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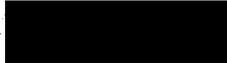


U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: FEB 18 2005

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

DISCUSSION: The preference visa petition was approved by the Director, California Service Center, on January 23, 1997. The director subsequently issued a notice of intent to revoke on October 14, 2004. After providing the petitioner with an opportunity to rebut the proposed revocation, which the petitioner submitted in a letter dated November 5, 2004, the director revoked the approval of the immigrant petition on November 22, 2004. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this immigrant petition seeking to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based 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). The petitioner claims that it is a branch of the foreign employer, located in People's Republic of China, and is operating in the United States as an import and export company.

On November 22, 2004 the director revoked the approval, concluding that the petitioner had not established that: (1) it had been doing business in the United States, rather than acting as a "mere agent" of the foreign entity; (2) the beneficiary was employed in the United States in a primarily managerial or executive capacity; (3) the beneficiary was employed abroad for at least one year in a primarily managerial or executive capacity; (4) a qualifying relationship exists between the petitioning organization and the foreign entity; or (5) as of the priority date, the petitioner had the ability to pay the beneficiary the proffered annual salary of \$24,000.

In an appeal filed on December 10, 2004, counsel asserts the following: (1) at the time of filing the petition, the petitioner submitted documentation demonstrating that it is engaged in the regular, systematic and continuous provision of goods or services in the United States; (2) the beneficiary is employed in a managerial or executive capacity, as is demonstrated through the description of his job duties and the petitioner's organizational structure; and (3) the Citizenship and Immigration Services' (CIS) determination that the beneficiary was not employed abroad for more than one year in a managerial or executive capacity "is logically flawed and purely based on conjecture." Counsel also claims that CIS "has no statutory basis" to revoke the instant petition. In a brief submitted to the AAO on January 6, 2005, counsel also claims that when considered in its entirety, the documentary evidence previously submitted for the record demonstrates that the petitioning organization is wholly owned and controlled by the foreign entity.

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

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for his 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. 8 C.F.R. § 204.5(j)(5).

Section 205 of the Act, 8 U.S.C. 1155 (2005), states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

Regarding "good and sufficient cause" and the revocation of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals (BIA) has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)):

The first issue in this proceeding is whether the petitioner established that it had the ability to pay the proffered wage, as of the date that the petition was filed, in accordance with 8 C.F.R. § 204.5(g)(2).

Both in response to the director's Notice of Intent to Revoke and on appeal, counsel does not address the issue of whether, at the time the petitioner's priority date was established, the petitioner had the financial resources to pay the proffered wage of \$646.15 per week. The petitioner has conceded the issue.

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. at 590. Generally, the director's decision to revoke the approval of a petition will be affirmed where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. See *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). Accordingly, for this reason alone, the appeal must be dismissed and the petition may not be approved.

Second, the AAO will address the issue of whether the petitioning organization has been "doing business" in the United States as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i).

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner filed the instant petition on January 13, 1997, stating in an accompanying letter, dated December 23, 1996, that it is engaged in the import and export of light industrial products. The petitioner submitted its articles of incorporation, dated September 16, 1994, indicating its establishment as a California corporation, and provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the year 1995 reflecting a gross profit of approximately \$101,000. In addition, the petitioner provided telephone records from May 19, 1996 through July 8, 1996. The petitioner also submitted a lease identifying office premises located at [REDACTED] in Downey, California, and included photographs of what is supposedly the interior and exterior of the petitioner's business premises. The photographs, however, do not contain an address or any identification of the exact location. Lastly, the petitioner provided invoices for goods sold on April 28, 1996, May 30, 1996, and October 28, 1996, a U.S. Customs Form 4333A identifying customs entries scheduled to be liquidated, a Form 7525-V, Shipper's Export Declaration, and offer sheets from the petitioner to prospective customers.

The director issued a Notice of Intent to Revoke on October 14, 2004 identifying a discrepancy in the location of the petitioning organization, and noting that the address [REDACTED] is not a commercial place of business as claimed by the petitioner, but rather a residential duplex.¹ The director also noted that the petitioner failed to submit comprehensive documentation in support of its regular, systematic, and continuous provision of goods and/or services. The director stated that "the petitioner has not been doing business legitimately in the United States as the record indicates that the petitioner was located at a . . . private residence." The director concluded "[t]he fact that the petitioner was operating from a . . . private residence indicates that the petitioner was acting as a mere agent in the United States," and was not doing business "as envisioned" by the regulation at 8 C.F.R. § 204.5(j)(2). The director gave the petitioner proper notice of the opportunity to submit additional evidence in support of its United States operations.

Counsel responded in a letter dated November 5, 2004, claiming that since the company's establishment in 1994, the petitioner "has been providing the regular and continuous goods and services" as an import and export company. Counsel noted the above-mentioned evidence previously submitted by the petitioner in support of this assertion, and submitted additional documentation, including the petitioner's corporate income tax return for the years 2000 through 2003, a new lease agreement for storage space for the term beginning on May 1, 2004 through November 31, 2004, a commercial insurance policy, a product catalog, and sample products and trading documents. With regard to the discrepancies in the petitioner's address, counsel stated:

The question of business address that is raised in your Notice of Intent to Revoke has been addressed in the letter the petitioner submitted on September 8, 1998 to your office in

¹ The director raised an additional discrepancy in the evidence submitted by the petitioner in a separate petition to classify the beneficiary as an L-1A nonimmigrant intracompany transferee. In the nonimmigrant petition, the petitioner identified its business location as "5374 Atlantic Avenue, Long Beach, California," yet a CIS on-site investigation revealed the location is actually a hotel. This documentation, however, has not been made part of the instant record.

response to the Action – Intent to Deny. The letter clearly explains why the petitioner was located at the Flamingo Inn Motel. As per the petitioner, the company is 'one of the managing partners of the Motel' and they are responsible for 'daily business management of the motel.' On the other hand, since the company exclusively does wholesales rather than retail and they never accept walk-in customers, they did not post a sign of the company's name on the door. The on-site investigation mistakenly concluded that 'the petitioner was not conducting business at the facility.'

The director subsequently determined in his November 22, 2004 Notice of Revocation that the petitioner did not demonstrate that it was doing business at its original address at the time of filing the petition in January 1997. The director addressed the new evidence submitted by the petitioner regarding an "Upland, California" business location, and stated that the petitioner would not be approved under a new set of facts. The director concluded that "the petition was patently unapprovable [sic] at the time of filing, that is, January 13, 1997."

Counsel filed an appeal on December 10, 2004. In a brief submitted on January 6, 2005, counsel claims that the director erroneously determined the existence of inconsistencies in the evidence related to the petitioner's location and address. Counsel explains that [REDACTED] was the original location of the petitioning organization when it began operations in September 1994. Counsel states that the petitioner subsequently moved its office to [REDACTED] which is the site of the Flamingo Inn Motel, when it became a partner of the motel. Without submitting evidence in support of the claim, counsel repeats the assertions that were made in response to the Notice of Intent to Revoke. Counsel states that because CIS previously accepted this explanation and granted the I-140 petition, "[i]t is inappropriate to bring up this issue again six years later only for the purpose of intent to revoke the petition."

Counsel further claims that the petitioner provided sufficient documentation, including customs forms, money wire transfer sheets, invoices, bills of lading, packing lists, marine cargo insurance policies, purchase orders and sales confirmations as evidence of its business activities in the United States.

Upon review, counsel's assertions are not persuasive. The director correctly determined that the petitioner's failure to explain the inconsistencies in the record warranted the revocation of the instant immigrant petition.

While counsel attempts to explain on appeal the different addresses for the petitioning organization, the record still contains discrepancies regarding the company's business location. The record identifies several different addresses for the petitioning organization, including the two addresses noted by counsel on appeal as well as an additional address, [REDACTED] which was listed on both the petitioner's insurance policy and the product documentation submitted by counsel in response to the director's notice of intent to revoke. Counsel does not address on appeal the existence of this third corporate location. Therefore, it is unclear whether the petitioner is presently operating from yet an additional location or whether it remains in the motel. Moreover, a new lease agreement submitted by counsel with his November 5, 2004 letter fails to even specify the location of the premises leased by the petitioner. 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. at 591-92.

Furthermore, counsel has not adequately explained its use of a hotel or private residence as its business location. According to counsel, the petitioner explained in a letter submitted to CIS on September 8, 1998

that it did not post a company sign because it does not accept walk-in customers. The petitioner, however, submitted photographs with the instant petition of its business location, which depicted the petitioner's company sign. Either the petitioner misrepresented its business location or failed to identify an additional location from which the business would operate. Regardless, the approval of the initial petition may be subject to revocation based on the inconsistent evidence submitted with this petition. *See* § 205 of the Act, 8 U.S.C. § 1155.

The petitioner's involvement as a partner in the Flamingo Inn Motel also raises the additional question of the actual form of the business in which the petitioner is engaged in the United States. As noted in its letter, the petitioner, as a managing partner of the motel, is purportedly responsible for the motel's daily business management. This claim contradicts the petitioner's assertion that it is doing business as an import and export company. The petitioner does not reconcile its responsibility of managing the motel with the claim that it is engaged in the import and export of light industrial products. Therefore, regardless of the documentation in the record related to the petitioner's import and export operations, the petitioner's position as a partner in the motel raises the unanswered question of how the petitioner is operating in the United States. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Counsel's additional claim that it is inappropriate for CIS to raise the issue of the petitioner's business operations in the United States following its approval of the petitioner's I-140 petition is misplaced. As previously noted, section 205 of the Act, 8 U.S.C. 1155, allows the Secretary of Homeland Security to revoke the approval of any petition approved by him under section 204 for good and sufficient cause. Here, the unexplained inconsistencies in the record regarding the petitioner's various business locations, as well as the question of how the petitioner is doing business in the United States, represents good and sufficient cause and warrants the revocation. By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. at 590.

Based on the above discussion, the director correctly determined that the petitioner had not established that it was "doing business" and properly revoked the approval. Accordingly, the appeal must be dismissed for this reason as well.

Third, the AAO will address the issue of whether the beneficiary's employment in the United States has been in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner noted on its December 23, 1996 letter submitted with the immigrant petition that the beneficiary would be employed as president in the United States company and would assume the following job responsibilities:

1. To direct and coordinate overall operations of the USA branch company;
2. To establish company policy and management system;
3. To review market research reports so to establish U.S. markets;
4. To negotiate and sign up major buying/selling contracts;
5. To review and approve financial statement[s] and budgets and make financial arrangements;
6. To hire/fire/train and review performance of USA local executive personnel and assign proper jobs[.]

The petitioner submitted a certificate of new assignment for the beneficiary also identifying the proposed job responsibilities.

The petitioner also noted in its December 1996 letter that it employed five workers at the time of filing the petition: the beneficiary, as president, a vice-president, an office manager, an office clerk, and a secretary/accountant. The petitioner explained that as the company develops, it anticipated hiring three or four sales and marketing representatives, a finance manager, a bookkeeper, an accountant, a purchasing manager, two purchasing personnel, an import and export manager, and two or three shipping and warehouse personnel. The petitioner submitted its quarterly wage report for the State of California reflecting the employment of the five named workers during the quarter ending September 30, 1996.

The director stated in his October 14, 2004 Notice of Intent to Revoke that the beneficiary was not employed in a managerial or executive capacity as the record did not demonstrate that he was managing professionals as required in the statutory definition of managerial capacity. The director stated that the lack of information pertaining to the four subordinates' job duties, responsibilities, education, and salaries, as well as the fact that the beneficiary has direct contact with the lower-level personnel, supports a finding that the beneficiary is employed as a first-line supervisor. The director also stated that the organization appears to be "top heavy" as three of its five employees are employed in supervisory positions. The director noted that "a normal business operation" would have more personnel in non-supervisory positions.

The director further concluded in his Notice of Intent to Revoke that the beneficiary's job description was not detailed enough to establish his employment as a manager or executive. The director noted that the description is "too general and vague" to determine the exact managerial or executive responsibilities the beneficiary would perform on a daily basis. The director provided the petitioner with thirty days during which to submit additional evidence in support of the beneficiary's employment in a qualifying capacity.

In the November 5, 2004 letter submitted in response to the director's notice of intent to revoke, counsel claimed that the beneficiary was employed in the United States in a managerial or executive capacity. Counsel stated that as president, the beneficiary "takes up the highest management authority under the supervision of the board of directors of the company," and is fully responsible for the management of the company. Counsel further stated that "the beneficiary is the one who set up the subsidiary in the United States, established the general goals and policies of the company, hired all necessary staff to run the business, and promoted the sales of the company." Counsel also noted that the company's organizational structure and the employees' job duties establish that the beneficiary is employed as a manager or an executive as each of the company's department managers possess a bachelor's degree or higher. Counsel claimed that "the beneficiary actually supervises a group of professionals," and therefore, qualifies as a manager or executive. Counsel submitted an organizational chart of the United States company identifying the beneficiary as president, and the following five subordinate employees: vice-president, marketing manager, warehouse manager, accounting manager, and sales assistant. Counsel also provided a description of the job duties performed by each worker and submitted IRS Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending March, June and September 2004.

The director determined in his November 22, 2004 Notice of Revocation that the petitioner did not demonstrate that the beneficiary was employed in the United States in a managerial or executive capacity. The director stated that while counsel alleged that the beneficiary's subordinates are professionals, counsel did not submit any documentation establishing that each employee actually holds a bachelors degree. The director also noted that the positions in the petitioning organization have changed since the filing of the immigrant petition, as the organizational structure now includes marketing, warehouse and accounting

managers, and a sales assistant. The director stated that this is a material change of facts that would not be considered. The director also stated that the petitioner failed to submit a more detailed description of the beneficiary's job duties, noting that the record was still "too general and vague to convey any understanding of exactly what the beneficiary will be doing on a daily basis." Lastly, the director determined that the record failed to address the beneficiary's employment in an executive capacity and specifically define the goals and policies established by the beneficiary during his employment as president. Consequently, the director revoked the petition.

On appeal, counsel asserts that the beneficiary's title of executive officer, his job duties and the petitioner's organizational structure demonstrate that the beneficiary is employed in a managerial or executive capacity. Counsel states:

In the instant petition, the beneficiary is employed by the petitioner at the position of the President since 1995. The beneficiary has absolute and discretionary authority and control of the company's entire business as well as the authority to hire and fire supervisory personnel. The beneficiary determines the company's investment plans, hiring plans and the goals and policies of the company. Since the company is the subsidiary of its parent company in China and the majority of the board of directors is working in China, the beneficiary receives only general supervision or direction from them and he is fully responsible for the overall management of the company.

Counsel restates the six job responsibilities of the beneficiary outlined above, and claims that these "clearly show that the beneficiary is employed in a managerial or executive capacity and he is qualified for an employment-based immigrant classification."

With regard to the petitioner's staff, counsel states that the company currently has three departments, each of which have a department manager who possesses a bachelor degree or higher. Counsel claims "the beneficiary actually supervises a group of professionals, and therefore, he is qualified for classification as a multinational executive or manager."

On review, the director properly revoked the petition based on the petitioner's failure to demonstrate that the beneficiary has been employed in the United States in a primarily managerial or executive capacity. As noted above, by itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. at 590. The director's decision to revoke the immigrant petition will be sustained where the record at the time the decision is rendered would warrant such a denial. *Id.*

Here, although specifically addressed by the director in his Notice of Intent to Revoke, the petitioner failed to clarify and further explain the specific duties performed by the beneficiary during his employment as president. Counsel's mere recitation of the beneficiary's six job responsibilities already provided in the petitioner's December 23, 1996. letter is not sufficient to overcome the director's notice of revocation. Reciting the beneficiary's vague and broadly cast job responsibilities are not sufficient; the regulations require a detailed description of the beneficiary's job duties. 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of*

Obaighena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, as noted by the director, counsel failed to present evidence in the November 2004 response supporting the beneficiary's employment in a qualifying capacity *at the time of filing the immigrant petition*. The director specifically noted in his Notice of Intent to Revoke that eligibility for the immigrant classification would be based on documentation relevant to the priority date, January 13, 1997, and would not include an analysis of new facts that arose after the filing of the petition. Counsel, however, submitted evidence in response to the director's Notice of Intent to Revoke that applied to the petitioner's present organizational structure in an attempt to establish the beneficiary's employment in a qualifying capacity. The petitioner's current organizational structure and the job duties presently performed by each of its workers is irrelevant to establishing the beneficiary's employment in a qualifying capacity at the time of filing the petition. As correctly noted by the director, 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. 45, 49 (Comm. 1971).

Moreover, counsel claim that the beneficiary's title of "executive officer" establishes the beneficiary's employment in a managerial or executive capacity is incorrect. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. As required in the regulation at 8 C.F.R. § 204.5(j)(5), the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary in order to establish employment in a qualifying capacity.

Absent additional evidence, the director's notice of revocation was properly issued for "good and sufficient cause," and therefore, the revocation will be sustained. *See Matter of Ho*, 19 I&N Dec. at 590. Accordingly, the appeal is dismissed.

Fourth, the AAO will consider the issue of whether the beneficiary was employed abroad for at least one year in a primarily managerial or executive capacity.

The petitioner outlined the following job duties for the beneficiary in its December 23, 1996 letter submitted with the immigrant petition:

1. To assist [the] General Manager in direct[ing] and manag[ing] overall operations of the company.
2. To review market research reports so to decide company development directions;
3. To review financial statements and approve budgets;
4. To represent company in attending major buying/selling and joint venture contracts meetings;
5. To review performance of executive personnel, hire/fire and assign proper jobs, etc.

The petitioner stated that the beneficiary "directly and indirectly" supervised twenty employees and reported directly to the company's general manager. An attached certificate of employment outlined the same five job responsibilities performed by the beneficiary overseas.

The petitioner also provided an organizational chart of the foreign entity reflecting the beneficiary's position as subordinate to the company's general manager, yet did not identify the employees the petitioner claimed to be supervised by the beneficiary.

The director subsequently stated in his Notice of Intent to Revoke that the record did not contain specific documentation describing the job duties of the beneficiary's subordinate personnel, the required educational levels to perform in each position, or each worker's employment status or salary. The director stated that it could not be determined whether the beneficiary actually managed employees in the foreign entity, whether the claimed employees were professional or managerial, or whether the beneficiary served as a functional manager or executive. The director also stated that the beneficiary's job description was "generic," and was not sufficiently detailed to demonstrate the beneficiary's employment as a manager or executive.

Counsel stated in his November 5, 2004 letter that the beneficiary had been employed as assistant general manager, the "second highest management authority in the company, from April 1993 through June 1994." Counsel claimed that "[t]he title of the position along [sic] indicates that [the beneficiary] was employed in a management capacity, because it is commonly accepted that the Assistant General Manager performs management capacity within an organization." Counsel further claimed that the organizational chart for the foreign entity supported a finding that the beneficiary supervised twenty employees. Counsel stated "[a]lthough the petitioner did not provide evidence or information about the employees under the beneficiary's supervision such as the duties and responsibilities, the required education, the hours worked, the lack of that information does not mean it is deficient." Counsel stated that at the time of filing the petition, no additional evidence was requested by CIS, and noted that "[g]iven the fact that the parent company is a regular business entity that is engaged in agricultural and industrial products trading, it is easy to understand the normal job duties and educational requirements for respective job positions." Counsel claimed that CIS did not consider the petitioner's stage of business development, and therefore, its finding was "logically flawed and purely based on conjecture."

The director determined in his Notice of Revocation that the petitioner did not demonstrate that the beneficiary had been employed abroad in a managerial or executive capacity. The director stated that the description of the beneficiary's job duties was "too general and vague" to convey the managerial or executive functions performed by the beneficiary on a daily basis. The director noted that counsel failed to clarify or elaborate on the five job duties previously provided by the petitioner. The director also stated that the record did not establish that the beneficiary had managed professional employees, as no evidence, such as job responsibilities, educational requirements, or employment status was submitted for each subordinate worker. The director also stated that the record did not identify the specific goals and policies made by the beneficiary in his capacity as assistant general manager, and failed to show that the beneficiary made discretionary decisions for the parent company. Consequently, the director revoked the petition.

On appeal, counsel claims that as the "second highest management authority in the [parent] company," the beneficiary was employed abroad for more than one year in a managerial and executive capacity. Counsel claims that the foreign entity's organizational chart indicates that the beneficiary supervised either directly or indirectly twenty employees. Counsel states although the petitioner did not provide evidence or information

about the job duties of the employees under the beneficiary's supervision, "[a]t the time of the filing of the petition, [CIS] did not ask for more information or evidence about the parent company, nor has [CIS] ever provided the petitioner with the opportunity for further illustration." Counsel again claims that given the type of business performed by the foreign entity, "it is easy to understand the normal job duties and educational requirements for respective job positions."

On review, the director properly revoked the petition based on the petitioner's failure to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Counsel conceded in the November 5, 2004 response to the director's Notice of Intent to Revoke that the record lacked documentation explaining the employment capacities, including job responsibilities, educational requirements, and hours worked, of the employees subordinate to the beneficiary. Counsel did not submit additional evidence, nor did he explain the positions of the lower-level personnel. Counsel's claim that "it is easy to understand the normal job duties and educational requirements" of the subordinate workers as a result of the nature of the business is insufficient. Moreover, contrary to counsel's assertion, the foreign company's organizational chart, which fails to identify any employees subordinate to the beneficiary, does not support the claim that the beneficiary was employed as a manager or executive. Counsel clearly chose to ignore the specific requests and issues raised by the director. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also erroneously claims that the petitioner was not provided with an opportunity to illustrate the personnel structure of the foreign entity and to define the tasks performed by each employee. Without considering the petitioner's opportunity to submit relevant documentation with the filing of its original petition, the petitioner was properly notified by the director of its opportunity to submit additional evidence in response to the director's notice of intent to revoke. Additionally, the petitioner was afforded the opportunity on appeal to submit additional documentation clarifying the beneficiary's employment capacity abroad. Counsel, however, failed to recognize this opportunity and neglected to provide any new evidence or explanation of the beneficiary's job responsibilities overseas. Contrary to counsel's claim, the petitioner was given three opportunities to establish the beneficiary's employment as a manager or executive in the foreign entity.

The director's decision to revoke will be sustained as the record at the time of the director's decision was deficient and warranted a denial based on the petitioner's failure to establish the beneficiary's employment abroad in a qualifying capacity. See *Matter of Ho*, 19 I&N Dec. at 590. Accordingly, the appeal will be dismissed.

Fifth, the AAO will address the issue of whether a qualifying relationship exists between the foreign entity and the petitioning organization.

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

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In the December 23, 1996 letter submitted with the petition, the petitioner stated that it is a branch of the foreign entity and noted that since its establishment in 1994, the foreign organization has owned 100% of the petitioner's shares of issued stock. The petitioner submitted its articles of incorporation authorizing the issuance of 1,000,000 shares of stock. The petitioner also provided copies of two stock certificates, dated November 15, 1994 and February 15, 1995, identifying the foreign entity as the owner of 30,000 and 70,000 shares of the petitioner's issued stock, and a stock transfer ledger confirming the issuances of stock to the foreign organization.

In his October 14, 2004 notice of intent to revoke, the director stated that despite the stock certificates, stock ledger, Notice of Issuance of Stock, Statement of Domestic Stock Corporation, and the petitioner's articles of incorporation, the record does not establish the existence of a qualifying relationship between the foreign entity and the petitioning organization. Specifically, the director noted that the petitioner did not provide proof, such as wire transfer receipts and bank statements, of the foreign entity's purchase of the petitioner's stock. The director stated that the evidence submitted is not sufficient "to determine whether a stockholder maintains ownership and control of a corporate entity." The director noted relevant evidence would include the stock certificate registry, the minutes of relevant shareholder meetings, in order to examine the total number of shares issued, the subsequent percentage ownership and the effect on corporate control, and any agreements relating to the voting of shares, distribution of profit, and management of the organization.

Counsel did not address the issue of qualifying relationship in his November 5, 2004 response to the director's notice of intent to revoke. Consequently, the director determined in his November 22, 2004 notice of revocation that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign entity and the petitioning organization.

On appeal, counsel claims that the above-named documents could not be located as the purchase transactions occurred approximately ten years ago. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Again, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *Matter of Arias*, 19 I&N Dec. at 569.

Finally, the AAO will address counsel's claim on appeal that CIS has no statutory basis to revoke the instant petition. In support of his claim, counsel referenced section 205 of the Act, 8 U.S.C. § 1155 (2003), which stated:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, admissibility shall be determined in the manner provided for by sections 235 and 240.²

Counsel also draws the AAO's attention to a recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.³

According to the record of proceeding, the petitioner lives in California; thus, this case did not arise in the Second Circuit. *Firstland* was never a binding precedent for this case. Even as a merely persuasive precedent, moreover, *Firstland* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences.

² The AAO notes that counsel incorrectly referred to the applicable statute as section 1155, 8 U.S.C. § 1252(a)(2)(B).

³ The *Firstland* opinion summarily overturned 35 years of established agency precedent. See *Matter of Vilos*, 12 I&N Dec. 61 (BIA 1967). Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary entered the United States as a nonimmigrant in 1995, more than a year prior to the filing of the Form I-140 immigrant petition and more than eight years prior to the revocation of the petition's approval. Accordingly, it was temporally and physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would create a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited until after he or she arrived in the United States to file the petition.

Section 205 of the Act now reads:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

Based on the foregoing discussion, the director's revocation of the instant petition will be sustained as the evidence of record at the time of his decision warranted such denial. *See Matter of Ho*, 19 I&N Dec. 590. Accordingly, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be revoked.

ORDER: The appeal is dismissed.