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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 00 044 50963

Office: VERMONT SERVICE CENTER

Date: MAY 11 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

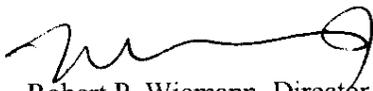
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

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DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in February 1997. The petitioning corporation primarily exports metal scrap from the United States to China. The petitioner further claims that it is the wholly-owned subsidiary of China National Nonferrous Metals Imp. & Exp. Tianjin Corp. The petitioner seeks to permanently employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager immigrant 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 language of the statute is specific in limiting this provision to only those executives and 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 this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that 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. *See* 8 C.F.R. § 204.5(j)(5).

On January 2, 2001, the director approved the Form I-140, Immigrant Petition for Alien Worker, filed on November 22, 1999. On May 21, 2002, the director recognized that the evidence of record did not demonstrate eligibility for this visa classification and issued a notice of intent to revoke the petition. The

notice of intent to revoke is addressed to the petitioner, to the attention of the beneficiary, at the petitioner's address on record. In the notice of intent to revoke, the director specifically observed that the evidence of record did not demonstrate that the beneficiary's duties are primarily managerial or executive. The director also noted that the petitioner and the beneficiary had made material misstatements in this petition and in other applications filed by the beneficiary before [Citizenship and Immigration Services (CIS)].

On August 30, 2002, after receiving no rebuttal to the notice of intent to revoke, the director revoked approval of the petition, again addressing the decision to the petitioner's address on record to the attention of the beneficiary. Counsel for the petitioner filed a Form I-290B, Notice of Appeal, that was date stamped September 18, 2002, or 19 days after the director's date of decision. On the Form I-290B, counsel requested an additional 30 days to submit a brief. Counsel submitted a brief dated April 3, 2003 that was date stamped received on June 7, 2003 by CIS. Counsel explains that the petitioner's prior counsel had been located in the World Trade Center and that the petitioner had been unable to communicate with its prior counsel since the tragic events of September 11, 2001 and had been unable to retrieve its files and supporting documentation. The director noted the untimeliness of counsel's appeal,¹ but elected to treat counsel's brief and the documents submitted in support of the appeal as a motion to reopen. On August 14, 2003, upon review of the brief and supporting documents submitted, the director issued a decision affirming his previous decision. The timely appeal of the director's motion decision followed and is now before the AAO. Counsel asserts that the director failed to elucidate the "gross error" which was made when either of the beneficiary's L-1A or E-13 petitions was approved. Counsel attaches a brief and case law "regarding improper revocation of L-1A status by the Service."

The AAO will address the issue of the director's revocation of the approval of the employment-based petition that is the subject of this appeal. The matter of a prior revocation of the beneficiary's L-1A nonimmigrant intracompany transferee classification is not part of this proceeding.

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." 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. 582, 590 (BIA 1988).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals 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

¹ The regulation at 8 C.F.R. § 205.2(d) indicates that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. As the Form I-290B was date stamped received September 18, 2002, 19 days after the director's decision, the appeal was not timely filed.

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 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In this matter, the director in his notice of intent to revoke determined upon review of the record that the petitioner had not established the beneficiary's managerial or executive capacity. The director requested additional information in the notice of intent to revoke to demonstrate that the beneficiary would be engaged in a managerial or executive capacity. The director also specifically detailed misstatements made by the petitioner and the beneficiary in previously filed petitions.

The director noted that:

On April 15, 1997, the beneficiary was granted a change of status from a B-1 visitor for business to that of an L-1A nonimmigrant intracompany transferee by virtue of an approved Form I-129 "new office" petition (EAC 97 128 53787);

On July 15, 1998, the beneficiary was granted an extension of his L-1A nonimmigrant intracompany transferee status (EAC 98 119 54075);

On September 2, 1998, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, (EAC 98 249 53270) which was denied on May 13, 1999; and,

On January 7, 1999, the director notified the petitioner of his intent to revoke the beneficiary's L-1A classification (EAC 98 119 54075) and on July 7, 1999, the director revoked the L-1A approval.

The director observed that the petition filed November 22, 1999 and the subject of this appeal, contained the petitioner's indication that it had not filed other immigrant petitions on behalf of this beneficiary as well as the petitioner's declaration that the beneficiary was still in valid L-1A status despite the July 7, 1999 revocation. The director concluded that the petitioner had falsely represented that no immigrant petition had been filed prior to this petition and that the beneficiary had repeatedly² misrepresented his status subsequent to the revocation of his L-1A status. The director concluded that had these facts been known when the November 22, 1999-Form I-140 had been filed a favorable decision would have been highly unlikely.

On appeal, counsel for the petitioner explains that the petitioner's prior counsel never informed the petitioner or the beneficiary that he (prior counsel) had received a notice of intent to revoke the beneficiary's L-1A status. Counsel claims that the petitioner did not respond to the notice of intent to revoke the beneficiary's

² On April 13, 2000, the petitioner submitted Form I-129, to extend the beneficiary's L-1A nonimmigrant status.

L-1A status because it had no knowledge of the notice that ultimately resulted in the revocation of the beneficiary's L-1A classification. Counsel also indicates that the petitioner's prior counsel failed to indicate on the second-filed Form I-140 that a Form I-140 had previously been filed on the petitioner's behalf. Counsel claims that the chairman of the parent company's board of directors was not advised of the contents of the second-filed Form I-140 that he signed allegedly on the petitioner's behalf and was not aware of the requirement to disclose previously filed petitions.

Counsel submits a March 18, 2003 affidavit signed by a "manager" for the petitioner. The "manager" states that the petitioner did not receive the January 7, 1999 notice of intent to revoke approval of the beneficiary's L-1A classification (EAC 98 119 54075) and did not receive the May 21, 2002 notice of intent to revoke approval of the beneficiary's immigrant [E-13] classification (EAC 00 044 50963) until its current counsel provided the petitioner with copies received from CIS in February 2003. The "manager" also noted that the petitioner's chairman did not know that he should review Part 4 [of the Form I-140] to correct the attorney's preparation.

In this matter, the petitioner claims that it did not receive a notice of intent to revoke on two separate occasions (EAC 98 119 54075 and EAC 00 044 50963) and further that it was unaware that the beneficiary's classification as an L-1A nonimmigrant had actually been revoked (EAC 98 119 54075). The AAO notes these claims but finds it improbable that the petitioner would not have received the three documents. In particular, the AAO observes that the notice of intent to revoke in this matter, EAC 00 044 50963, was sent to the attention of the beneficiary and yet a "manager" not the beneficiary submits an affidavit that the notice was not received. In addition, the chairman of the petitioner or the petitioner's parent company is responsible for understanding the documents he signs. Whether the petitioner's previous counsel was ineffective may never be known because of the tragic circumstances of September 11, 2001. However, the AAO finds that the misstatements on the petitioner's second-filed Form I-140, the petition that is the subject of this appeal, are sufficient to cast doubt on the validity of the petitioner's claim that the beneficiary is eligible for this visa classification. Doubt cast on any aspect of the petitioner's proof may, of course, 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 at 591. Further, generally, 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 intent to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). In this matter, the AAO finds that notice of intent to revoke the Form I-140 that is the subject of this appeal was properly addressed to the petitioner and that the petitioner failed to offer a timely explanation or rebuttal to the properly issued notice of intent to revoke.

For the sake of clarity the AAO will further address whether the director's decision to revoke the approval of the second-filed Form I-140 violates established CIS policy. Counsel asserts that when CIS initiates proceedings to revoke a previously issued benefit or classification granted to an alien, it must specifically elucidate the "gross error" made which resulted in the approval. Counsel cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) and includes a copy of the U.S. District Court for the District of Columbia's decision in *Delta Airlines, Inc. ET. AL. v. U.S. Department of Justice, Immigration and Naturalization Service* 98-3050-LFO (July 13, 1999), in support of his assertion.

Counsel's assertion in this regard is not persuasive. It is noted that the "gross error" standard has been incorporated into the regulations for the revocation of a nonimmigrant L-1A petition. *See* 8 C.F.R. § 214.2(l)(9)(iii)(5). As the present matter involves the statutory denial of an immigrant visa petition, the "gross error" standard does not apply to this matter.³

Of note, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

Many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

In addition, although counsel requests consideration of the previous approvals and an elucidation of the "gross error" made when approving the petitions, the record reveals that CIS also had denied the previously submitted Form I-140 immigrant visa petition, and had revoked the approval of the second submitted Form I-129 nonimmigrant extension visa petition. Counsel neglects to discuss these previous denials. Counsel also fails to discuss that the initial nonimmigrant approval was for a "new office" with distinctly different requirements than those for an employment-based immigrant visa classification.

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

Furthermore, counsel's citation to *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) for the proposition that denial of a third preference classification on the same facts as an L-1 visa and extension that

³ The facts in the *Delta Airlines, Inc. ET. Al. v. U.S. Department of Justice, Immigration and Naturalization Service* matter relate to revocation of a nonimmigrant L-1B petition; thus is also not pertinent to the revocation of an employment-based immigrant visa classification

were approved is an abuse of discretion without specific elucidation stating why the previous approvals were in error is not persuasive. Counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not manager or executive after having determined that he was manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Because the approved nonimmigrant petitions are not part of the current immigrant visa record of proceeding, the AAO cannot determine whether the previous L-1A petitions were approved in error, or whether the beneficiary was originally eligible but the facts changed before the Form I-140 immigrant petition was filed, or whether the disparate requirements of an L-1A petition and an E13 petition caused the result. Regardless, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597.

Accordingly, the AAO does not find that the director's decision should be overturned based on the cited case law or on the premise that the "gross error" standard also applies to employment-based immigrant petitions.

The substantive issue of eligibility in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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

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

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

considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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

In a November 5, 1999 letter appended to the petition, the petitioner provided a general statement of the beneficiary's duties for the petitioner. The petitioner stated:

As President of American Company, [the beneficiary] is authorized to plan, develop and establish policies and objectives of the company in accordance with [the] Board of Directors, directives and corporation charter; Confer with the company officials to plan business objectives, to develop organizational policies, to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives; Direct and coordinate formulation of financial programs to provide funding for new operations, to maximize returns on investment; Plan and develop sales, marketing, importing & exporting and public relations policies designed to improve company's image and relations with customers, employees and public; Evaluate the performances of managerial and professional staff of 4 and exercises wide latitude in hiring and firing; Only receives general supervision from the Board of Directors of China Company.

The director did not request further evidence on the issue of the beneficiary's job duties for the petitioner and approved the petition on this limited description.

In the May 21, 2002 notice of intent to revoke, the director determined that the record did not support the petitioner's claim that the preponderance of the beneficiary's duties would be managerial or executive. The director requested: (1) a complete position description for all of the petitioner's employees and a breakdown of the number of hours devoted to each of their duties; (2) minimum education requirements for the beneficiary's subordinates and how their education related to their duties; (3) evidence documenting the use of

contractors, if applicable; (4) copies of the petitioner's Employer's Quarterly Tax Return for the last quarter of 1999 and the first quarter of 2001; (5) Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, for 1999, 2000, and 2001 issued by the petitioner; and, (6) 1999, 2000, and 2001 IRS Forms 1120, U.S. Corporate Tax Returns.

As observed above, the petitioner claims that it did not receive the director's notice of intent to revoke and did not provide a rebuttal. The director revoked the petition on August 30, 2002. Counsel for the petitioner filed a late appeal that the director treated as a motion to reopen. Counsel provided numerous documents to support the motion to reopen. However, the AAO decision will not analyze or recite every document contained in the record. In the interest of brevity, this decision will refer only to the critical documents in this matter.

The petitioner stated the beneficiary as president:

- Is vested full discretionary authority and control of the entire company (general);
- Planning and formulating policies, and strategy activities of the company, formulating and administering company's production policies and manufacturing policies, and developing current goals and objectives (5 hours);
- Directing and coordinating two divisions, instruct division and subsidiary managers and executive on their working processing to ensure complete [sic] the entire company's tasks, coordinate the activities (8 hours);
- Budget allocation and control for the company's trading business, and developing new investment projects (6 hours);
- Organizing and directing his subordinates to implement purchase order and specifications with Chinese manufactures, direct his subordinates to prepare sample of nonferrous metal products for the U.S. customers approval; give supervisors directions to manufactures [sic], and resolve problems on production (8 hours);
- Attending meetings of the board of directors of the company or liaison with the board of director and leaders of the parent organization (2 hours);
- Review and analyzing reports and records on the [sic] each transaction in the United States, arranging implementing schedule (5 hours);
- Negotiate and review leading trading contracts, comments on the negotiation (4 hours), and
- Overseeing day to day [sic] overall administrative and business operations of the U.S. company (4 hours).

The petitioner also indicated that it employed a trade and marketing manager, an assistant manager in the general and accounting department, a salesman, and an office clerk. The petitioner indicated that the trade and marketing manager supervised and coordinated the activities of the department, conducted research on nonferrous metal and processing equipment, made and directed trading plans and implemented projects, analyzed each business transaction, attended staff meetings, developed the budget for the trading operation, and supervised and conducted market research activity with the United Nations. The petitioner advised that the assistant manager directed, planned, and coordinated all administration affairs, accounting projects, and

strategy activities of the company, implemented the managerial system, gave subordinates direction to resolve problems, prepared meetings, compiled administration reports and statistical records, analyzed financial statements, conducted financial research, and directed accountants to prepare financial statements, payroll, and tax returns. The petitioner's salesman found sale sources, negotiated with importers, prepared sales contracts, provided information, prepared and compiled documents for importing nonferrous metals, prepared invoices, conducted paying and receiving processing, and analyzed marketing conditions. The petitioner's office clerk was responsible for clerical support, bookkeeping, and word processing.

The petitioner's organizational chart depicted: the trade and marketing department manager and the assistant manager as reporting directly to the president; the salesman reporting to both the trade and marketing department manager and the assistant manager; and, the clerk reporting to the salesman. The petitioner's New York Form, NYS45, for the quarter in which the petition was filed confirmed the employment of the beneficiary and four subordinates.

The director determined that the petitioner's second iteration of the beneficiary's duties paraphrased the definitions of managerial and executive capacity and did not convey a clear understanding of the beneficiary's daily duties. The director also determined that the described duties of the beneficiary's subordinates were not so complex as to require a bachelor's degree to perform them; thus, the beneficiary was not supervising professional employees. The director further noted that the growth of the petitioner's business after the petition was filed was not pertinent to this proceeding, as the petitioner must establish eligibility when the petition was filed.

On appeal counsel for the petitioner asserts that it was unreasonable for the director to issue a notice of intent to revoke based solely on the size of the petitioner's staff. Counsel claims that the nature of an import/export and trade business requires few personnel. Counsel contends that the beneficiary operates in an executive capacity. Counsel repeats the definition of executive capacity and concludes that the beneficiary satisfies the definition.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As the director determined, the petitioner's description of the beneficiary's duties is vague and nonspecific and it fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include authorization to "plan, develop and establish policies and objectives of the company," and "to coordinate functions and operations between divisions and departments," and to "[p]lan and develop sales, marketing, importing & exporting and public relations policies." The petitioner does not, however, further delineate the petitioner's goals and policies. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner's second iteration of the beneficiary's duties did not further expand upon the beneficiary's daily duties. Instead of providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as having "full discretionary authority and control of the entire company," and "[p]lanning and formulating policies, and strategy activities," and "developing current goals and objectives." Further, the petitioner indicated that the beneficiary was responsible for "[b]udget allocation and control for the company's trading business, and developing new investment projects," and "[o]verseeing day to day [sic] overall administrative and business operations of the U.S. company." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner's statements that the beneficiary directs and coordinates divisions and instructs subsidiary managers to implement purchase orders, prepare samples, and resolve problems although indicative of a supervisory task is not sufficient to establish managerial capacity. The record does not provide sufficient evidence that the tasks the beneficiary's subordinates perform are professional, managerial, or supervisory tasks. It appears that the beneficiary's subordinates carry out some of the operational tasks of the petitioner but the tasks described are not sufficiently complex to elevate the positions to professional positions. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Finally, the petitioner states that the beneficiary is responsible for negotiating and reviewing trading contracts and reviewing each transaction and arranging the implementing schedule. These tasks are not sufficiently described to enable CIS to conclude that these duties comprise primarily managerial or executive duties rather than the performance of the necessary functions of an organization involved in trade. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's job descriptions do not establish that the beneficiary performs primarily managerial or executive duties.

Counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, 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). In this matter, the petitioner has not provided evidence that the beneficiary will be relieved from primarily

performing the petitioner's trade negotiations and first-line supervisory 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 at 190.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties. For this reason, the petition must be denied. Accordingly the decision of the director will be affirmed.

Beyond the decision of the director, the petitioner has provided confusing information regarding its purported qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

In this matter the petitioner provides a copy of its stock certificate purportedly issued to the beneficiary's foreign employer. The stock certificate shows that 200 shares have been issued. The petitioner also provides a copy of a "book transfer advice" crediting the petitioner's account in the amount of \$119,248.25. The advice is dated April 2, 1997 and originates from China National Nonferrous Metals, I/E Tianjin Corp. However, the petitioner's IRS Forms 1120 for the years 1998, 1999, 2000, and 2001 identify the beneficiary as the owner of 100 percent of the petitioner's common stock on Schedule E, Line 1(d). In addition, the petitioner's IRS Forms 1120, all show on Schedule L, Line 22(a) that the petitioner has issued preferred stock valued at \$50,000 and common stock valued at \$50,000. These inconsistencies cast doubt on the petitioner's true ownership. 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. For this additional reason the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.

ORDER: The decision of the director is affirmed. The petition is denied.