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File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 02 2006
WAC 97 160 53847

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

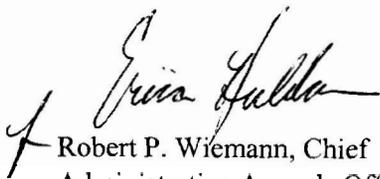
Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
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 December 1995. It claims it manufactures, distributes, and exports scientific instruments and equipment to Asia Pacific Rim countries. It seeks to employ the beneficiary as its export manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The petitioner filed the Form I-140, Petition for Alien Worker,¹ on May 19, 1997 and it was approved July 14, 1997. Upon subsequent review of the record, the director issued a notice of intent to revoke approval on July 17, 2004. The director questioned whether the petitioner had established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) that the foreign entity continued to do business; or (3) that the beneficiary would be employed in a primarily managerial or executive position for the U.S. entity. Counsel for the petitioner submitted a rebuttal on August 23, 2004.² On April 14, 2005, the director revoked approval of the petition, determining that the petitioner had not established that a business existed when the petition was filed and that documentation submitted was fictitious and submitted only to obtain classification for this immigrant visa. The director also determined that the record was insufficient to establish that the U.S. entity owned and controlled the beneficiary's foreign employer as claimed. The director observed that the evidence in the record was inconsistent and that the petitioner had not submitted evidence in rebuttal to the notice of intent to revoke sufficient to overcome the grounds for revocation.

On appeal, counsel for the petitioner contends: that the director's decision was an abuse of discretion; that the director failed to review the evidence in its entirety and misinterpreted the applicable regulations; that the evidence clearly shows that the U.S. entity owned 100 percent of the foreign entity since 1993; that the evidence presented clearly establishes that the business is not fictitious; that the petitioner met its burden of proof establishing that the beneficiary's position would be executive or managerial; and that the law does not permit revocation of a previously approved immigrant visa petition where the beneficiary is already in the United States. Counsel also notes that the director made no allegation of fraud or misrepresentation but only identified grounds of revocation based on the adjudicator's speculative conclusions.

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

¹ The petitioner filed a Form I-140 (WAC 97 015 51922) on October 21, 1996. The director denied the petition on November 15, 1996, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

² The director considered the rebuttal submitted timely as the director's first two attempts to contact the petitioner on March 17, 2004 and July 17, 2004 were returned as undeliverable. The AAO observes that the director sent a copy of the notice of intent to revoke to the petitioner's counsel and apparently counsel's receipt of the notice prompted the rebuttal received by CIS on August 23, 2004.

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

* * *

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

Preliminarily, the AAO notes counsel's reference to an 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). In that opinion, the court interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, Citizenship and Immigration Services (CIS) may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since she was already in the United States when the director issued the revocation.

According to the record, the petitioner is located in California; thus, this case did not arise in the Second Circuit. Moreover, counsel should note that *Firstland* is no longer a binding precedent.

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 *Firstland* argument is not meritorious.

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 AAO specifically observes that the approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Further, 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). The approval of the petition based on the limited information submitted in this matter was clearly a matter of gross error. The petitioner has not provided evidence, either in rebuttal or on appeal, to rectify the deficiencies in the original submission regarding the beneficiary's eligibility for this visa classification.

The first 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.

In a February 17, 1997 letter appended to the petition, the petitioner indicated that it had been established in 1988 and that the foreign entity was incorporated in January 1993 as a subsidiary of the petitioner. The petitioner also indicated that the president of the petitioner, [REDACTED] had invested \$200,000 in the establishment of the foreign entity.

The petitioner also provided documents in support of the petition including:

A proof of publication in the Orange County Reporter for the dates of January 14, 21, and 28 1988 and February 4, 1988 showing that Jeffrey Sun is doing business as American Hi-Tech Co.;

Business Permits for the City of Irvine issued to American Hi-Tech Co., owner Jeffrey Sun, for 1988, 1989, and 1990;

Articles of Incorporation for American Hi-Tech Company, Inc. showing that it had been incorporated in the State of California in December 1995;

A Certificate of Limited Partnership for Eucrown, L.P. showing American Hi-Tech Company, Inc as the General Partner, filed December 1995, as well as the Limited Partnership Agreement;

A Seller's Permit issued to American Hi-Tech Co. in January 1996;

The petitioner's (American Hi-Tech Company, Inc.) stock certificate number 1 issued to Jeff Sun in the amount of 10,000 shares on January 1, 1996;

A grant deed conveying property³ to Eucrown, L.P. in January 1996, recorded January 9, 1996, in the Orange County, California records;

A grant deed conveying real property (also known as 67 Summitcrest, Dove Canyon Area, California) to Jeffrey N. Sun, on April 17, 1996 and recorded May 24, 1996 in the Orange County, California records; and

The petitioner's (American Hi-Tech Company, Inc.'s) 1996 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, showing \$16,994,442 in gross receipts, cost of goods in the amount of \$12,293,920, and salaries and wages paid in the amount of \$185,220, as well as a Schedule K-1 for Form 1120S identifying Jeff Sun as the petitioner's 100 percent shareholder.

The initial record did not contain any evidence regarding the establishment of the foreign entity, other than the petitioner's statement that its sole shareholder, Jeff Sun, had invested \$200,000 in the foreign entity. The director did not question the petitioner's relationship with the foreign entity and approved the petition.

On July 17, 2004, the director issued a notice of intent to revoke approval questioning whether the foreign entity existed or ever existed. The director noted that the record did not contain documentary evidence establishing the ownership and control of the foreign entity. The director requested: evidence that the U.S. parent company has, in fact, paid for the foreign entity, including original wire transfers, cancelled checks, deposit receipts, and bank statements detailing the monetary amounts for the stock purchase; the foreign entity's articles of incorporation; the foreign entity's list of owners; and the foreign entity's minutes of meeting listing its stock shareholders and the number and percentage of shares owned.

On August 23, 2004, counsel for the petitioner provided documentary evidence in rebuttal. The documents included:

██████████ DBA American Hi Tech Co's bank statement for the month of January 1993 showing funds transferred on January 29, 1993 to Tianjin Hi-Tech Scientific in the amount of \$50,000;

██████████ DBA American Hi Tech Co's bank statement for the month of February 1993 showing funds transferred on February 4, 1993 to Tianjin Hi-Tech Scientific in the amount of \$150,000;

³ The grant deed references a description of property attached on Schedule 1, but the Schedule 1 is not included in the record.

A translated document dated August 4, 2004 from a foreign bank certifying that the foreign entity's account was credited with \$50,000 on February 3, 1993 and \$150,000 on March 3, 1993;

Minutes of the foreign entity's board of director's meeting dated March 5, 1993, indicating that [REDACTED] had invested \$200,000 in the foreign entity and that [REDACTED] holds 100 percent ownership of the foreign entity;

The foreign entity's September 5, 1999 resolution changing its name from Tianjin Hi-Tech Scientific Instrument Co. Ltd. to Suntek (Tianjin) Science Instrument Co., Ltd.; and

The foreign entity's articles of incorporation dated January 5, 1993.

On April 14, 2005, the director revoked approval of the petition, determining that the record was insufficient to establish that the U.S. entity owned and controlled the beneficiary's foreign employer as claimed. The director observed that the evidence in the record was inconsistent and that the petitioner had not submitted evidence in rebuttal to the notice of intent to revoke sufficient to overcome the grounds for revocation.

On appeal, counsel for the petitioner asserts that the petitioner has met its burden of proof establishing that a qualifying business relationship exists with the foreign company. Counsel contends that the evidence establishes: [REDACTED] is the owner and president of the U.S. based American Hi-Tech Co., now American Hi-Tech Company, Inc. (American Hi-Tech). American Hi-Tech owns and controls 100% of the foreign entity Tianjin Hi-Tech Scientific Instrument Co., Ltd. now Suntek Science Instrument Co, Ltd. (Suntek)."

Counsel's assertion is persuasive in part. Upon review of the totality of the record, the record contains **sufficient evidence to establish that** [REDACTED] owned and controlled the petitioner, American Hi-Tech Company, Inc. and owned and controlled Tianjin Hi-Tech Scientific Instrument Co., Ltd. now Suntek Science Instrument Co, Ltd., when the petition was filed. Thus the petitioner has established an affiliate relationship between the U.S. based petitioner and the foreign entity when the petition was filed. The director in this matter has not identified a specific inconsistency or material misrepresentation pertinent to this issue. The director's decision on the issue of qualifying relationship will be withdrawn.

Although the director's decision on the issue of qualifying relationship will be withdrawn, the record does not contain sufficient evidence establishing that the beneficiary's position for the U.S. petitioner has been or will be in a managerial or executive capacity. Further, the record lacks evidence that either the U.S. petitioner or the foreign entity continue to do business as defined in the regulations or continue to enjoy a qualifying relationship. Although the director noted these deficiencies in the notice of intent to revoke, and requested further evidence on the issue of the foreign entity's conduct of business, the director failed to include adequate discussion on either of these issues in his revocation decision. As such, the AAO's review is conducted on a *de novo* basis. The AAO will herein address the merits of the petitioner's evidence and eligibility on these issues. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

On the issue of the beneficiary's managerial or executive capacity for the U.S. petitioner, the AAO specifically finds that the petitioner's initial description of the beneficiary's duties for the U.S. petitioner, the petitioner's organizational structure, and documentary evidence establishing its number of employees and their remuneration was insufficient to establish eligibility for this visa classification. The director's approval of the petition with the glaring deficiencies in the record regarding this issue constituted gross error.

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.

Specifically, the petitioner's February 17, 1997 description of the beneficiary's duties indicated that:

Functioning autonomously, [the beneficiary] is responsible for managing and directing all the export business activities of the company as they pertain to our international development and expansion plans. Her direct subordinates are assistants [redacted] and [redacted] (see Exhibit 11 and 12⁴). The specific duties of [the beneficiary] as the Export Department Manager of [the petitioner] include the followings [sic]:

Supervise the daily operation of the Export Department with the assistance of the subordinates. Direct and coordinate export business activities of the company. Oversee the work of the staff and assign specific jobs [sic] duties.

Introduce the manufacturing and exportation projects and product lines of the company in the local business circles and seek potential investors and business partners.

Establish business relationships with business institutions dealing in scientific instruments and equipments in the U.S. and in Asia Pacific Rim countries. Set up international and domestic distribution channels for manufactured products.

Keep in close contact with the scientific instrument and equipment market and collect the most updated information on the market value of the products. Work out detailed plans for the expansion of the company's export business in the U.S. as well as in Asia.

Direct detailed market survey on scientific instruments and equipments [sic]. Prepare reports on the research results and direct the information to the President for reference.

Contact business partners and potential customers and establish long-term relationships with them. Introduce and promote the instruments and equipments of the company in the international and domestic market.

Recruit local professionals for Export Department and make evaluations on the working performances of the staff members of the department. Prepare monthly reports on business transactions and financial affairs of the company for the reference of the President concerning long-term business expansion.

⁴ The petitioner's list of exhibits attached to the February 17, 1997 letter in support of the petition identified Exhibit 11 as the U.S. Corporation Income Tax Return and Exhibit 12 as the Company Financial Statement (Form 1040).

The petitioner provided its organizational chart depicting the beneficiary in the position of export department manager and listing two individuals in the positions of "assistant" subordinate to the beneficiary. The petitioner also provided its California Form DE-6, Quarterly Wage and Withholding Report, for the quarter ending prior to filing the petition. The first quarter California Form DE-6 listed four employees, including [REDACTED] identified as the president, the beneficiary identified as the export department manager, [REDACTED] identified as the beneficiary's assistant, and an individual identified as the office administration department manager who reported to the president and had no subordinate employees. The petitioner indicated that the beneficiary's assistant provided customers with advice on the nature, usage, and characteristics of different instruments and equipment, informed customers about the quality, price, packing, and production period, promoted different models, prepared sales contracts and service agreements, arranged shipping procedures, set up the display of sample products, and prepared company brochures. The record also contains numerous shipper's declarations signed by the beneficiary on behalf of the petitioner.

The director approved the petition despite the petitioner's description of the beneficiary's duties demonstrating that the beneficiary was involved primarily in marketing and promoting the petitioner's products to other businesses, setting up distribution channels, performing market research, and preparing marketing and financial reports to present to the president; despite the lack of evidence showing that the beneficiary had subordinates who would relieve her from primarily performing these tasks; and despite the lack of evidence establishing that the beneficiary supervised or would supervise a subordinate of staff of professional, managerial or supervisory employees or manage an essential function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO observes that 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. In this matter, the beneficiary's position clearly failed to satisfy the elements of either the definition of managerial capacity or executive capacity. The director noted the failure to establish this essential element of eligibility in the notice of intent to revoke but did not request any specific information necessary to overcome the deficiency.

The AAO further observes that the petitioner's August 10, 2004 rebuttal statement consisted of claims regarding the beneficiary's managerial or executive capacity without adequate supporting documentation. For example, the petitioner asserted that the beneficiary did not perform daily operational functions, but failed to identify who in the petitioner's employ marketed, promoted, and arranged distribution of the petitioner's product. 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, the petitioner asserted that the export department manager served as a key link between the U.S. parent company and the foreign subsidiary but failed to explain how this task elevated the beneficiary's position to one of managerial or executive capacity. The petitioner asserted further that the beneficiary

provided leadership within the petitioner by managing, developing, and directing implementation of a full range of export issues but failed to detail the daily tasks associated with the "export issues." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner asserted that the beneficiary developed and managed creative commercial strategies to optimize business performance but failed to describe the beneficiary's daily tasks associated with these claimed responsibilities. 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.

The petitioner's claim that the beneficiary exercised complete authority over approval of suppliers, functional budgets, prioritization of activities, sales offerings to customers, and had joint authority over allocation of resources to various functions does not distinguish between the non-qualifying aspects of these operational tasks and any possible qualifying aspects of these tasks. An individual will not be deemed an executive or a manager under the statute simply because they have an executive or managerial title or because they "direct" the enterprise as the sole managerial employee.

Finally, the record does not contain any evidence of the personnel the petitioner employed when the petition was filed and continuing until the director's revocation decision, other than the beneficiary and the owner/president of the U.S. entity. As such, any input the beneficiary may have had relating to personnel decisions cannot be substantiated and does not assist in determining that the beneficiary's position is a managerial or executive position. Likewise, whether the beneficiary is only one of two persons authorized to access the petitioner's business bank accounts has little or no bearing on the beneficiary's managerial or executive capacity.

The only documentation submitted to show that the beneficiary performed any of the broadly stated objectives was an authorized signature card for the petitioner's bank showing the beneficiary as a signatory and a purchase invoice sent to the beneficiary's attention and accepted by her. These documents do little but confirm that the beneficiary is the individual selling the petitioner's products. The petitioner did not provide any documentary evidence that would establish that the beneficiary's position with the U.S. entity when the petition was filed was in a managerial or executive capacity or that the position ever became more than a marketing or sales position. 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.

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, as observed above the petitioner bears the ultimate burden of establishing eligibility for the benefit sought and that burden is not discharged until the immigrant visa is issued.

Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984). Counsel's assertion on appeal that the description of the beneficiary's duties associated with her position as export manager clearly shows that the majority of the beneficiary's time is spent in executive or managerial functions is not persuasive. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, the deficiency in the record regarding the petitioner's continuing employment of individuals other than the beneficiary and the president/owner casts doubt on the legitimacy of the petitioner's initial offer of employment; as the petitioner has not established that the petitioner ever achieved the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis.

The record does not contain evidence establishing that the beneficiary's duties for the U.S. petitioner were or will be in primarily a managerial or executive capacity. The record is deficient in establishing that the beneficiary performed primarily managerial or executive duties when the petition was filed or that the beneficiary continues to perform primarily managerial or executive duties for the petitioner. For this reason, the petition will not be approved.

The AAO also finds that the record is deficient in establishing that the U.S. petitioner and the foreign entity continue to do business, thus maintaining the multinational nature of the U.S. entity.

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."

The record contains one purchase order and supporting documentation dated June 2004 to show that the petitioner continues to do business. However, despite the director's request for evidence in the notice of intent to revoke to establish that the foreign entity continues to do business, the petitioner failed to provide legible, dated documentation to establish this fact. 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

In response to the director's request, the petitioner provided balance sheets allegedly for the foreign entity for 2001, 2002, and 2003. The balance sheets do not contain sufficient information linking them to the foreign entity. The petitioner also provides bank statements with a key translation but with no information establishing the month or year the bank statements were allegedly issued. The photographs of the foreign entity do not contain any evidence identifying where the photographs were taken or any other identifying features to demonstrate that the photographs are of the foreign entity conducting business. The foreign entity's brochures do not contain the dates that the brochures were published. The record does not contain sufficient independent evidence to establish that the foreign entity continues to conduct business or that the foreign entity continues to enjoy a qualifying relationship with the petitioner at this time. The record is

insufficient to establish that the petitioner is a multinational entity, thus the petition for the beneficiary to be employed as a multinational manager or executive cannot be approved.

The AAO acknowledges that CIS approved an initial L-1A nonimmigrant transferee petition that had been filed on behalf of the beneficiary; however, 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 substantial 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. *See* 8 C.F.R. § 103.8(d). 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.

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.