U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 24 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

DISCUSSION: The Director, Vermont Service Center, initially approved the employment-based visa petition. Upon subsequent review, the director properly 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 a corporation organized in the State of Maryland in June 1995. It acquires and exports instrumentation equipment to China. It seeks to employ the beneficiary as its president and chief executive officer. 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 director initially approved the petition. Upon subsequent review, the director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. The director also determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. After properly issuing a Notice of Intent to Revoke, the director revoked the approval of the petition on August 24, 1999. The director subsequently reopened the matter, but in a decision dated June 11, 2001 concluded that the petitioner had not overcome the grounds for revocation.

On appeal, counsel for the petitioner asserts that: (1) the Chinese parent company owns 100 percent of the petitioner; (2) the beneficiary performs executive and managerial duties for the petitioner; and, (3) the director's decision is arbitrary and capricious in light of three prior approvals when the facts have not changed in substance.

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

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

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

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General 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 204."

Moreover, 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. 582, 590 (BIA 1988). Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and 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, *supra* (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The first issue in this proceeding 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 petitioner claims that it is a wholly owned subsidiary of the foreign entity. In support of this claim, the petitioner provided stock certificate number "1" issued to [redacted] Automation Co., Ltd. for 100 shares. The petitioner's stock ledger shows that this is the only stock issued. The petitioner's 1997 and 1998 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, show that the beneficiary owns 100 percent of the petitioner's stock.

The director observed these discrepancies in the Notice of Intent to Revoke and determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. The director requested

an explanation of the discrepancies and further documentation of the ownership and control of the foreign affiliate organization.

In rebuttal to the Notice of Intent to Revoke, counsel for the petitioner stated that no discrepancy existed as the beneficiary "owns 100% of the Chinese parent, thus making him the sole owner of both entities." Counsel also provided: a copy of the [the petitioner's] stock certificate, stock transfer ledger, and organizational minutes; and a copy of [the claimed Chinese parent company's] memorandum regarding the petitioner's establishment. The record also contained: the claimed parent company's Business License showing the beneficiary as the foreign entity's legal representative; and the petitioner's initial bank statement showing a wire transfer of $28,285 from China; and a copy of an accountant's April 9, 1999 letter indicating that the accountant had been told that the beneficiary owned 100 percent of the foreign entity. Counsel claimed that the Chinese Business License was comparable to Articles of Incorporation and that the $28,285 was used to initially capitalize the petitioner.

The director determined that the evidence submitted did not establish a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director focused on the lack of documentation establishing that the beneficiary owned the foreign entity.

On appeal, counsel for the petitioner asserts that the lack of documentation establishing the ownership and control of the foreign entity is irrelevant. The AAO agrees that the ownership and control of the foreign entity is primarily relevant only if the petitioner is claiming that it is affiliated with the foreign entity rather than a subsidiary of the foreign entity.

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.
>
> *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.
>
> *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 this matter, the discrepancies in the record and counsel's explanation that the beneficiary ultimately owns both the United States petitioner and the foreign entity undermines both an affiliate and subsidiary relationship. Counsel's explanation that the beneficiary ultimately owns both companies indicates that the petitioner is attempting to establish an affiliate relationship with the beneficiary's overseas employer. However, counsel claims on appeal that the petitioner is a wholly owned subsidiary of the beneficiary's foreign employer and that the stock certificate is sufficient to establish this fact.

Counsel's claims are not persuasive. The record continues to contain inconsistencies. The petitioner's IRS Forms 1120 indicate that the beneficiary is the petitioner's 100 percent owner. Counsel's explanation that this is simply for tax purposes because essentially the beneficiary owns both companies is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Moreover, the petitioner's 1996, 1997, and 1998 IRS Forms 1120, Schedule L, Line 22 show that the petitioner's common stock is valued at $1,000. The petitioner provided its initial bank statement and claimed that the $28,285 transferred from abroad was used for its initial capitalization. This amount does not comport with the information contained in the petitioner's tax returns. 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, supra.*

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings). Moreover, as ownership is a critical element of this visa classification, Citizenship and Immigration Services (CIS) may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. In this regard, not only has the petitioner failed to provide viable explanations for the petitioner's information provided on its IRS Forms 1120, the information in the record suggests that the petitioner was created for the primary purpose of transferring the beneficiary and his family to the United States pursuant to this visa classification. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also questions in rebuttal and on appeal how an immigrant petition based on three previous approvals on precisely the same facts can be revoked. The record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before him, it was unnecessary for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous.

Further, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear 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, supra.* 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).

Furthermore, 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 second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a May 15, 1997 letter accompanying the petition, the petitioner stated that the beneficiary would concentrate on cultivating new markets and contacts within the United States through and on behalf of the petitioner. The petitioner also indicated that the beneficiary would hire additional personnel and increase its expenditures on ancillary services such as warehouse services, shipping, and dock work.

In response to a request for evidence, counsel for the petitioner: referred to the letter submitted in support of the petition; noted the "certification" of the beneficiary's managerial/executive status by CIS on two previous approvals; and, submitted two contracts signed by the beneficiary. Counsel also noted that the beneficiary headed an operation that had generated over two million dollars in gross sales in 1996 and concluded that overseeing such substantial business activities would require the beneficiary's managerial and executive functions. Counsel also indicated that the petitioner employed a marketing and sales coordinator.

The petitioner also provided a list of the beneficiary's duties and the time he allocated to the duties:

- Make strategic plans for corporation both in China and in the US (40%)
- Hold meetings of employees to discuss strategies (5%)
- Supervises operation of US subsidiary while in the US (25%)
- Instruct employees to conduct market research to discover potential markets in China and potential suppliers in the US (2%)
- Negotiate contracts, investment agreements (10%)
- Negotiate with US suppliers to become their representatives in China (8%)
- Maintain good relationship with existing customers and suppliers, public relationship (10%)

The petitioner's organizational chart showed the beneficiary as chief executive officer, and an employee in each of the position of "sales," "marketing," and "secretary."

The director approved the petition based on this limited information.

Upon subsequent review of the record the director issued a Notice of Intent to Revoke and requested: (1) a complete position description for all of the petitioner's employees in the United States including the beneficiary; (2) a copy of the petitioner's IRS Form 941, Employer's Quarterly Tax Return, for the last two quarters of 1998 and the first quarter of 1999; (3) a copy of all 1997 and 1998 IRS Forms W-2, Wage and Tax Statement, and IRS Forms 1099, Miscellaneous Income.

In response, counsel for the petitioner referred to "page two of the Petitioner's letter of support dated July 17, 1998[1] (Exhibit 6) under the heading 'The US Position Held by the Transferee'," (footnote added) wherein the petitioner allegedly stated:

> [The beneficiary] functions as the liaison between the Petitioner and [the claimed parent company of the petitioner]; hires and fires personnel; directs and develops the export and sales strategy of the Petitioner; and coordinates all activities between the Petitioner's US operations and those of its parent. Additionally, [the beneficiary] is the only individual affiliated with Petitioner who has the authority to make these crucial business decisions.

Counsel continued by stating that: "[The beneficiary's] duties are geared toward oversight, long term strategy, and organizational goals, and are clearly managerial in nature. The day-to-day activity of the Petitioner is carried out by the organization's other employees." Counsel then states that the above description "conclusively establishes [the beneficiary] is far more than [a salesperson.]." Counsel acknowledges that the beneficiary "spends a substantial portion of his time promoting his company, whose chief business is to promote American products on the Chinese market."

The petitioner submitted its 1997[2] IRS Forms W-2 issued to the beneficiary and to an individual identified on the organizational chart in the position of "sales." The petitioner's 1998 IRS Forms W-2 were also issued to the beneficiary and the individual in the position of "sales." A third 1998 IRS Form W-2 was issued for $604.84, indicating the individual's limited employment in the 1998 year. The petitioner also provided a list of its employees in September 1999 showing the beneficiary in the position of president and chief executive officer, a vice-president/accounting and financial manager, and an import/export manager. The petitioner also submitted the same position description for the beneficiary as submitted in response to the director's initial request for evidence.

The director determined that the petitioner's description of the beneficiary's duties was vague and did not provide an understanding of the beneficiary's daily duties. The director also noted that the record did not

---

[1] The letter accompanying the I-140 petition filed September 2, 1997 is dated May 15, 1997. Counsel may be referring to a letter submitted with another petition. However, this record does not contain a July 17, 1998 letter or accompanying exhibits.

[2] The petition was filed in 1997, thus the most relevant employment documents establishing the petitioner's managerial hierarchy are documents issued in 1997. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

provide sufficient evidence that the beneficiary would be relieved from performing non-qualifying duties. The director concluded that the petitioner had not established that the beneficiary had been and would be employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts the beneficiary: (1) is directly involved in the management of the organization and involved in the supervision of the petitioner's corporate management; (2) develops business contacts and negotiates contracts, is responsible for the development of office regulations, investigation of shipping services, and the set up warehouse accommodation; (3) controls the work of supervisory employees; and (4) secures office space. Counsel refers to contracts signed by two previously unidentified employees and asserts that these two individuals are managerial employees under the beneficiary's supervision.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The definitions of executive and managerial capacity have two parts. 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) (Emphasis in original). 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).

First, the petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary as both an executive and a manager.

Second, the petitioner has ascribed 65 percent of the beneficiary's time to vague and nonspecific tasks that fail to demonstrate what the beneficiary actually does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "make[ing] strategic plans for corporation both in China and in the US establishing goals and policies," and "[s]upervises operation of US subsidiary while in the US." The petitioner did not, however, define the plans, goals, policies, or detail the actual tasks or functions the beneficiary was supervising. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Third, when the petitioner provides more specific details regarding the beneficiary's duties, the petitioner describes the beneficiary as cultivating new markets and contacts and negotiating contracts and investment agreements. Since the beneficiary actually performs these fundamental operations, he is performing the tasks necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra.*

Last, even though counsel claims that employees other than the beneficiary carry out the petitioner's day-to-day activity, the petitioner has not provided evidence to substantiate that it employed a sufficient number of individuals to relieve the beneficiary from primarily performing its day-to-day operational tasks. When the petition was filed, the petitioner employed one other individual in "sales" leaving the beneficiary to negotiate all agreements, including shipping and accommodations, perform basic market research, and customer service including spending a substantial portion of his time promoting the company. As indicated in a footnote above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Likewise, counsel's assertion on appeal that the beneficiary controls the work of supervisory employees is not substantiated in the record. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* The petitioner has not provided evidence that it employs sufficient personnel to relieve the beneficiary from performing its day-to-day operational and administrative duties.

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary directs the management or manages the organization or an essential function of the organization, rather than performing the petitioner's essential operational and administrative tasks. The petitioner has not provided evidence that the beneficiary supervises and controls other supervisory, professional, or managerial employees. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

Again counsel's reference to previously approved petitions that had been filed on behalf of the beneficiary is not relevant. As stated above, 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, supra.*

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.