

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

34

PUBLIC COPY

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JAN 24 2006

WAC 97 083 50236

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, approved the employment-based visa petition. Following an interview and investigation performed in connection with the beneficiary's Form I-485 Application to Adjust Status, the director issued a Notice of Intent to Revoke and properly provided the petitioner thirty days during which to rebut the proposed revocation. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive 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 is a corporation organized under the laws of the State of California that is engaged in the import and export of stuffed animals and toys. The petitioner seeks to employ the beneficiary as its general manager.

The director approved the employment-based petition on August 5, 1997. On February 17, 2005, the director issued a Notice of Intent to Revoke as a result of information obtained in connection with the beneficiary's I-485 application. The petitioner did not respond to the director's notice.¹ On April 29, 2005, the director revoked approval of the petition based on the petitioner's failure to demonstrate that: (1) the petitioning entity was doing business for at least one year prior to the filing of the immigrant petition; (2) the beneficiary had been employed abroad and would be employed in the United States in a primarily managerial or executive capacity; (3) a qualifying relationship existS between the foreign and United States entities; and (4) the petitioner has the ability to pay the beneficiary's proffered annual salary of \$30,000.

The petitioner's former counsel filed an appeal on June 23, 2005 requesting additional time within which to submit an appellate brief. The AAO notes that the appeal was timely filed, as the record demonstrates that the director's decision to revoke approval was initially mailed to an incorrect address before being sent to the beneficiary on June 15, 2005. On September 26, 2005, the petitioner's new counsel submitted a letter and brief challenging the director's revocation of approval of the immigrant petition. Counsel cites section 205 of the Act, 8 U.S.C. § 1155 (2003), stating that it restricts Citizenship and Immigration Services (CIS) from revoking approval of a petition after the beneficiary has departed for the United States. Counsel also contends that the prior approvals for an L-1A nonimmigrant visa demonstrate the beneficiary's eligibility for the classification requested herein.

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

¹ A review of the record reveals that due to a typographical error the director's Notice of Intent to Revoke was mailed to an incorrect address of the petitioner's former counsel. This issue, however, is moot, as the petitioner has submitted new evidence on appeal which will be considered herein.

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 this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Following approval of an immigrant or nonimmigrant petition, the director may revoke approval of the petition in accordance with the statute and regulations. 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 Dec. 450 (BIA 1987)).

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. Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke 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 Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The AAO will first address counsel's reference on appeal to Section 205 of the Act. In a recent opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), the court interpreted the third and fourth sentence of section 205 of the Act 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.²

According to CIS records, the petitioner is located 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. 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 argument no longer has merit.

The AAO will next consider the issue of whether the petitioning entity was doing business for at least one year prior to the filing of the instant petition.

The term "doing business" is defined by the regulation at 8 C.F.R. § 204.5(j)(2) 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 immigrant petition on March 3, 1997 and noted that the corporation had been established as an import and export company on November 30, 1995. In an appended letter dated January 16, 1997, the petitioner explained that since its establishment, the corporation "has been engaged in the trading of furs, crafts [and] toys and many other items." The petitioner noted its gross annual income in the amount of

² 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 L-1A on January 1, 1995, approximately two years prior to the filing of the Form I-140 immigrant petition and ten years prior to the revocation of the petition's approval. Accordingly, it was 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 have created 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.

\$237,992 for the year 1996, and referenced an accompanying balance sheet, which reflected the same. As evidence of its business operations in the United States, the petitioner submitted the following documentation: (1) Internal Revenue Service (IRS) Form SS-4, Application for Employer Identification Number; (2) a City of Los Angeles Tax Registration Certification issued on January 13, 1996; (3) a seller's permit; (4) State, Local and District Sales and Use Tax Return for March through November 1996; (5) an unaudited balance sheet as of November 30, 1996; (6) IRS Form 941, Employer's Federal Quarterly Tax Return for the three quarters ending March through December 1996; (7) IRS Form 1120, U.S. Corporation Income Tax Return for 1995; (8) State of California Form DE-6, Quarterly Wage Report, for the quarters ending March through December 1996; (9) a one-year commercial lease for showroom premises dated January 2, 1997; (10) Customs Form 7501, Entry Summary, dated August through December 1996; (11) debit notes and bills of lading; and (12) bank statements dated during the month of March 1996 and the months August through December 1996.

The director subsequently submitted a request for evidence on February 10, 1997, yet did not request evidence specifically related to whether the petitioner was doing business during the appropriate time period. Nevertheless, the petitioner submitted with its April 24, 1997 response its 1996 corporate tax return and related financial statements, a "verification" from the petitioner's landlord of its lease for commercial premises, and an addendum extending the lease until 2003. The petitioner also submitted additional financial documents, however, the dates reflected on the financial statements do not relate to the time period during which the immigrant petition was filed. Therefore, they will not be considered herein. 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).

The director issued a Notice of Intent to Revoke approval of the immigrant petition on February 17, 2005. In his notice, the director acknowledged photographs, shipping invoices, bills of lading and sales receipts submitted by the petitioner demonstrating its business activity through 1999. The director noted, however, that the petitioner had not provided evidence to establish that it has been doing business from 1999 until the present. The director referenced a public records search of the petitioner's business in the Business Development Division for the State of California that indicated the business "[had] been recently suspended." Consequently, the director concluded that the petitioner is no longer engaged in the regular, systematic and continuous provision of goods and/or services. The director properly provided the petitioner with an opportunity to respond to the proposed revocation. As no response was received from the petitioner, the director revoked approval of the immigrant petition in a decision dated April 29, 2005. In his decision, the director again referenced the lack of documentation demonstrating the petitioner's business activity from 1999 until the present.

On appeal, counsel contends that the petitioner has been doing business in the United States since 1999. Counsel references copies of the petitioner's federal and state quarterly wage reports filed during the years 1996 through 2005, and invoices, packaging slips, bills of lading, Customs Form 7501, and United Parcel Service (UPS) statements for the years 2003 through 2005. The petitioner also submitted its corporate tax returns for the years 1999 through 2004.

Upon review, the petitioner has demonstrated that it has been doing business in the United States since one year prior to the filing of the immigrant petition on February 3, 1997. The petitioner provided substantial documentary evidence in the form of corporate tax returns, federal and state quarterly wage reports, bills of lading, invoices, seller's permit, customs forms, financial statements and lease agreements demonstrating its business activity in the United States from 1996 through the date at which the director's notice of revocation

was issued. Consequently, the director did not have good and sufficient cause to revoke approval of the immigrant petition based on the finding that the petitioner was not doing business in the United States for at least one year prior to the filing of the petition. Therefore, the director's decision related to this issue will be withdrawn.

The AAO will next consider the issue of whether the beneficiary would be employed by the United States entity 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.

In the January 16, 1997 letter appended to the immigrant petition, the petitioner outlined the following job duties for the beneficiary's proposed position of general manager:

1. Direct and coordinate the activities of the subsidiary company. Supervise the work of the staff and assign specific duties. Report the operations and management status to the parent company on a constant basis.
2. Review market research and price analysis reports to determine company development directions and fix short-term and long-term development plans.
3. Coordinate communications and business activities between U.S. subsidiary and China parent company.
4. Develop strategies for market expansion in the U.S. and direct the implementation of the strategies with the help of the staff members.
5. Make financial arrangements and allocate funds. Oversee the utilization of funds to ensure maximum profits.
6. Oversee the business transactions of the subordinates. Negotiate and sign up major importing/exporting and domestic sales contracts.
7. Recruit personnel for the subsidiary and direct the implementation of the company policies and regulations. Make evaluations on the working performance of the personnel. At present there are three employees under the supervision of [the beneficiary].

The petitioner stated that as the general manager, the beneficiary would function autonomously "managing and directing all development activities of [the petitioning entity] as they pertain to our international operations."

The petitioner submitted its organizational chart, which identified the beneficiary's position as general manager, and noted the employment of a secretary and two salespersons. Appended to the chart was an outline of the job duties to be performed by each of the beneficiary's three subordinate employees. In response to the director's request for evidence, which did not specifically address the beneficiary's employment capacity, the petitioner provided a copy of its March 31, 1997 quarterly wage report which verified the employment of the petitioner's four workers.

In his Notice of Intent to Revoke, the director noted his consideration of the beneficiary's proposed job duties, as well as the petitioner's organizational structure and its type of business as factors in establishing the beneficiary's employment capacity. The director stated that the job descriptions provided for each of the subordinate employees were not sufficient "to show that the beneficiary was acting in a managerial/executive capacity," and did not identify whether the workers are employed in professional positions. The director noted that a review of the petitioner's current organizational chart revealed the employment of six workers, of which three were claimed to be managers or executives. The director stated that it was not reasonable that a company engaged in the sale of fur animals, crafts and toys could sufficiently operate with the represented organizational structure. The director also addressed the petitioner's "generic," "general," and "vague" job description, stating that it did not "convey any understanding of exactly what the beneficiary will be doing on a daily basis." The director noted that the petitioner did not identify the specific goals and policies established by the beneficiary or the discretionary decisions made by the beneficiary during the last six months. While the director allowed the petitioner thirty days within which to provide a rebuttal to the director's intent to revoke approval, no response was filed. In his April 29, 2005 Notice of Revocation, the director noted the same grounds as those previously outlined herein.

On appeal, counsel references the beneficiary's job description, an outline of the beneficiary's decisions and goals, and the company's organizational chart as evidence of the beneficiary's employment in a primarily managerial capacity. Counsel states:

According to the Petitioner, besides planning, developing and establishing policies and objectives of the company in accordance with the Board directives, the beneficiary also has final decision-making authorities over business, accounting, personnel and future expansion plans. He directly/indirectly supervises the works of all subordinate staffs who release him from performing non-managerial daily tasks in the company.

In his appellate brief, counsel challenges the director's reference to the petitioner's "generic" job description, stating that it is customary that "Chinese employees understand their scope of responsibility with the job description in its generic nature." Counsel further states that despite the generalization, the managerial or executive authority held by the beneficiary can be interpreted through such words as "direct," "supervise," "assign," "determine," and "develop." Counsel contends that the beneficiary's role as a manager or executive is established through the petitioner's annual sales, which amounted to \$3,000,000 to \$4,000,000. Counsel also references the attached job description as evidence that the beneficiary "set[s] the company development direction," "direct[s] the implementation of the company policies and regulations," and "exercise[s] discretionary decisions by making and establishing goals and policies from time to time to meet the growing needs of the company."

Counsel provides the same job description as that submitted at the filing of the immigrant petition and submits an organizational chart of the petitioner's current staffing levels. Counsel also submits the petitioner's "development plan" for the years 1996 through 2000, demonstrating the goals and decisions made by the beneficiary in his capacity as general manager.

Upon review, the director properly revoked approval of the immigrant petition. The petitioner did not demonstrate that at the time of filing the petition the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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). Here, although specifically addressed by the director, the petitioner failed to clarify and explain on appeal the specific managerial or executive job duties to be performed by the beneficiary on a daily basis. Counsel submitted with his appellate brief the same limited job description as that initially provided with the petition, which was mainly a summary of the beneficiary's job responsibilities. Counsel's additional explanation that Chinese employees understand the scope of responsibility associated with a generic job description appears to mock the statutory and regulatory requirements designed to assist CIS in determining an alien's eligibility for the requested classification.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to submit a clear description of the job duties to be performed by the beneficiary in the petitioning entity. The petitioner's failure to satisfy the regulatory requirement makes it difficult to ascertain what managerial or executive tasks would be associated with the beneficiary's responsibilities of coordinating the company's activities, "review[ing] market research and price analysis reports," developing corporate expansion strategies, and overseeing the allocation of funds and business transactions. For example, the AAO will not attempt to surmise what managerial decisions the beneficiary has made and what strategies have been implemented with regard to the petitioner's proposed

expansion, or what managerial or executive role the beneficiary has in the company's market research or finances. Additionally, contrary to counsel's claim on appeal, absent additional documentary evidence, the AAO cannot assume that the words "direct," "supervise," "assign," "determine," and "develop" illustrate a primarily managerial or executive role within the company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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).

Rather than demonstrating employment in a qualifying capacity, the beneficiary's limited job description indicates that he would likely be engaged in the performance of many of the petitioner's non-qualifying functions. It appears from the petitioner's representations that the beneficiary would be personally responsible for performing functions related to maintaining the petitioner's financial and business records, particularly the accounts receivable and payable, inventory, and sales journals, as well as performing financial transactions for the company. In addition, as none of the job responsibilities of the three lower-level employees encompass these tasks, the beneficiary would likely be responsible for the company's marketing. Moreover, a review of the cumulative amount of wages paid to the petitioner's two salespersons during the first quarter of 1997, the period during which the instant petition was filed, indicates that the sales representatives were employed, at the most, on a part-time basis.³ It seems implausible that the petitioner could gross sales in 1997 in the amount of approximately \$400,000⁴ if not for the beneficiary's direct participation in selling the petitioner's products. This assumption is further supported by tradeshow nametags, which have been provided for the record, that identify the beneficiary as "exhibitor" and "buyer." The petitioner has not provided evidence that would dispute the conclusion that at the time of filing the beneficiary would be responsible for personally performing at least a portion of the petitioner's sales, as well as its marketing and maintenance of sales and financial records. 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).

Moreover, as addressed by the director, the petitioner does not employ a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. It is also 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*

³ This assumption is based on the unlikely suggestion that if the petitioner operates on a forty-hour workweek and the petitioner's two salespersons were in fact employed on a full-time basis, each would have been receiving wages of approximately \$1.00 or \$2.00 per hour.

⁴ This figure is based on the petitioner's "gross receipts or sales" reported on its 1996 corporate income tax return that covers the period of December 1, 1996 through November 30, 1997.

Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As previously noted, the petitioner has failed to account for the performance of many non-qualifying business functions by lower-level employees. As a result, it seems implausible that the reasonable needs of the petitioner are met through the employment of the beneficiary as general manager, as well as a secretary and two part-time salespersons.

Based on the foregoing discussion, 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.

The AAO will next consider whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing the petition.

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.

The petitioner stated in its January 16, 1997 letter that a qualifying relationship exists as a result of the foreign corporation's ownership of 100 percent of the petitioner's issued stock. As evidence of a parent-subsidiary relationship, the petitioner submitted: (1) its articles of incorporation and by-laws; (2) a stock certificate naming the foreign entity as the holder of 10,000 shares of the petitioner's issued stock; (3) a stock transfer ledger confirming the foreign entity as the sole shareholder of 10,000 shares of stock in the petitioning entity; and (4) a "verification" from the Ministry of Industrial and Commercial Executive Administration of Dingtiao, Shandong province confirming that the foreign entity has three subsidiaries, one of which is located in the United States.

In his February 17, 2005 Notice of Intent to Revoke, the director recognized the 10,000 shares of stock issued by the petitioner to the foreign entity on December 16, 1995. The director stated, "[h]owever, the record fails to show that the foreign entity actually purchased the U.S. entity beyond the submission of the Articles of Incorporation, a stock certificate and a stock ledger." The director noted that relevant evidence would include a wire transfer receipt, bank statements, or other evidence of payment transferred from the purported parent company. The director concluded that the evidence was insufficient to demonstrate the existence of the

claimed parent-subsidary relationship. The director referenced the same insufficiencies in his April 29, 2005 Notice of Revocation.

On appeal, counsel challenges the director's finding that a qualifying relationship does not exist between the foreign and United States entities. Counsel addresses an increase in the foreign entity's capital investment in the United States entity in August 1998 and references evidentiary documentation, including the minutes from its board of directors' meetings in 1995 and 1998.

Upon review, the record demonstrates the existence of a qualifying relationship between the foreign and United States entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In the instant matter, the record contains sufficient documentation to demonstrate that the foreign entity owned and controlled the petitioner at the time of filing the petition. The petitioner's issued stock certificate and stock ledger identify the foreign entity as the sole shareholder of the organization. The foreign corporation's ownership interest is confirmed on IRS Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business, which identifies the foreign corporation as the foreign shareholder, as well as in the minutes from the petitioner's December 6, 1995 organizational meeting, which document that 10,000 shares were issued to the foreign

entity in exchange for merchandise totaling \$23,199.20 shipped from the foreign entity on December 2, 1995. Additional documentation, particularly in the form of invoices from the foreign entity to the petitioner and the petitioner's audited financial statement ending November 30, 1996⁵, corroborates the claim of a parent-subsidiary relationship. As a result, the director's decision pertaining to this issue will be withdrawn.

The AAO will also consider the issue of whether the petitioner had the ability to pay the beneficiary's proffered annual salary of \$30,000 as required in the regulation at section 204.5(g)(2).

In his Notice of Revocation, the director recognized the 1996 and 1997 corporate tax returns submitted by the petitioner as evidence of its ability to pay the beneficiary his proffered salary, yet noted that the petitioner had not provided financial documentation related to the years 1998 through 2004. The director stated that the petitioner had failed to satisfy the regulatory requirement that the petitioner possess the ability to pay the proposed salary from the priority date until the date that the beneficiary obtains lawful permanent residence.

On appeal, counsel references the minutes from the foreign entity's December 7, 1995 board of directors' meeting, which identifies that "all of [the petitioner's] profits derived within the next five years shall be retained at the US branch company as the development fund for business expansion." Counsel also references the petitioner's attached financial statement for the period ending November 30, 1996 as evidence of the petitioner's ability to pay.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at the proffered salary.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

⁵ The petitioner's audited financial statement reflects issued and outstanding common stock in the amount of \$10,000. The attached notes identify the petitioning entity as being wholly owned the foreign corporation.

As the petition's priority date falls on February 3, 1997, the AAO must examine the petitioner's tax return for 1997. The petitioner's IRS Form 1120 for the tax year December 1, 1996 through November 30, 1997 presents a net taxable income of \$1,576. The tax return, including Schedule E, does not reflect any amount of compensation paid to the beneficiary as an officer of the corporation. Accordingly, the AAO cannot conclude that the petitioner could pay a proffered wage of \$30,000 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. The petitioner's net current assets of approximately \$12,000 would not be sufficient to pay the beneficiary's proposed salary.

The AAO notes that the beneficiary's California Resident Income Tax Return for the year 1997 reflects wages in the amount of \$24,000. This clearly demonstrates that at the time of the priority date the petitioner was not able to pay the beneficiary his proffered annual salary of \$30,000. The director properly revoked approval of the petition.

Counsel does not specifically address on appeal the director's finding that the beneficiary was not employed overseas in a primarily managerial or executive capacity, yet merely contends that the beneficiary's eligibility for the requested classification was previously determined by CIS' approval of prior nonimmigrant petitions. In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. 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.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 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). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30 (recognizing that CIS approves some petitions in error).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140

petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval 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 would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

Finally, 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).

Taking into consideration the merits of the instant issue, the AAO affirms the director's finding that the beneficiary was not employed overseas in a primarily managerial or executive capacity. In its January 16, 1997 letter submitted with the immigrant petition, the petitioner explained that as manager of the import and export department in the foreign company, the beneficiary possessed the following job duties:

1. Direct and coordinate the overall operations of the Import & Export Department. Direct the subordinates to attract business partners and promote products.
2. Review market research and price analysis reports and work out solutions for present problems and tentative plans for future business development directions.
3. Set up business targets so as to determine the short term and long term projects and market strategies.
4. Negotiate and sign up major import and export contracts. Oversee the business transactions of subordinates to ensure maximum profits.
5. Recruit staff members for Import & Export Department and provide training for new staff. Make evaluations on the performance of staff members and report to the Personnel Department.
6. Prepare reports in the business transactions and report to General Manager on a constant basis. Implement the policies and market strategies of the company.

While the petitioner submitted an organizational chart of the foreign company, the beneficiary's position, and particularly any lower-level employees supervised by the beneficiary were not identified.

The petitioner's job description fails to identify the specific managerial or executive job duties performed by the beneficiary while employed overseas. For example, it is unclear what "overall operations" the beneficiary performed in the company's import and export department or even which subordinate employees the beneficiary directed. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives

is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Absent additional evidence documenting the specific managerial or executive tasks performed by the beneficiary in his role within the foreign entity, the AAO cannot conclude that the beneficiary was primarily employed as a manager or executive.

Based on the foregoing discussion, the director's notice of intent to revoke approval of the visa petition was properly issued for good and sufficient cause. Additionally, the director's revocation of approval of the immigrant visa petition will be affirmed. The appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.