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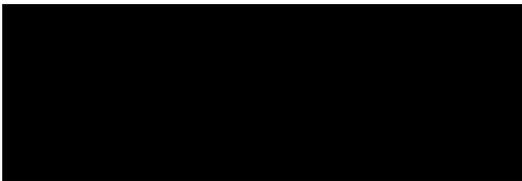


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 24 2006  
WAC 97 221 50779

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

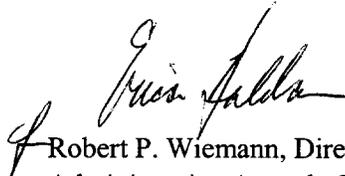
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 July 1995. It provides businesses and services including investment, consultation, and export for its corporate clients. It seeks to employ the beneficiary as its president.<sup>1</sup> 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 August 14, 1997 and it was approved August 22, 1997. Upon subsequent review of the record, the director issued a notice of intent to revoke approval on March 8, 2005. The petitioner submitted a rebuttal on April 5, 2005, but upon review the director ultimately revoked the approval of 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; (3) that the beneficiary would be performing primarily managerial or executive tasks for the U.S. petitioner; or, (4) that the petitioner and the beneficiary's foreign employer enjoyed a qualifying relationship.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Service's (CIS) notice of revocation decision repeated the information in the notice of intent to revoke, suggesting that the decision-maker did not read the supporting documents submitted with the petitioner's rebuttal. Counsel contends that the CIS decision was conclusive and not made on reasonable grounds. Counsel submits a brief and re-submits the documentation submitted in rebuttal to the notice of intent to revoke in support of her 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

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<sup>1</sup> In the petitioner's rebuttal to the director's notice of intent to revoke, the petitioner provided the foreign entity's November 1, 1995 board resolution indicating that the beneficiary was being transferred to act as the petitioner's business manager.

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).

The first issue in this proceeding is whether the petitioner has established that it was doing business when the petition was filed and continuing until the immigrant visa is issued.<sup>2</sup>

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: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States. 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."

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<sup>2</sup> 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). In addition, 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 initially submitted: its lease for office space; its articles of incorporation establishing that it had been incorporated in July 1995; its 1995 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showing \$817,050 in gross receipts or sales, a net income of \$16,796, and salaries, wages, and officer compensation of \$6,400; its California Forms DE-6, Employer's Quarterly Wage Report, for the last three quarters of 1996 and the first two quarters of 1997; several proposals created for the petitioner for project developments, investments, and requests for insurance advice; and, two invoices, one for "UCR" human resources, dated November 1995 and one for "UCR" management for executives program, dated April 1996.

On August 27, 1997, the director approved the petition.

On March 8, 2005, upon review of the record of proceeding, including information obtained in conjunction with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, the director observed that the record contained company photographs, and the petitioner's 1996, 1997, 1998, 1999, 2000, 2001, and 2002 IRS Forms 1120. The director noted that the record did not contain evidence that the company had been doing business, such as, sales invoices, business transactions, shipping receipts, bank statements, wire transfers of funds, and telephone records. The director also noted that the nature of the petitioner's business was not clear, observing that the evidence submitted did not establish whether the company had adequate warehouse/office space or a separate work site for retail operations. The director requested further clarification on this issue.

In an April 5, 2005 rebuttal, the petitioner provided the same IRS Forms 1120. Each IRS Form 1120 indicates that the petitioner's business is trade and consulting, except the initial 1995 IRS Form 1120 that shows that the petitioner's business is in general merchandise. The petitioner also included copies of a July 13, 1999 contract to sell commodities, a March 10, 2000 air waybill, a June 25, 2000 invoice, a June 27, 2000 invoice, an August 8, 2000 bill of lading, an October 13, 2000 invoice, an October 27, 2000 invoice, a November 24, 2003 bill of lading, a November 25, 2003 invoice issued to the petitioner for shipping services it used, a January 30, 2004 contract for the sale of gas compressors, and an August 12, 2004 contract for the sale of generators. In addition, the petitioner provided information showing the petitioner had leased warehouse premises, had paid for the use of a warehouse, and had telephone records from 1998 to 2005 showing telephone calls to China and other countries. Counsel for the petitioner also asserted that the petitioner's business activities "are systematic and continuous," and that the petitioner had plenty of documents evidencing its business activities over the years. Counsel contended that the petitioner was not just an agent or office but instead conducted a bona fide business.

On April 25, 2005, the director revoked approval of the petition, determining that the petitioner had not addressed this issue. The director noted the documents submitted but determined that "tax records from 1996 to 2003" and "letters, in-house invoices, contracts, and 3 bills of lading" did not sufficiently establish that the petitioner is regularly, systematically, and continuously providing good and/or services.

On appeal, counsel for the petitioner references the "30 pages of various kinds of documents" that had been submitted to show that the petitioner had been doing business in the United States, as well as the nine years of tax returns that had been filed with the IRS. Counsel argues that the information submitted proves that the petitioner has been doing business in the United States in a regular, systematic, and continuous manner.

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 was involved in several transactions in 1999, 2000, 2003, and 2004. The petitioner has not presented evidence that it was involved in transactions in 1996, 1997, 1998, 2001, 2002, and most of 2003, except for the IRS Forms 1120 submitted. Although, the petitioner has submitted evidence to establish that it has intermittently facilitated the conduct of business, the petitioner has failed to establish that it has been conducting business in a continuous manner. Counsel notes the economic downturn affected the petitioner's business, however, 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). Further, neither the petitioner nor counsel sufficiently support the ongoing nature of the petitioner's business, in spite of the economic downturn. The petitioner has not adequately established that it has been and continues to be engaged in facilitating the regular, systematic, and continuous provision of goods or services. For this reason, the petition may not be approved and the director's decision will be affirmed.

The next issue in this matter is whether the petitioner has established a 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.

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 initially presented copies of the following documents, among others, as evidence in support of its claim that it is wholly-owned by the beneficiary's foreign employer, Hainan Pan China Enterprises Stock Ltd.:

Pan-China Investment, Inc.'s stock certificate number one (No. 1) issuing 50,000 shares to Hainan Pan China Enterprises Stock Ltd., dated November 29, 1995.

Petitioner's Certificate of Incorporation, Articles of Incorporation, By-laws, Organizational Minutes, and an April 24, 1997 letter signed by the president of Hainan Pan China Enterprises Stock Ltd. stating that it was the petitioner's sole shareholder.

The petitioner's 1995 IRS Form 1120, showing on Schedule L, Line 22(b), that the value of the petitioner's stock is \$50,000 and that Hainan Pan China Enterprises Stock Ltd. is a 25 percent foreign shareholder.

In the March 8, 2005 notice of intent to revoke, the director observed that the record did not contain evidence that the foreign entity had actually purchased its interest in the petitioner. The director noted that evidence showing payment for the stock would include copies of wire transfer receipts, bank statements, and other evidence of payment.

In the April 5, 2005 rebuttal, the petitioner provided copies of its bank statements and the foreign entity's customer receipts for transfers of funds to the petitioner. The customer receipts are for: \$14,974.50 (\$15,000 less transfer fee) in February 1996; \$14,974.50 (\$15,000 less transfer fee) in April 1996; \$9,974.50 (\$10,000 less transfer fee) in June 1996; \$39,976.50 (\$40,000 less transfer fee) in August 1996; and, \$14,976.50 (\$15,000 less transfer fee) in September 1996. Counsel asserted that the documents prove that the foreign entity was actively involved in the petitioner's business operations and did not give up on its subsidiary, even during economic downturns. Counsel also states that the foreign entity actually wired more than \$95,000 to the petitioner's account and actually owns and controls the petitioner.

On April 25, 2005, the director revoked the approval of the petition, determining that the information provided by the petitioner showed that the foreign entity had sent funds to the petitioner five months and more after the sale of stock. The director noted that the petitioner still had not provided evidence that the foreign entity paid the initial \$50,000 to purchase the petitioner's stock in November 1995.

On appeal, counsel for the petitioner repeats that the foreign entity in this matter wired more than \$50,000 to the petitioner and asserts that the petitioner should not be punished for wiring additional funds to the petitioner. Counsel also notes that the petitioner's previous L-1 petition and L-1 petition extension were approved based on the parent-subsiary relationship between the petitioner and the beneficiary's foreign employer. Counsel cites an unpublished matter in support of her arguments.

Counsel does not address the director's concern that the petitioner failed to provide evidence in the form of wire transfers and bank statements to confirm the initial \$50,000 capitalization of the petitioner.

The regulations and applicable precedent decisions 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. 8 C.F.R. § 204.5(j)(2); *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362

(BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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.

Moreover, the regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. The purpose of the director's request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). 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. The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Because the foreign entity's ownership of the petitioner's stock is a critical element that must be proven to show a parent-subsidary relationship under 8 C.F.R. § 204.5(j)(2), the petitioner bears the burden of establishing eligibility once the director requests material evidence.

Counsel does not address the director's concern regarding the petitioner's initial capitalization. The AAO acknowledges that the evidence in the record does not suggest that any party, other than the beneficiary's foreign employer, capitalized the petitioner or owned or controlled the petitioner. The petitioner has claimed in its IRS Forms 1120 all along that the beneficiary's foreign employer owned the petitioner and has submitted documentation to demonstrate the foreign entity's ongoing relationship with the petitioner. However, the petitioner has failed to explain the delay in capitalizing the petitioner or why the petitioner was funded only partially until August 1996. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO declines to speculate regarding the circumstances of the petitioner's initial capitalization and whether the funds transferred to the petitioner consisted of funds to purchase the petitioner's stock or were transferred to the petitioner for other purposes.

Regarding the issue of the petitioner's claimed qualifying relationship, the petitioner has not provided evidence or argument sufficient to overcome the director's revocation. For this reason, the petition may not be approved and the director's decision will be affirmed.

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.

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 an undated attachment to the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary's responsibilities as president are:

Develops and maintains the vision of the company. Oversees marketing, product development, personnel and finance, customer service, etc. Approves all financial obligations. Seeks business opportunities and strategic alliances with other companies and organizations. Plans, develops, and establishes policies and objectives of business organization in accordance with board directives and company charter. Directs and coordinates financial programs to provide funding for new or continuing operations in order to maximize return on investments, and increase productivity.

The petitioner also provided its organizational chart showing a vice-president, a manager, a business assistant, and an office administrator in addition to the beneficiary's position as president. The petitioner's California Form DE-6, Employer's Quarterly Wage Report, for the quarter ending prior to filing the petition, listed the individuals holding the positions depicted on the organizational chart. The petitioner also provided a brief job description for the vice-president, indicating that he managed market planning, advertising, public relations, sales promotion, merchandising, and facilitating staff services, as well as identifying new markets, and overseeing market research and analysis. The petitioner added that the vice-president directed staffing, training, and performance evaluations, managed working capital, and performed financial forecasting. The petitioner indicated that the marketing manager managed sales distribution by establishing sales territories, quotas, and goals, advised dealers and distributors, analyzed sales statistics to formulate policy and to facilitate sales promotion, and managed sales office activities.

On the basis of the 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 March 8, 2005. The director determined: (1) that the beneficiary's job description was general and too vague to convey an understanding of the beneficiary's daily duties; (2) that the petitioner had employed five individuals, including the beneficiary, when the petition was filed but had not provided sufficient information concerning the employees duties for the organization and whether they held professional positions; and, (3) that the petitioner had not shown the specific goals and policies that the beneficiary had established. 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 an April 5, 2005 rebuttal, counsel for the petitioner claimed that the beneficiary "established [the petitioner's] management system, and made all of the important decisions regarding the management and development of [the petitioner], including setting business goals, scope, policies and operation systems, giving the final approval for signing of important business contracts, hiring or firing employees, etc." and received only general supervision from the foreign entity board of directors. Counsel also provided examples of the beneficiary's decision-making including: the beneficiary's decision to focus on exporting U.S.-made merchandise to China and the beneficiary's actions during the economic downturn of 2000 and 2001 to postpone expansion plans, reducing employees' working hours, and limiting operation expenses.

Counsel also indicated that the petitioner had hired professionals who had special knowledge and experience required for their job duties. Counsel contended that section 101(a)(44)(C) of the Act allows a company or department head to be approved at the start-up stage when it is too early to have hired a professional staff or tiered levels of employees. Counsel further noted that the beneficiary had authority over matters regarding the company's operation system, development goals, and policies and never personally had to make a sale, conduct any market research, or contact any customers, and yet none of the important contracts were finalized without her final review and approval. Counsel asserted that the beneficiary's duties met the criteria of the definitions of managerial and executive capacity.

In the director's April 25, 2005 decision to revoke approval, the director referenced the petitioner's rebuttal to the notice of intent to revoke but noted that the petitioner had not provided an organizational chart or a brief

description of each employee's duties. The director determined that the petitioner's description of the beneficiary's duties was vague and nonspecific. The director found that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner contends that the decision-maker did not read the evidence and the detailed explanations regarding the beneficiary's position with the petitioner. Counsel notes that the notice of revocation decision does not give any reason why the beneficiary was admitted as an L-1 manager or executive and allowed to extend her stay and then found not to be a manager or executive in the United States. Counsel also asserts that the petitioner gave examples of the beneficiary's decision-making and explained how the beneficiary met the requirements found in the definition of multinational manager, as well as providing evidence that two of the beneficiary's subordinates had master degrees. Counsel also cites an unpublished decision in support of her contentions.

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 is both a manager and an executive. However, 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.

The petitioner's initial description of the beneficiary's duties, as the director observed, was vague and nonspecific. The petitioner recited general job responsibilities and broadly-cast business objectives to establish the beneficiary's eligibility for this visa classification. For example, the petitioner states that the beneficiary's duties included "develop[ing] and maintain[ing] the vision of the company," overseeing various functions, and "[p]lan[ing], develop[ing], and establish[ing] policies and objectives of business organization in accordance with board directives and company charter." The petitioner however, does not further define the beneficiary's activities associated with these broadly-stated goals. 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)). In addition, seeking business opportunities and coordinating financial programs to provide more funding is more akin to an individual engaged in the daily operational activities associated with starting up a company. 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).

In rebuttal, counsel provided the same general description of the beneficiary's duties referring to the beneficiary's set up of the petitioner's management system and responsibility for making important decisions. Although counsel asserted that the beneficiary gave final approval for business contracts and made the decision to focus on exporting merchandise to China, the record lacks documentary evidence substantiating this assertion. Again, 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. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel's reference to the petitioner's subordinates who were hired because of their special knowledge and experience is insufficient to establish that the beneficiary's subordinates held managerial, supervisory, or professional positions. Although the beneficiary is not required to supervise personnel, if it is claimed that her 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 operational tasks of an export and consulting firm. Further, portions of the petitioner's description of the beneficiary's two subordinate employees, does not comport with the other information in the record. For example, the petitioner indicated that the vice-president managed market planning, advertising, public relations, sales promotion, merchandising, identified new markets, and oversaw market research and analysis. However, the petitioner did not provide information regarding who actually performed these services, other than the vice-president. Furthermore, it is not clear how the duties associated with the petitioner's marketing manager's position, including sales distribution and analyzing sales statistics, correspond to the petitioner's stated business of exporting U.S. merchandise and providing consulting services.

Counsel's note that the beneficiary had authority over matters regarding the company's operation system, development goals, and policies but never personally had to make a sale, conduct any market research, or contact any customers, is again not substantiated in the record. First, as observed above, it is not sufficient to refer to the beneficiary's level of authority and not specify the beneficiary's actual duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Second, although the petitioner has described the duties of two of the beneficiary's subordinates who apparently provide the petitioner's marketing and sales services, the petitioner has not provided evidence of who supervises the petitioner's employees, other than the beneficiary. If the beneficiary primarily supervises the petitioner's employees, the record supports at most, that the beneficiary is a supervisor of non-professional, non-supervisory, and non-managerial employees.

In addition, counsel misunderstands section 101(a)(44)(C) of the Act when contending that this section allows a company or department head to be approved at the start-up stage when it is too early to have hired a professional staff or tiered levels of employees. The regulations pertaining to an employment-based immigrant petition require that the company be established and sufficiently able to support a multinational manager or executive when the petition is filed. 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). Although a petitioner's size alone, without taking into account its reasonable needs, may not be the determining factor in denying a visa to a multinational manager or executive; 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C); See also *e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Finally, counsel's citation to unpublished matters is not probative. First, counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The approval of the petition based on the description provided coupled with the lack of supporting evidence was gross error. 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 pertaining to the beneficiary 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 her 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 for the foreign entity comprised primarily managerial or executive duties.

In an April 24, 1997 letter appended to the petition, the president of the foreign entity indicated that the beneficiary had worked for the company from May 1993 until 1995 as the manager of the marketing development department. The foreign entity indicated that the beneficiary supervised seven employees while in the position of manager. Also in an undated letter attached to the petition, the petitioner described the beneficiary's duties for the foreign entity as: "in charge of the marketing development of construction materials and sales, supervised 7 employees in the said department, was frequently in Beijing to represent the parent company in business negotiations, sales transactions, etc."

The petition was approved based on this limited information concerning the beneficiary's position with the foreign entity.

In the March 8, 2005 notice of intent to revoke, the director noted that the petitioner had not provided evidence or information regarding the parent company and the names, job titles, duties, responsibilities, and employment status, among other things, of the staff subordinate to the beneficiary's foreign position. The director observed that he could not determine that the beneficiary actually served in a managerial or executive capacity for the foreign entity. 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 rebuttal, counsel for the petitioner did not directly address this issue, but provided the foreign entity's November 1, 1995 board resolution which again indicated that the beneficiary worked as the manager of marketing development, specifically for construction materials and sales, as well as supervising seven employees. The resolution also noted that the foreign entity's marketing department (or function) was an "important department and a major component of the company" and that the success of the marketing department directly determined the success of the whole company's operation and development.

In the director's April 25, 2005 revocation decision, the director determined that the petitioner had not addressed the issue of the beneficiary's managerial or executive capacity while employed by the foreign entity. The director concluded that the petitioner had not established that the beneficiary had been employed for at least one year in a managerial or executive capacity by a qualifying entity.

On appeal, counsel for the petitioner refers to the foreign entity's board resolution and asserts that this information establishes that the beneficiary had been supervising a major and essential function of the foreign company and that she exercised discretion over all of the day-to-day operations of the foreign entity's marketing function. Counsel also alleged that some of the beneficiary's foreign subordinates held master's or bachelor's certificates showing that they were professionals in their field.

Counsel's assertion is not persuasive. The record does not contain an adequate description of the beneficiary's duties for the foreign entity. 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. Counsel seems to suggest on appeal that the beneficiary may have been a function manager for the foreign entity. However, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided sufficient evidence to establish that the beneficiary managed an essential function for the foreign entity.

Moreover, the record does not contain evidence of the job duties of the beneficiary's foreign subordinate employees. As the director observed in the notice of intent to revoke, the petitioner has not provided information regarding the names, job titles, duties, responsibilities, or employment status of the foreign entity's employees who were subordinate to the beneficiary's position. The record does not contain sufficient evidence to elevate the beneficiary's position to one of a manager supervising professionals, managers, or supervisors. Neither does the record establish that the beneficiary's foreign position was primarily an executive position. The petitioner has not established 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. In addition, the initial approval of the Form I-140 without a request for further evidence to clarify or explain the deficiencies in the record, is clear error on the part of the director.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form 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 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 approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by revoking approval of the immigrant petition.

In addition, 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).

Further, 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). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter, the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

In this instance, the petitioner 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 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. 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).

The approval of 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.