pay for the issuance of an additional 10,000 shares of stock in 1999. Counsel states that the "petitioner maintains that the \$30,000 entry on the 1997 and 1998 tax returns were mistakes since \$20,000 entry was actually a transfer of funds from the foreign parent company to further capitalize the U.S. company." On motion, the petitioner submits two wire transfer orders from two unrelated companies as evidence of the \$20,000 that was purportedly transferred from the claimed parent company.

Finally, counsel asserts that the AAO arbitrarily and subjectively rejected the evidence submitted to clarify the inconsistencies in the record. Taking issue with the reference to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) and *Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997), counsel claims that the AAO inappropriately refused to accept the amended tax returns and the late-filed California stock registration as evidence of the claimed relationship.

Counsel's assertions are not persuasive. As noted in the previous decision, the current proceeding is governed by the Immigration and Nationality Act and the related federal regulations, not the California Corporations Code. For immigration purposes, the terms "parent," "subsidiary," "ownership," and "control" have been defined by federal statute, regulation, and through case law

¹ *Matter of Hughes* was issued prior to the publication of the definition of "subsidiary" and "affiliate" at 8 C.F.R. § 204.5(j)(2). See 56 Fed. Reg. 60897 (Nov. 29, 1991). In *Matter of Hughes*, the Commissioner of the Immigration and Naturalization Service ("INS")(now Citizenship and Immigration Services ("CIS")), not the BIA, reviewed the critical terms in the context of other federal laws, absent a statutory definition for purposes of federal immigration law. With the publication of the final rule in 1991, the INS defined the terms "subsidiary" and "affiliate" within the context of federal immigration law and this immigrant visa classification. It is that regulation that now controls the present determination. However, although they predate the regulations, *Matter of Hughes* and the other pre-1991 precedent decisions are authoritative guidance on the general question of ownership and control.

and CIS precedent decisions. *See generally* 8 C.F.R. § 204.5(j); *Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (BIA 1988).

The applicable regulations 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 immigrant visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 595; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. at 289. 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.

The AAO acknowledges that the evidence of "ownership" and "control" submitted by a petitioner will be dictated by the laws of the place of organization and the business form of the petitioner. As discussed in the submitted legal opinion, in the case of a California corporation such as the petitioner, the AAO would expect to see, *inter alia*, copies of the corporate stock certificates, stock certificate stubs, a record of shareholders, corporate bylaws, the minutes of relevant annual shareholder meetings, and the petitioner's California Form 260.102.14(c) Notice of Stock Transaction. The AAO will also consider any other probative evidence that may be created in the course of operating as a corporation in that jurisdiction, such as state and federal tax returns, the corporation's financial statements, or filings with other federal agencies such as the U.S. Securities and Exchange Commission.

To determine the issue of ownership and control, the AAO will examine the record as a whole in order to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage of ownership and its effect on corporate control. As general evidence in an immigrant petition for a multinational executive or manager, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. A petitioning company must also 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. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 365.

In the present matter, the evidence as a whole contradicts the petitioner's claims. On motion, counsel points to the two stock certificates that have been submitted and asserts that, under California state law, the share certificates are *prima facie* evidence of title to the shares they represent. The two stock certificates represent that [REDACTED] owns 20,000 shares of the petitioning company, amounting to \$20,000 in shareholder's equity. As noted by counsel, the AAO previously accepted the evidence to demonstrate that the claimed parent company issued \$10,000 to the petitioner's organizer in 1994 and the organizer hand carried the funds to the United States to fund the start up of

the corporation. The petitioner claims that [REDACTED] transferred an additional \$10,000 to the petitioner in 1998 to pay for the second issuance of stock in February 1999.

However, as previously discussed, a serious discrepancy was discovered when the AAO reviewed the petitioner's tax returns and compiled financial statements which indicated that in the 1997 tax year, the petitioner had issued \$20,000 in stock for a total of \$30,000 in shareholder's equity. According to the petitioner's claims, the corporation had only issued \$10,000 in common stock at that time. Consequently, there was a question as to the number of shares that had been issued, the ownership of those shares, and the resulting ownership and control of the corporation. The AAO gave notice of the discrepancy to the petitioner and remanded the matter to the director to provide the petitioner an opportunity to resolve the question. At that point, the petitioner was obligated to explain the discrepancy and provide independent objective evidence in support of its explanation. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although CIS and the AAO have provided ample opportunity to resolve this issue, the petitioner has failed to reconcile the inconsistencies through competent objective evidence.

The petitioner's explanations for the \$20,000 discrepancy in shareholder's equity have been inconsistent, vague, and lacking in specifics and details. After the AAO discovered the discrepancy, the petitioner, petitioner's previous counsel, and the petitioner's accountant explained that the inconsistency was due to a "clerical error" that resulted after the company's bookkeeper attributed an "officer loan" as a contribution of capital. In a declaration dated May 15, 2003, the petitioner's accountant [REDACTED] CPA, stated: "In fact, I have now confirmed that this \$20,000 was a personal loan from an officer and not a stock purchase i.e. a capital contribution (shareholder's equity)."² (AAO Decision at 6-7.)

As observed in the previous decision, an "officer loan" occurs when an officer of the corporation acts as a lender and allows the company to borrow money for a specified time period and the company agrees to return the money at the end of the specified period. According to the petitioner's initial explanation, an unnamed corporate officer made a personal loan of \$20,000 to the corporation in 1997 or 1998 that was considered by the firm's bookkeeper and accountant to be a capital contribution in exchange for common stock, as reflected in the tax returns and financial statements. If the unnamed officer contributed \$20,000 to the corporation and that contribution was mistakenly considered a contribution of capital, then the unnamed officer would have been considered the majority owner of the corporation up until the time that CIS noticed the discrepancy. In the previous decision, the AAO noted that petitioner had failed to identify the officer or submit evidence of the

² Remarkably, [REDACTED] statement was altered by counsel when he quoted the declaration in his brief in support of this motion. While the petitioner's accountant stated that she had confirmed that the \$20,000 was "a personal loan from an officer and not a stock purchase," counsel changed the quote to read "a personal loan from an officer *of the parent company* and not a stock purchase." (Emphasis added.) Counsel's alteration of the witness' statement is inexplicable. Counsel's use of the altered quotation in his brief appears to be a false statement of material fact that was submitted to mislead or misinform the AAO. See 8 C.F.R. §§ 1003.102(c) and 292.3(d).

claimed officer loan, such as a promissory note, bank statements, or other documentation of the loan. (AAO Decision at 9.) Despite the AAO's suggested evidence, the petitioner has not revealed the name of the officer or submitted any documentary evidence on motion that would confirm the claimed "officer loan."

On motion, the petitioner has changed its explanation and now claims that the stockholder Beijing Unitek, and not an individual officer of the petitioning corporation, transferred the \$20,000 to the petitioner in 1997 to remedy the petitioner's cash flow concerns. The petitioner points to a \$31,000 wire transfer from an unrelated company that occurred on August 13, 1997. The petitioner claims that because of "currency transaction restrictions in the People's Republic of China," the claimed Chinese parent company utilized an "accommodator" in Hong Kong to effect the wire transfers. In addition, the petitioner now submits evidence of the \$10,000 wire transfer, dated October 19, 1998, that is claimed to have been transferred by Beijing Unitek as payment for the second issuance of 10,000 shares of stock.

Specifically, the petitioner submits copies of two wire transfer receipts and five declarations from individuals who claim to have knowledge of the transactions. The petitioner has submitted a series of five personal declarations that were purportedly made by the petitioner's former bookkeeper, the petitioner's president and chief financial officer, the president of Beijing Unitek, and the president of a Hong Kong company. Although the declarations support the petitioner's explanations for the wire transfers, the statements are not credible or worthy of much weight in this proceeding because they are not detailed, plausible, consistent with the petitioner's previous claims, or corroborated by the evidence.

First, the declarations are little more than unsupported assertions, with no detailed explanation of the claimed transactions or support for the assertion that Beijing Unitek was the actual source of the contributed funds. For example, the petitioner's president and chief financial officer, the president of [REDACTED] and the president of the Hong Kong company, [REDACTED] all state that the source of the transferred funds was [REDACTED]. However, none of the declarations provide any detail to explain how [REDACTED] was the original source of the funds. The declarations explain that [REDACTED] used an accommodator in Hong Kong because it could not transfer the money out of China, but fail to explain or document how the company was able to transfer the funds to the accommodator. Second, the statements are inconsistent with the petitioner's previous claims and the previously submitted evidence. As previously noted, the petitioner originally submitted evidence and claimed that the \$20,000 entry on the balance sheets was a loan from a corporate officer. On motion, the declarants now assert that the funds were transferred from the claimed parent company. Finally, other than the two wire transfer statements that will be discussed separately, the petitioner provided no documentary evidence to confirm the identity of the declarants or the content of their statements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The copies of the two wire transfer receipts, as documentary evidence, are properly before the AAO on motion and merit significant weight. The first document is a copy of a wire transfer receipt from [redacted] Hong Kong, dated August 13, 1997, that represents a transfer of \$31,000 from the account of [redacted] to the petitioner's Wells Fargo account in Alhambra, California. The second document is a copy of a wire transfer receipt from China State [redacted] Hong Kong, dated October 19, 1998, that represents a transfer of \$10,000 from the account of [redacted] "On Behalf Beijing Co-Team Comtuter [sic [redacted] [redacted]), to the petitioner's Bank of Colorado account in Grand Junction, Colorado.

The evidence submitted on motion is not persuasive. On their face, the two wire transfer documents present additional inconsistencies, rather than supporting the petitioner's explanation that Beijing Unitek transferred either the \$10,000 payment for the second stock issuance or the \$20,000 that led to the claimed "clerical error."

First, the evidence submitted on motion does not establish that the claimed parent company contributed \$10,000 in exchange for the issuance of the second stock certificate in 1999. Although California corporate law may state that a stock certificate proves ownership on its face, the regulation at 8 C.F.R. § 204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases. As "ownership" is a critical element of this visa classification, it is reasonable for the director to inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. On May 2, 2003, prior to entering his final revocation decision, the director specifically requested evidence of the payments made for the issuance of stock. In response, the petitioner submitted an October 1998 bank statement for the petitioner's business account at the Bank of Colorado, reflecting a wire transfer of \$9,990 on October 19, 1998. On appeal, the petitioner stated that this wire transfer represented Beijing Unitek's second capital contribution of \$10,000, less the wire transfer fee. The AAO acknowledged the bank statement on appeal, but affirmed the director's decision to revoke since the petitioner did not submit evidence to establish the *source* of that critical wire transfer. (AAO Decision at 8-9.)

On motion, the petitioner now submits a copy of the October 19, 1998 wire transfer receipt, demonstrating that the funds were transferred by [redacted] on behalf of Beijing Co-Team, and not transferred by the claimed parent company [redacted]. Rather than clarifying the ownership of the petitioner, the evidence submitted on motion creates additional discrepancies. Although the petitioner claims that [redacted] was the actual source of the transferred funds and that Beijing Co-Team is an affiliate of [redacted] no evidence was submitted to establish this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. Without independent and objective evidence, the AAO will not accept the petitioner's claim that the purported parent company used an "accommodator" in Hong Kong to transfer the funds to the petitioner.

Second, the August 13, 1997 wire transfer receipt does not lend weight to the claim that the \$20,000 discrepancy in the petitioner's tax returns and financial statements was a "clerical error" that resulted

after the overseas company transferred the funds to the petitioner. It is noted that the wire transfer does not correspond with the date or the amount of the claimed transfer of \$20,000 that purportedly caused the inconsistency. One of the sources of the inconsistency is the petitioner's 1997 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates on the Schedule L Balance Sheet that the petitioner began the tax year with \$10,000 in common stock and ended the tax year with \$30,000 in common stock. According to the first page of the Form 1120, the petitioner defined its tax year as beginning on September 1, 1997 and ending on August 31, 1998. On motion, the petitioner now points to a wire transfer of \$31,000, rather than amount of the \$20,000 inconsistency, that occurred on August 13, 1997, during the previous tax year.³ Again, instead of clarifying the previously noted inconsistencies, the evidence submitted on motion serves to create additional irregularities. Since the submitted evidence does not resolve any inconsistencies in the record, the petitioner has not met its burden in this proceeding. *Matter of Ho*, 19 I&N Dec. at 591-92.

Regarding the petitioner's credibility, the integrity of the submitted evidence is not enhanced by the claim that the wire transfers were effected through an "accommodator" in Hong Kong so that the company could circumvent the currency transfer laws of the People's Republic of China. Although a petitioner may submit secondary evidence if the required documents do not exist or cannot be obtained, the AAO will not accept a petitioner's illicit activity as an excuse. See 8 C.F.R. § 103.2(b)(2)(i). The petitioner cannot hide financial transactions from its home country and then expect the AAO to accept the activity as an excuse for the lack of evidence. The non-existence or unavailability of required evidence creates a presumption of ineligibility. *Id.*

Relating to the AAO's review of the evidence, counsel's arguments and reference to *Matter of Hughes* misconstrue the previous AAO decision. 18 I&N Dec. at 292. The AAO did not base its determination on the Internal Revenue Code, federal tax law, or solely on the petitioner's tax returns. Instead, as discussed, the AAO reviewed the submitted evidence as a whole in light of the statute and regulatory definitions of affiliate and subsidiary. 8 C.F.R. § 204.5(j)(2). Counsel's assertion that "any and all issued shares of Petitioner's stock is owned by Beijing Unitek" would be persuasive if the evidence consistently indicated that [REDACTED] owned all of the outstanding shares. Instead, both the petitioner's 1997 tax returns and the 1998 financial statements present a serious

³ In addition, it is noted that the change in the petitioner's explanation creates inconsistencies with the amended tax returns, IRS Forms 1120X, that were previously submitted on certification. In the amended tax returns, the petitioner attributed the \$20,000 discrepancy to a "Loan from Officer." On motion, the petitioner now points to the wire transfer as evidence that the claimed sole stockholder, [REDACTED] attributed the funds. If this were the case, it appears that the petitioner would have amended the tax returns to reflect a "Loan from Stockholder" or "Additional Paid-in Capital," instead of a "Loan from Officer." And although the petitioner asserts that the bookkeeper did not have the knowledge or training to appreciate the different accounting treatment of a stock transaction and an officer loan, it is noted that the 1997 IRS Form 1120 tax return contains entries on Schedule L (and the related "Statement 7") for both the disputed common stock transaction and an additional loan from a corporate officer.

inconsistency in the evidence regarding the number of issued shares that has not been resolved by independent objective evidence.

Regarding counsel's assertion that the AAO arbitrarily and subjectively rejected the evidence submitted to clarify the inconsistencies in the record, counsel makes a persuasive point. Counsel asserts that *Matter of Katigbak*, 14 I&N Dec. at 49, does not apply to the amended tax returns or late-filed California Form 260.102.14(c) because the documents do not create a "new set of facts" but instead serve to support previously established facts. Upon review, the AAO agrees with this assertion and withdraws its previous reference to *Matter of Katigbak* as it relates to the amended tax returns and the late-filed California form.

However, counsel properly asserts that the emphasis should be on the weight of the evidence, rather than the admissibility of new facts. The AAO affirms its previous statement that newly-created documents will not be considered "independent objective evidence" or "competent objective evidence" when that evidence is created or invented by the petitioner after CIS points out inconsistencies in the record of proceeding. *See Matter of Ho*, 19 I&N Dec. at 591-92. Newly-created evidence may be given some evidentiary weight in these proceedings, but by itself, the evidence will not conclusively establish the truth of the matter asserted. Although counsel objects to the reference in the previous decision, the AAO notes that, in family-based immigrant visa petitions, late-filed birth certificates are accorded less weight than birth certificates that are registered at the time of the birth. *See Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). (AAO Decision at 10.) For the same reasons, the AAO will not accept the amended tax returns and late-filed California Form 260.102.14(c) as persuasive objective evidence to establish the claimed parent-subsidiary relationship between the petitioner and Beijing Unitek.

Finally, relating to the petitioner's creation of new evidence, counsel objects to the AAO's observation, "without any evidence," that the petitioner had previously invented documents after the director requested specific evidence of eligibility. In the previous decision, the AAO noted that on July 30, 1997, the director requested "copies of payroll checks for all employees for the last six months." In response, the petitioner submitted copies of canceled checks that were backdated for the previous six months and deposited all in the same six-week period after the director's request. After carefully reviewing the evidence, the AAO found that the petitioner had drafted, backdated, and cashed the entire series of checks after the director's request in order to manufacture evidence of the company's payroll. (AAO Decision at 11.)

Contrary to counsel's assertion that there was no evidence of the manufactured documents, the record of proceeding contains copies of the canceled checks, including the date of signature and the bank's processing stamps on the reverse, that were submitted by the petitioner in 1997. This evidence was discussed in detail in the previous AAO decision, including the check numbers, the purported dates that the checks were drafted, and the dates that the checks were actually deposited. (AAO Decision at 10-11.) Although counsel objects that this observation has no bearing on the

qualifying relationship, counsel ignores the AAO's finding that the evidence raised serious concerns regarding the validity and sufficiency of the remaining evidence, including that of the claimed relationship with [REDACTED]. 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. at 591. In addition, the AAO referenced the backdated checks in the discussion of the beneficiary's claimed managerial duties, since the manufactured evidence necessarily raised questions as to whether the petitioner actually employed the workers that were reflected in the company's organizational charts. The requested payroll records are specifically material to the determination of the beneficiary's managerial capacity. (AAO Decision at 15.)

Upon further review, and noting that the petitioner has failed to provide on motion any rebuttal to the charge that it manufactured evidence, the AAO finds that the petitioner willfully, deliberately, and voluntarily submitted checks that had been drafted, backdated, and cashed in order to satisfy the director's request for material evidence. The AAO incorporates by reference the discussion of this matter in the previous AAO decision, dated October 2, 2003.

In general, the petitioner's assertion that the \$20,000 discrepancy on the tax returns and the financial statements was a "clerical error" is not persuasive. In addition, the petitioner's claim that Beijing Unitek contributed \$10,000 by wire transfer as payment for the second stock issuance is not credible. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 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).

For the previously stated reasons, both in this decision and the AAO's decision dated October 2, 2003, the petitioner has not established on motion that a qualifying relationship exists between the petitioner and the claimed parent company. *See* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(2). The previous decision of the AAO will be affirmed.

The second issue on motion is whether the beneficiary has been and will be performing in a primarily managerial capacity, as defined at section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). (*See generally* AAO Decision at 13-24.)

On motion, the petitioner has submitted no new evidence to support its claim that the beneficiary has been employed in a managerial capacity. Instead, counsel asserts that the AAO did not consider the requirements of section 101(a)(44)(C) of the Act, which requires CIS to consider the reasonable needs of the petitioner when determining whether an alien is primarily performing in a managerial or executive capacity. Counsel also refers to a number of unpublished AAO decisions.

Counsel's reference to the unpublished decisions of the AAO will not be considered in this motion since they are not precedent decisions and do not properly support a motion to reconsider. 8 C.F.R. § 103.5(a)(3). The unpublished, non-precedent decisions of the AAO are not binding authority.

While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel's assertions on motion are not persuasive. Counsel takes issue with the AAO decision as it focused in part on the inconsistent description of the beneficiary's job duties. Counsel asserts that the descriptions were submitted over a six-year period and that "it is understandable that the petitioner's requirements, title, and proposed duties changed based on the business necessities of the business." It must be emphasized that the critical question is the nature of the beneficiary's duties at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49. The petition was filed on July 1, 1997, and any subsequent change in the beneficiary's duties or position title is irrelevant to the beneficiary's claimed managerial capacity. *Cf. Calexico Warehouse, Inc. v. Neufeld*, 259 F. Supp. 2d 1067, 1079-80 (S.D. Cal. 2002).

Regarding counsel's reference to section 101(a)(44)(C) of the Act, it must be noted that the AAO discussed this section of law in the previous decision and found that the director did not focus on the size of the company alone. Although the director's decision did contain a number of inappropriate comments, that portion of the director's decision was rejected and withdrawn by the AAO. The AAO noted that the director properly examined the petitioner's multiple descriptions of the beneficiary's job duties, the organizational structure of the business, and the nature of the subordinate employees' duties. (AAO Decision at 20.)

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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As discussed in the previous AAO decision, the petitioner did not establish this essential element of eligibility. (AAO Decision at 21-24.)

The AAO will not further re-examine this issue on motion, beyond noting that it is appropriate for CIS 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 size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

For the previously stated reasons, both in this decision and the AAO's decision dated October 2, 2003, the petitioner has not established that the beneficiary has been and will continue to primarily perform duties in a managerial or executive capacity. *See* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(2). Again, the previous decision of the AAO will be affirmed.

The final issue raised by counsel in this proceeding is the AAO's reference to a Dun & Bradstreet report in a footnote of the previous decision. (AAO Decision at 25.)

In the previous decision, the AAO noted in a footnote that it had gone to exceptional efforts, including the remand for additional evidence and the granting of oral argument, seeking to clarify the record in this matter. The AAO noted that there was a degree of uncertainty about the petitioning corporation and the nature of its business. Although the company originally claimed to be engaged in the export of "super computers" and other high technology products, the evidence indicated that it was actually exporting construction materials such as gutters, shingles, and prefabricated windows that had been purchased from Home Depot and Anderson Windows. In addition, during oral argument, the petitioner's previous counsel continued to assert that the petitioner continues to export millions of dollars in high technology goods despite a lack of evidence supporting this claim.

Attempting to learn more about the nature of the petitioner's business, the AAO obtained a business information report from Dun & Bradstreet on September 17, 2003. First, the report noted that the company operates as a "systems engineering consultant" and not as an exporter of either computer equipment or construction materials. Second, the initial report stated that the beneficiary was the owner of the company and, after an update, later reported that the "stock ownership and/or nature of legal ownership has not been clearly established." Third, the Dun & Bradstreet report noted that the petitioner is a "single location" and does not claim to be the subsidiary of any foreign company. Fourth, the report stated that the petitioner had not conducted any significant business transactions in the six to twelve months prior to April 2003. Finally, Dun & Bradstreet was unable to confirm the existence of the claimed parent company in Beijing, China.

Counsel asserts that the AAO's *sua sponte* review of the Dun & Bradstreet report was inappropriate and a violation of 8 C.F.R. § 205.2(b), as the petitioner should have been given notice of the issue and an opportunity to submit rebuttal evidence. Counsel notes that pursuant to 8 C.F.R. § 103.2(b)(2), the petitioner must be advised of derogatory evidence of which he is unaware and be offered an opportunity to rebut such evidence. Counsel notes that Dun & Bradstreet does not have the authority to gather information on "private companies" and cannot gather corporate data beyond information that is a matter of public record.

Upon review, the AAO will concede the issue and withdraw the footnote that referenced the Dun & Bradstreet report in its earlier decision. Nevertheless, this error was plainly harmless. First, the AAO clearly stated that the report would not be considered in the matter and specifically declined to enter a finding, beyond the decision of the director, on whether the petitioner was "doing business" pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D). Second, as noted on motion, the information to which counsel now objects is a matter of public record. Third, it is noted that the petitioner has declined to provide any evidence on motion that would actually rebut the observations made in the footnote. Finally, and above all, the information noted in the footnote was not critical to the findings of the AAO or the ultimate decision to affirm the director's revocation. Since the reference to the Dun & Bradstreet report was not appropriate, the footnote will be withdrawn.

Upon review, the petitioner has not overcome the director's reasons for the revocation. The director's realization that he erred in approving the petition is good and sufficient cause for revoking the approval, provided the director's opinion is supported by the record. *Matter of Ho*, 19 I&N Dec. at 590. Upon review, it is apparent that the director did err in approving the petition as the director failed to note the discrepancies in the record regarding the claimed stock issuance and further failed to inquire beyond the beneficiary's wholly inadequate position descriptions. Accordingly, pursuant to section 205 of the Act, 8 U.S.C. § 1155, the director had good and sufficient cause to revoke the approval of the petition.

The previous decision of the AAO, with each ground for revocation considered as a separate and independent basis for the revocation, will be affirmed. The decision to revoke will be affirmed.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

Order: Except for those limited portions specifically withdrawn by this decision, the previous decision of the AAO dated October 2, 2003 is affirmed. The approval of the petition is revoked.