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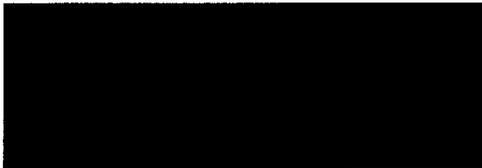
Office: CALIFORNIA SERVICE CENTER

Date: NOV 23 2005

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

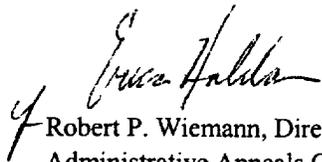
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

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

The petitioner is an organization incorporated in the State of California in January 1995. It initially imported and sold black and white televisions and currently markets and sells key chains and thermos coffee mugs. It seeks to employ the beneficiary as its sales manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The petitioner filed the petition on December 13, 1996 and it was approved January 11, 1997. Upon subsequent review of the record, the director issued a notice of intent to revoke approval on January 7, 2005. The petitioner submitted a rebuttal on February 7, 2005, but upon review the director ultimately revoked the petition. The director determined that the petitioner had not established: (1) that it was doing business in a regular, systematic, and continuous manner; (2) that the beneficiary had been employed in a managerial or executive capacity for one year prior to entering the United States as a nonimmigrant for the foreign entity; and (3) that the beneficiary would be performing primarily managerial or executive tasks for the U.S. petitioner.

On appeal, counsel for the petitioner asserts that: (1) 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, is applicable to this matter and requires the director to issue a notice of intent to revoke an immigrant petition prior to the beneficiary's journey to the United States; (2) Citizenship and Immigration Services (CIS) approved the petitioner's request for the beneficiary's classification as an L-1A intracompany transferee four times and the beneficiary's classification as a multinational manager or executive pursuant to section 203(b)(1)(C) once, on the same basic facts; (3) although the petitioner's sales have fluctuated, the company has remained profitable; (4) the beneficiary worked for the foreign entity as its deputy sales manager in a qualifying position; or, (5) the beneficiary qualifies as a manager of the petitioning entity. Counsel submits documentation in support of his assertions.

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).

As a preliminary matter, the AAO will address counsel's citation to the 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.¹

According to the record of proceeding, the petitioner is located in California; thus, this matter did not arise in the Second Circuit. *Firstland* was never a binding precedent for this matter. 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, __ Stat. __ (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. Section 205 of the Act now reads:

¹ In the present matter, the beneficiary entered the United States as a B-1 nonimmigrant on December 31, 1994 and obtained an L-1A intracompany transferee classification valid from May 3, 1995 to April 15, 1996. The L-1A classification was extended three times and expired March 27, 1999. While in the United States as an intracompany transferee, the petitioner submitted the Form I-140 requesting classification as an employment-based manager or executive. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United 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.

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.

In the present matter, the director had good and sufficient cause to issue the notice of intent to revoke and the petitioner has not submitted sufficient independent and objective evidence to meet its burden of proof.

The first substantive issue in this proceeding is whether the petitioner has established that it was doing business when the petition was filed and continuing until the beneficiary adjusts status.²

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

- (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

² The AAO acknowledges counsel's apparent confusion on appeal regarding the petitioner's obligation to satisfy its burden of proof, not only when the petition was filed but also continuing until the immigrant visa is issued. However, as established in *Matter of Katigbak*, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak* 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed and the petitioner's burden is not discharged until the immigrant visa is issued. See 8 C.F.R. § 245.1(a); *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). Thus, the petitioner must establish eligibility when the petition is filed and continuing until the immigrant visa is issued.

In this matter, the petitioner provided its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 1995 through 2003. Each IRS Form 1120 showed the petitioner had gross receipts fluctuating between \$277,109 for the first year of operation to \$9,926,122, for the second year of operation and the peak of its gross receipts, to \$712,531 for the year 2003. The petitioner has also provided customs forms, its business lease, annual business licenses to wholesale electronic products, and wire transfers from the petitioner to overseas entities per invoices, up to and including the 2004 year as evidence of its continuing operations.³

The AAO observes that counsel in his rebuttal to the director's notice of intent to revoke and on appeal, states that the petitioner's "primary reason for existence is to engage in the sale of the parent company's products to businesses in the United States," and that "[i]ts function is to sell company goods, arrange to have them delivered to the customers, and collect payments." A restrictive view of the petitioner's primary function would place the petitioner in the status of an agent, acting only behalf of the foreign entity and not doing business on its own as required by the regulation. However, the critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the "mere presence of an agent or office" without conducting any business activities. The proper focus on this issue thus, is the nature and conduct of the petitioner's business activities, if any. In the matter at hand, the petitioner has presented evidence that it is involved in a number of transactions. The petitioner has submitted sufficient evidence to establish that it facilitated the annual import of black and white televisions and accommodated the change in the market by creating a new product, obtaining a patent, and facilitating its manufacture and import in the years immediately preceding the notice of intent to revoke. The petitioner has adequately established that it has been and continues to be engaged in facilitating the regular, systematic, and continuous provision of goods. The director's decision will be withdrawn as it relates to the question of whether the petitioner was doing business in a regular, systematic, and continuous manner.

The next issue in the revocation decision is whether the petitioner established that the beneficiary's position for the United States entity would be in a managerial or executive capacity when the petition was filed and continuing until the beneficiary adjusts status.

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;

³ The AAO notes counsel's reference to the beneficiary's daughter's file and claim that substantial documentation was provided to the CIS district adjudicating officer in October 2004 showing the continuing nature of the petitioner's business from 1999 to 2004. However, the daughter's [REDACTED] (attached as a rider to this proceeding) does not include additional documentation establishing the continuing nature of the petitioner's business.

- 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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated it employed four individuals. In a December 10, 1996 letter appended to the petition, the petitioner stated that the beneficiary would "continue to fill the position of Sales Manager of [the petitioner]." The petitioner also indicated that: the beneficiary as sales manager would be responsible for overseeing all of the petitioner's purchasing and sales activity which involved both long-range planning, and the ability to understand market forces; would continue to direct sales expansion by developing new markets; would represent the petitioner in business negotiations and other transactional matters; would be responsible for training; and, would consult with the parent company's sales personnel and marketing department to coordinate a global strategy.

On the basis of this limited description of the beneficiary's proposed duties, the director approved the petition.

Upon review of the record of proceeding in this matter, the director issued a notice of intent to revoke approval on January 7, 2005.⁴ The director determined: that the beneficiary's job description was general and too vague to convey an understanding of the beneficiary's daily duties; that the petitioner had only employed four individuals when the petition was filed and had not provided information concerning the employees' duties for the organization and whether they held professional positions; and, that the petitioner's organizational chart suggested that the beneficiary was a first-line supervisor of non-professional employees. The director afforded the petitioner 30 days to offer evidence in support of the petition and in opposition to the notice of intent to revoke.

In a February 7, 2005 rebuttal, counsel for the petitioner indicated that the petitioner had regularly employed four to six full-time workers and had indirectly employed six to ten more workers to perform custom broker, advertising, and accounting services, to perform as commissioned sales personnel, truck drivers, and warehouse workers through contracts with third party companies. Counsel indicated that the beneficiary had authority to negotiate and sign contracts, attended trade shows, met with wholesale buyers, and directed the commissioned sales agents who concentrated on smaller retail stores. Counsel also referenced the company's national sales manager "who is responsible for day-to-day management of the sales force." Counsel also provided examples of the beneficiary's duties such as, the management of an account with Radio Shack that the beneficiary had negotiated and maintained for eight years and recent sales presentations made by the beneficiary to promote the petitioner's line of patented stainless steel insulated travel cups and mugs. Counsel also noted that the beneficiary supervised company employees who arranged for shipping and delivery. Counsel further indicated that the beneficiary was responsible for setting the goals of the company and creating plans to reach the goals and making decisions regarding sales presentation to various retailers and distributors, which trade shows to attend, what advertising to use, hiring and firing employees, and making their job assignments. Counsel further claimed that the petitioner's national sales manager's job duties were so complex that they required the services of an individual with a marketing degree and that the beneficiary's supervision of the national sales manager and the department elevated the beneficiary's position to that of managing a function within the meaning of the regulation.

⁴ The record contains information that the beneficiary attended an adjustment interview in May 1999 and was requested to provide additional documentation. In addition, the district adjudicating officer requested that an overseas investigation be conducted to verify the beneficiary's eligibility for this visa classification. After repeated inquiries by the beneficiary's attorney in conjunction with the adjudication of the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, and repeated requests by the Los Angeles District Office for an overseas investigation, the record of proceeding was returned to the California Service Center with a request to begin the revocation process. In a November 2002 memo, the Los Angeles District Office noted that an investigative report had never been received but that the record of proceeding did not contain sufficient evidence to establish eligibility for this visa classification. Apparently the California Service Center rejected the request for revocation because of the lack of an investigative report. On December 1, 2004, the Los Angeles District Office again requested revocation, noting the deficiencies in the record regarding the beneficiary's claimed managerial or executive capacity as a basis for the revocation, not an overseas investigation. Upon review of the record, the California Service Center director issued a notice of intent to revoke approval on January 7, 2005.

Counsel concluded by asserting that the beneficiary qualified as a manager in that he: (1) primarily manages a subdivision or component of the parent company, (2) he is an executive who manages an essential function of the organization, the sales effort to major retailers and distributors in the United States, (3) he directly supervises other employees and has the full authority to hire and fire and take other personnel actions, and (4) he is an executive who exercises full direction over the daily operations of the activity or function over which he has authority.

The record contains copies of two employee lists, one list indicates the employees' dates of employment, and the second list does not. The list indicating the dates of employment show that most of the employees were employed intermittently in 1997, 1998, and 1999, and a second group of employees employed intermittently in 2000, 2001, and 2002. The record contains copies of the petitioner's California Forms DE-6, Employer's Quarterly Report for the quarter ending March 31, 1999, and for the last quarter of 2003 and the first three quarters of 2004. The California Form DE-6 for the quarter ending March 31, 1999 shows that the petitioner employed four individuals in January and February and five individuals in March 1999. The names on the first quarter 1999 California Form DE-6 correspond to the names on the list of employees in the positions of office manager, office manager/purchaser, warehouse supervisor, warehouse employee, and the beneficiary's position of "general manager." The last quarter 2003 and first quarter 2004 California Form DE-6 show employees in the position of secretary, office manager, and the beneficiary's position as "general manager." The second quarter 2004 California Form DE-6 adds an individual in the position of office clerk, and the third quarter 2004 California Form DE-6 adds an individual in a warehouse position for the first month of the quarter but shows that the petitioner employed only three individuals in the last two months of the quarter. The record also contains a rudimentary undated organizational chart showing the beneficiary as general manager and individuals in the position of: office manager; office clerk; secretary; warehouse supervisor hired October 2004; two temporary helpers in the warehouse department; and the first names of three individuals and two organizations in the sales department.

On February 15, 2005, the director revoked approval of the petition, determining that the petitioner had failed "to show how the hiring of employees equates to beneficiary's claimed managerial or executive capacity." The director also observed that the record did not contain corroborating evidence of counsel's assertions. The director further concluded that the information submitted in rebuttal did not resolve the issues raised in the notice of intent to revoke, including the general description of the beneficiary's duties, the failure to establish that the beneficiary would be managing professionals, and the failure to establish the specific goals and policies and decisions made by the beneficiary.

On appeal, counsel restates the information contained in the rebuttal and emphasizes that according to the notice of intent to revoke, all the evidence that had been submitted was true but was just inadequate. Counsel asserts that the sole reason for issuing the notice of intent to revoke is that the adjudicating officer believed that more documentation regarding certain points or issues was necessary. Counsel contends that all of the information and documentation had been provided on five previous occasions.

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). The record suggests that the petitioner is claiming that the beneficiary would be primarily

engaged in managerial duties under section 101(a)(44)(A) of the Act. For the record, the AAO notes that a petitioner may not claim that a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In this matter, the petitioner's initial description of the beneficiary's duties as its sales manager does not include information that describes the managerial or executive aspect of the beneficiary's proposed position as a sales manager. At most, the description portrays the beneficiary as a supervisor involved in the sale and marketing of the parent company's product. The record did not contain any information regarding the beneficiary's subordinate employees or the management of a function that would have elevated the beneficiary's supervisory sales position to that of a manager as defined in the regulations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The approval of the petition based on this description and lack of supporting evidence was gross error.

In addition, counsel's description of the beneficiary's duties depicts the beneficiary as the individual who negotiates contracts, attends trade shows, meets with buyers, supervises shipping and delivery, as well as makes the decisions regarding sales presentations, advertising, and hiring, firing, and assigning employees their duties. This description establishes that the beneficiary is the individual performing the essential operational and administrative duties of the organization. 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).

Further, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The record does not provide evidence that the positions of the beneficiary's subordinates required individuals with professional credentials, rather than individuals who could perform the administrative and clerical tasks of an import and distribution company. Moreover, counsel's attempt in rebuttal and on appeal to insert a national sales manager position between the beneficiary and a sales staff is not persuasive. The substantiating information in the record does not identify the individual purportedly in the position of national sales manager. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Finally, upon review of the petitioner's IRS Forms 1120, for the years 1996 through 2003, the petitioner has not paid salaries and has not provided other evidence that the petitioner's cost of labor comports with the number of employees claimed. The record does not contain evidence explaining how the petitioner could have a sufficient number of individuals to relieve the beneficiary from primarily performing the petitioner's operational, first-line supervisory, and sales tasks in light of the intermittent and minimal salaries paid each year.

Counsel observes that it is the inadequacy of the record that forms the basis of the revocation of the approval and not that the beneficiary does not qualify as a manager or executive. The AAO disagrees. While it is true that the petitioner in this matter did not provide sufficient evidence that the beneficiary was employed in a managerial or executive capacity when the petition was filed and has not offered evidence that the petitioner has evolved into an employer that could support an individual employed in a primarily managerial or executive capacity; the initial general description of the beneficiary's duties indicates that the beneficiary would be overseeing sales and marketing, and performing supervisory tasks. This general description suggests that it is the beneficiary that would be primarily performing the petitioner's operational tasks. Counsel's description of the beneficiary's duties only confirms that the beneficiary is the primary source of the petitioner's labor requirements. Again, 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. at 604. The statute requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Although the AAO acknowledges that the director's gross error in 1997 when approving this petition may have resulted in an inequitable position for the beneficiary and his family, the AAO is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991).

In this matter, the record does not demonstrate and the petitioner has not established that the beneficiary was employed in a managerial or executive position when the petition was filed and the evidence provided since the petition was filed does not establish that the beneficiary was ever employed or would be employed in a managerial or executive position with the petitioner. For this reason, the approval of the petition will be revoked.

The next issue in this matter is whether the petitioner has established that the beneficiary had been employed in a managerial or executive capacity for the foreign entity prior to his entry into the United States as a nonimmigrant. The focus of this issue is not whether the beneficiary had been employed by the foreign entity, but rather whether the beneficiary's duties comprised primarily managerial or executive duties.

In the December 11, 1996 letter in support of the petition, the petitioner indicated that the beneficiary had been "employed as a Deputy Manager for [the foreign entity] in charge of sales and quality control," and that "[the beneficiary] was charged with the supervision, training, and direction of a sales force, and was also involved in negotiations with third-party entities on behalf of [the foreign entity]."

In the notice of intent to revoke the petition, the director determined that the petitioner had not provided evidence that the beneficiary's position with the foreign entity was in a managerial or executive position. In rebuttal, the petitioner provided a list of the foreign entity's employees in the sales department in October

1993. The list of employees included a manager, the beneficiary's position of deputy manager, and eleven subordinates. The petitioner also includes brief job descriptions for the employees included on the list. The descriptions include responsibility for customer service, business negotiation, quality inspection, bookkeeping, customs and other importing activities, taking, placing, and following up on orders, and making shipping arrangements, among other duties. The foreign entity identifies three of the beneficiary's subordinates as leaders of a specific team, identifying the teams as the direct foreign sales group team, sales group team, and importing and customs duty team.

On appeal, the petitioner provides a letter from the foreign entity that indicates that the beneficiary managed 12 or more sales personnel, supervised and instructed sales personnel, approved contracts, coordinated with the production line, made arrangement for shipments, secured sales receipts, made business plans for the next quarter and year, interviewed potential employees, initiated basic and advanced training programs for the new hires and experienced sales representatives, and checked on the quality of the product.

Counsel complains that if the petitioner had been requested to provide evidence earlier in the proceeding it would have been easier to obtain the records of the beneficiary's foreign employment. Counsel asserts that the information provided on appeal is sufficient to show that the beneficiary was eligible for the intracompany transferee classification and also is eligible for this employment-based visa classification.

Counsel's assertion is not persuasive. Again, the AAO observes that the information in the record depicts the beneficiary as a first-line supervisor over sales personnel when employed with the foreign entity. The AAO acknowledges the foreign entity's description of certain of the beneficiary's subordinates as leaders; however, this designation is insufficient to identify these individuals as supervisors. The descriptions of the beneficiary's duties, his superior's duties, and those of his subordinates do not elevate the beneficiary's position to one of a manager supervising professionals, managers, or supervisors. If the petitioner claims that the beneficiary primarily supervises employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Again, the description of the beneficiary's duties and those of his subordinates do not establish that the beneficiary performed primarily managerial or executive tasks for the foreign entity. For this reason, the approval of the petition will be revoked.

The last issue in this matter regards counsel's reference to past approvals of the beneficiary in an L-1A classification and the initial approval of this Form I-140 petition. Counsel should note that prior nonimmigrant approvals do not preclude CIS from denying an extension or a separate immigrant petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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.

Further, the approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. It must be noted that 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 L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Moreover, 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). If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory asserts that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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. 593, 597 (Comm. 1988).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this instance, the descriptions of the beneficiary's duties and both the petitioner's and the foreign entity's organizational structure, failed to demonstrate the beneficiary's eligibility when the petition was filed. The director's initial approval was clearly a matter of gross error. The director properly issued a notice of intent to revoke based on the deficiencies in the record. The record does not contain adequate rebuttal or explanation to the director's notice of intent to revoke. The director's decision to revoke approval will be affirmed.

Counsel should note that generally, a 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. See *Matter of Arias*, 19 I&N Dec. 568, 569 (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 Esteime*, . . . 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. at 590.

CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. See 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

In this matter, the petitioner has not submitted an explanation or explanation or rebuttal to the director's properly issued notice of intent to revoke. The petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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 appeal is dismissed.