



U.S. Citizenship
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FILE:

WAC 97 083 50236

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 21 2007**

IN RE:

Petitioner:

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:



PHOTIC COPY

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.

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Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, revoked the approval of the employment-based immigrant visa petition. The matter subsequently came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The petitioner filed a complaint for judicial review and declaratory judgment in the United States District Court, Central District of California. *Guo Hua (USA) Trader's Inc. v. Chertoff*, CV-06-1745 (filed March 22, 2006). The AAO has agreed to reopen the matter on U.S. Citizenship and Immigration Services (USCIS) motion to allow the petitioner to supplement the record of proceeding. See 8 C.F.R. § 103.5(a)(5). On USCIS motion, the AAO will affirm its previous decision dismissing the appeal.

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. The beneficiary was subsequently interviewed in connection with his Form I-485 Application to Register Permanent Residence or Adjust Status on August 16, 1999 at the USCIS Los Angeles District Office. In September 1999, the District Office requested an overseas investigation to verify the beneficiary's employment history and the claimed qualifying relationship between the U.S. petitioner and the beneficiary's foreign employer. The petition was returned to the California Service Center for further review and action on January 22, 2003.

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 Form I-485, Application to Register Permanent Resident Status of Adjust Status. The petitioner did not respond to the director's notice. 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.

In a decision dated January 24, 2006, the AAO dismissed the petitioner's appeal and affirmed the director's decision to revoke approval of the petition on three independent and alternative grounds: (1) the petitioner did not establish that the beneficiary would be employed in the United States in a managerial or executive capacity; (2) the petitioner did not establish the ability to pay the beneficiary's proffered annual salary; and, (3) the petitioner did not establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

On March 28, 2007, the AAO reopened the matter on USCIS motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii), and allowed the petitioner 30 days in which to submit a brief and additional evidence in support of the petition. Counsel for the petitioner submitted a brief and documentary evidence on April 19, 2007. On USCIS motion, counsel disputes each of the AAO's three grounds for dismissal of the appeal.

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

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

* * *

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

The language of the statute is specific in limiting this provision to only those executives 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.

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). 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 unrebutted, 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.

As a preliminary point, the AAO stresses that, in this proceeding, the petitioner must establish that the petitioner and beneficiary were eligible for the benefit sought at the time the instant petition was filed on February 3, 1997. 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); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The evidence in the record of proceeding dates from 1996 through 2006. Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41. 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).

The petition approval in this matter was ultimately revoked due to the director's realization that the petition was erroneously approved in August 1997, rather than based on a conclusion that the beneficiary and petitioner became ineligible for the benefit sought subsequent to the approval of the petition. Accordingly, the AAO will confine its analysis of the evidence to documentation that is contemporaneous with the beneficiary's priority date of February 3, 1997.

The AAO will first address the issue of whether the petitioner established that 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.

The immigrant visa petition was filed on February 3, 1997. In a letter dated January 16, 1997, 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, as well as

information regarding their monthly salaries. The petitioner stated that the sales representatives were employed at a monthly salary of \$1,000, while the secretary received \$500 per month.

In response to a request for evidence issued on February 10, 1997, which did not specifically address the beneficiary's employment capacity, the petitioner provided a copy of its March 31, 1997 quarterly wage report. On the quarterly report, the petitioner indicated that it employed only two employees during January 1997, three employees in February 1997, and three employees in March 1997. The secretary earned \$2,000 during the three-month period, while the two sales representatives earned wages of \$500 and \$1,000, respectively.

In his Notice of Intent to Revoke and Notice of Revocation, 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 further 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."

On appeal, former counsel for the petitioner referenced 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 challenged 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 stated that despite the generalizations, the managerial or executive authority held by the beneficiary could be interpreted through such words as "direct," "supervise," "assign," "determine," and "develop."

The AAO dismissed the appeal in a decision dated January 24, 2006, concluding that the petitioner had failed to overcome the deficiencies noted by the director. The AAO emphasized the petitioner's failure to provide a detailed description of the beneficiary's actual duties, such that they could be classified as managerial or executive in nature. The AAO noted that the limited job description suggested that the beneficiary would participate in non-qualifying duties associated with marketing the petitioner's products and maintaining the company's financial records, as none of these tasks were assigned to lower-level employees at the time the petition was filed. Finally, the AAO considered the petitioner's staffing levels in relation to its reasonable needs and determined that the petitioner had not established that the beneficiary's subordinate employees could reasonably relieve him from performing non-qualifying duties associated with the company's day-to-day operations, particularly as both of the company's sales representatives received wages consistent with part-time employment.

In support of the instant USCIS motion to reopen, counsel for the petitioner asserts that the beneficiary's job duties were clearly and sufficiently described, and that they satisfy each of the four subsections of section 101(a)(44)(A) of the Act, which defines the term "managerial capacity." Counsel asserts that the beneficiary will manage the "finance function" of the organization by "managing any and all aspects of the company's financial viability by forecasting revenue streams, including managing, supervising and controlling any and

all procedures and goals." Counsel asserts that the finance function is clearly "essential" as it relates to the company's growth and success, and notes that the beneficiary will supervise a sales manager/office manager and independent contractors such as an accounting professionals and business or tax attorneys in his role as function manager. Counsel further emphasizes that the beneficiary functions at a senior level within the organizational hierarchy and with respect to the function managed, has the authority to hire and fire personnel, and exercises discretion over the day-to-day operations of the finance department and the overall organization.

In support of her assertions, counsel references several unpublished AAO decisions in which the director's determination that a beneficiary was not employed in a managerial capacity was overturned by the AAO on appeal, including one decision involving a beneficiary who was found to serve as the manager of his employer's finance function.

Counsel further asserts that the beneficiary supervised five employees at the time the immigrant petition was filed, and states that he currently manages eight employees. The petitioner submits copies of the petitioner's organizational chart as of March 30, 2007, copies of the company's 2005 and 2006 IRS Forms W-2, Wage and Tax Statement, and copies of the company's state and federal quarterly wage reports for 2005 and 2006 in support of its claims regarding the company's current staffing levels.

As noted above, evidence related to the petitioner's current staffing levels are not relevant to a determination regarding his employment capacity for the purpose of this analysis. Again, 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. at 49. The petitioner must establish that the beneficiary was employed in a primarily managerial or executive capacity as of February 1997. Counsel does not submit any documentary evidence to support her claim that the beneficiary supervised five employees at the time of filing. It is noted that this claim directly contradicts the petitioner's original assertion that it employed a staff of four. The AAO also notes that the petitioner's 1997 wage reports demonstrate that it employed only two or three staff members at the time of filing. 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).

Counsel also suggests that the AAO did not properly apply section 101(a)(44)(C) of the Act, which requires USCIS to consider the reasonable needs of the organization in light of its overall purpose and stage of development, when relying on staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity. Counsel asserts:

The reasonable need of Petitioner, specially with regards to the function of President and General Manager, is to manage the finance function of the company, including the supervision of the accountant, attorneys, if necessary, the sale manager/office manager, and the delegation of non-managerial duties to the secretary/receptionist, as well as managing the entire finance function of the company, and the function of the Finance Department, this is an extremely important moment for the petitioner's growth and success. In addition to its current employees, petitioner also employs the services of several independent contractors for

services. Finally, beneficiary will be delegating any and all non-managerial duties to the secretary, and will report only to the president of the foreign company.

Based on the language of the Immigration and Nationality Act Section 101(a)(44)(C), the staffing level of the expected position of the Beneficiary will satisfy the reasonable needs of the company (and of the finance function of the company) based on the company's stage of development. This is evidenced by all of the evidence

With respect to the AAO's specific findings that the beneficiary's job description was overly vague and non-specific, counsel asserts that the petitioner had "clearly listed 7 main job duties," with the initial petition filing, and had later clarified that the beneficiary would be responsible for "final decision making authority over business, accounting, personnel and future expansion plans," and supervising the work of all subordinate staff "who release him from performing non-managerial daily tasks in the company." Counsel asserts that the AAO erroneously "speculated" that the beneficiary would be engaged in non-qualifying functions. Counsel states that the petitioner employed two sales staff in 1997 and utilized an outside accountant to perform bookkeeping. Counsel further alleges that the beneficiary was not directly involved in the marketing of products, and characterizes the beneficiary's involvement in major trade shows as a "normal" duty for a manager or executive. Counsel concludes that the AAO's decision was arbitrary and capricious based on the facts presented.

Upon review of the record and the new evidence submitted by the petitioner on motion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity as of the date the petition was filed.

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 in the notice of revocation, and again by the AAO on appeal, the petitioner has declined to clarify the specific managerial or executive job duties to be performed by the beneficiary as general manager of the U.S. company as of the time filing. Counsel's insistence that the job description submitted with the initial petition was sufficiently detailed to establish the beneficiary's employment in a managerial or executive capacity is a poor substitute for a description of the beneficiary actual duties, and cannot be accepted in lieu of such description. 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).

The regulation at 8 C.F.R. § 204.5(j)(5) affirmatively requires the petitioner to submit a clear description of the job duties to be performed by the beneficiary in the petitioning entity. The deficiencies in the job description were discussed at length in the AAO's previous decision, but will nevertheless be revisited here. The petitioner indicated that the beneficiary would "review market research and price analysis reports," but failed to identify any lower level employees who would be responsible for performing market research duties or preparing such reports. Thus, it is not clear that the beneficiary would perform a managerial or oversight role with respect to market research activities. The petitioner stated that the beneficiary would "coordinate communications and business activities" between the petitioner and its parent company, but did not provide any examples of what types of communications or activities would be "coordinated." As the petitioner's parent company appears to be the primary or sole supplier of the goods sold by the U.S. company, these

"business activities" could include such routine tasks as submitting and following up on orders, communicating product specifications, and other non-managerial duties related to procurement and transport of goods to be sold by the U.S. company. Again, the petitioner does not indicate that any of the petitioner's lower-level employees are involved in communications with the parent company, and it is thus unclear who is responsible for procurement of inventory from the parent company and coordinating the import and delivery of the products to the United States. Absent additional clarification, the AAO will not assume that the beneficiary's "coordination" of communications and business activities involves primarily managerial tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The remainder of the beneficiary's job description was laden with ambiguous language, such as the beneficiary's responsibility to "direct and coordinate the activities of the subsidiary company," "develop strategies for market expansion . . . and direct the implementation of the strategies," and "oversee the business transactions of the subordinates." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

While the AAO does not doubt that the beneficiary exercises discretion over the U.S. company as its general manager and sole full-time employee at the time of filing, the definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner's only attempt to clarify the beneficiary's responsibilities and role within the company is counsel's new claim that the beneficiary will serve as the manager of an essential function, specifically, the company's finance function.

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 in managing the essential function, 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. *See* 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 “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 petitioner's initial description of the beneficiary's job duties included the following responsibilities related to the finance function: "Make financial arrangements and allocate funds. Oversee the utilization of funds to ensure maximum profits." The petitioner did not indicate what specific tasks are encompassed by making financial arrangements or overseeing the utilization of funds, nor was there any indication in previous submissions that the beneficiary's primary responsibility is to manage the finance function. Also, it is not entirely clear whether counsel is advancing the claim that the beneficiary managed the finance function as of February 1997 when the petition was filed, or whether this represents the beneficiary's current role within the company. Based on counsel's statement that the beneficiary will supervise a sales manager, office manager, accountant and attorneys in his role as manager of the finance function, it appears that the petitioner is representing that the beneficiary currently manages the petitioner's finance function.

The AAO again emphasizes that 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. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

At the time of filing, the beneficiary was the only employee who was claimed to perform any duties associated with the petitioner's finances. Although counsel claims that the petitioner has utilized an outside accountant since 1996 to take care of its bookkeeping, the record does not contain any documentary evidence to support this claim. 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. While it appears that the petitioner utilized an accountant to prepare annual financial statements and tax returns at the time of filing, the petitioner has not established that it utilized outside employees to handle its day-to-day bookkeeping, accounts payable and receivable, invoicing and banking tasks. Accordingly to the submitted tax returns, the petitioner paid "professional fees" of \$2,700 and \$4,190 in 1996 and 1997, respectively, which would have included any payments to accountants and attorneys. These payments are not consistent with counsel's claim that the petitioner utilized a contracted accountant to perform the routine day-to-day tasks associated with the petitioner's financial function. The fact that the beneficiary was the only employee responsible for the petitioner's financial operations at the time of filing is insufficient to elevate his position to that of a function manager.

The petitioner's vague description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the petitioning organization. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations

of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel addresses the reasonable needs of the petitioning company with respect to its current staffing levels and the beneficiary's claimed role as the manager of the company's finance function. Counsel does not even acknowledge the AAO's conclusion that the petitioner's staffing levels at the time the petition was filed could not plausibly support the beneficiary in a managerial or executive capacity, other than contending that the AAO merely "speculated" that the beneficiary would engage in non-qualifying functions. 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. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

At the time the petition was filed, the petitioner was a one-year-old company engaged in the import and wholesale of fur handicraft items, which achieved gross sales in the amount of \$270,000 and \$405,515 in the fiscal years ended on November 30, 1996 and November 30, 1997, respectively. The petitioner submitted evidence that it held three lease agreements, for an office, a warehouse and a showroom, as of February 1997. Based on the nature of the petitioner's business, it reasonably requires employees to perform many non-managerial tasks, including staff to market and sell its products to wholesalers and retailers in the United States, to research market trends and requirements, to communicate product information and recommendations to the foreign entity, to obtain product samples and purchase full orders from the parent company and any other foreign manufacturers, to schedule and coordinate the import of goods from China and follow up on manufacturing and delivery schedules, to operate and maintain the warehouse, to perform inventory control functions, to manage the company's day-to-day finances, including bookkeeping, accounts payable and receivable, banking and bill paying, to purchase office and warehouse supplies, to prepare orders and arrange domestic transport of products to customers, to plan and prepare for the company's participation in trade shows, and to perform general clerical and administrative office work. The petitioner has presented evidence that it eventually hired workers to perform all of these duties, including an accounting/office manager, a merchandising manager, a sales manager, a warehouse supervisor, a warehouse worker, two office assistants, and independent sales representatives.

However, at the time the petition was filed, the evidence of record shows that the beneficiary was the company's only full-time employee, and that only a part-time secretary and one part-time sales employee supported him. Although the company operated on a smaller scale in 1997, it still had a showroom, a warehouse, and an office to staff, and no employees to perform many of the non-managerial functions, other than some sales and clerical duties. The petitioner has not accounted for any employees to perform duties related to warehousing, inventory control, import coordination, marketing, purchasing, packaging, distribution, or finance activities. The petitioner's 1996 and 1997 financial records do not reflect any payments to contractors or other outside labor, other than minimal amounts paid to an accountant and/or attorney. The AAO's conclusion that the beneficiary was required to perform a number of these non-managerial duties at the time the petition was filed was not based on unfounded speculation. It would be unreasonable to reach any other conclusion based on the evidence presented, and neither the petitioner nor counsel has submitted any new evidence in this proceeding that would overcome this conclusion. 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. at 604.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and to establish, through independent documentary evidence, that someone other than the beneficiary performs the majority of the day-to-day non-managerial and non-executive tasks associated with operating the petitioning entity. The petitioner has failed to meet this burden. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

The AAO acknowledges counsel's references to unpublished decisions in which the AAO overturned the director's determination that the beneficiary would not be employed in a managerial or executive capacity, including several cases involving function managers. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Regardless, 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 cases cited by counsel are not AAO precedents.

Based on the foregoing discussion, the AAO affirms its determination that the director's notice of revocation was properly issued for "good and sufficient cause," and that the revocation was properly upheld by the AAO. *See Matter of Ho*, 19 I&N Dec. at 590.

The AAO will next 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). The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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. The AAO determined that the petitioner did not establish that it had previously employed the beneficiary at the proffered salary, as the beneficiary received wages in the amount of \$24,000 in 1997. The AAO also determined that the petitioner did not have sufficient net assets to pay the proffered salary. 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.

However, upon review, the AAO determines that the petitioner did in fact have sufficient net current assets to pay the proposed salary. 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. Since the petitioner established that it paid the beneficiary \$24,000 in 1997, this amount may be deducted from the proffered wage, and the petitioner must show that it had sufficient net assets in 1997 to pay the additional \$6,000 of the proffered \$30,000 salary. The petitioner's 1996 Form 1120 shows net current assets in excess of \$6,000. Accordingly, the AAO's and the director's determinations regarding this issue only will be withdrawn. The petitioner has established its ability to pay the proffered wage.

The third and final issue to be addressed is whether the petitioner established that the beneficiary was employed overseas in a primarily managerial or executive capacity for at least one year in the three years preceding his entry to the United States as a nonimmigrant. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

In its letter dated January 16, 1997, submitted with the immigrant petition, the petitioner explained that as manager of the import and export department in the foreign company, the beneficiary performed 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 petitioner did not identify the beneficiary's position, or any lower-level employees that were supervised by the beneficiary. The director ultimately revoked the approval of the petition on the grounds that the petitioner did not submit sufficient evidence to establish the beneficiary's employment with the foreign entity in a primarily managerial or executive capacity.

On appeal, the petitioner's previous counsel did not specifically address the director's finding that the petitioner failed to establish that the beneficiary was employed overseas in a primarily managerial or executive capacity. Instead, counsel merely contended that the beneficiary's eligibility for the requested classification was previously determined by USCIS's approval of prior nonimmigrant petitions. Accordingly, the AAO affirmed the director's conclusion that there was insufficient evidence to establish that the beneficiary performed primarily managerial or executive duties, or to establish the organizational structure of the foreign entity and the beneficiary's placement within it.

In the instant proceeding, counsel asserts that the beneficiary was employed in a qualifying capacity as import and export manager for the petitioner's parent company. Counsel states that since the foreign entity is export-oriented, "the import and export department will be its pivotal department for its business." Counsel further asserts:

A reasonable assumption would indicate that at least 20 employees would work under import and export department which includes professional export sales persons who has knowledge of international trade, letter of credit, customs clearance, shipping and forwarding and knowledge of reading, speaking and writing English. Usually a graduate from University who specialize [sic] in English or International Trade would qualify to work as a sale person in a foreign trade oriented company's import and export department. Thus, under [the beneficiary's] leadership, there must many [sic] college graduate professionals. However, since in 1997, then INS was very easy to approve the L-1 petition or I-140 petition for transnational executives, thus the prior attorney did not spend time and effort to collect then available data and information.

Counsel's assertions on motion are speculative. The petitioner has not submitted evidence to overcome the previous decisions of the director and the AAO.

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. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Absent any 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.

Although these deficiencies were specifically highlighted in the AAO's decision, neither counsel nor the petitioner has acknowledged the AAO's findings, much less clarified the beneficiary's actual job duties while employed by 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 does address the foreign entity's organizational structure in an attempt to establish that the beneficiary supervised a staff of professionals while employed as the import and export manager of the foreign entity. However, by relying on speculative comments, counsel appears to concede that she does not have any documentary evidence or specific information from the petitioner as to the number and types of employees actually supervised by the beneficiary while he was employed by the foreign entity. Counsel emphasizes that the foreign entity, as a large company, likely had a significant number of employees in its import and export department, and these employees probably had college degrees due to their need to be fluent English speakers. The lack of any evidence or statements from the foreign company is puzzling. The AAO cannot accept these assumptions from counsel in lieu of a detailed account of the beneficiary's job duties while employed by the foreign entity and the actual personnel structure of the department he managed. Again, 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).

In addition, the AAO notes that there is some discrepancy in the record with respect to the beneficiary's dates of employment and positions held with the foreign entity. The petitioner stated in its letter dated January 16, 1997 that the beneficiary assumed his position as the manager of the import/export department of the foreign entity in 1995, the year in which the company was authorized by the Chinese government to engage in international import and export activities. The record also contains a translated "verification" from the Ministry of Industrial and Commercial Executive Administration of Dingtao, Shandong province, dated January 6, 1997, which states that the foreign entity was granted the right to independently operate an import and export business in 1995. The petitioner also submitted an "Employment Certification" from the foreign entity, dated December 1, 1995, which indicated that the beneficiary was appointed to the position of manager of the import and export sales department of the foreign entity in 1993. Another employment certificate issued by the foreign entity on May 21, 1999 indicates that the beneficiary assumed the position of manager of the export department in 1994, when the foreign company was granted import and export rights. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The date on which the beneficiary assumed the position of manager of the import and export department is relevant, as the petitioner relies on this position to establish that he was employed in a primarily managerial or executive position for at least one year prior to his entry to the United States as a nonimmigrant. The beneficiary entered the United States as a nonimmigrant visitor on January 1, 1995 and did not depart the U.S. again prior to the filing of the instant petition on February 3, 1997. Therefore, even if the petitioner had demonstrated that this position was managerial or executive as defined by the statute, due to the conflicting statements regarding his dates of employment, the record does not clearly establish that the beneficiary was employed in this position for one full year, nor does the record include sufficient descriptions of any prior positions held by the beneficiary within the foreign organization.

Based on the foregoing discussion, the AAO affirms its determination that the director's notice of intent to revoke approval of the visa petition was properly issued for good and sufficient cause on the grounds that the

petitioner failed to establish that foreign entity employed the beneficiary in a primarily managerial or executive capacity.

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

Because the petitioner cannot establish eligibility as of the original filing date, the AAO must affirm the revocation of this visa petition approval. However, if the petitioner believes that current facts would establish eligibility, the AAO notes that there is nothing to bar the filing of a new petition supported by current evidence.

ORDER: The AAO's decision dated January 24, 2006 is affirmed.