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

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 04 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

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that was incorporated in the State of Texas in July 1998. It provides equipment and supply services to the oil, gas, and mining industry. It seeks to employ the beneficiary as its president. 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 determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) that it was doing business in the United States; (3) that the foreign entity was doing business; (4) that the beneficiary had been employed for one year in a managerial or executive capacity for the foreign entity; or, (5) that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the director erroneously denied the petition. Counsel submits a brief and documents in support of the appeal. Counsel requests the opportunity to present oral argument.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in matters involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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).

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.

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 a June 21, 2002 letter accompanying the petition, the petitioner stated that its parent company was Suplindo formerly The petitioner indicated that PT acquired in early August 2001. The petitioner did not submit any evidence of PT Timas claimed acquisition of

The petitioner also presented its Articles of Incorporation. The Articles of Incorporation identified the shareholders, their number of shares, and the consideration paid for the shares as:

	18,000 shares	$18,000
	9,000 shares	$ 9,000

The petitioner also provided copies of stock certificates issued to substantiating the issuance of 18,000 shares and 9,000 shares respectively.

On August 6, 2003, the director requested, among other documentation and information, a copy of the petitioner's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. In a September 26, 2003 response letter from the president/director stated tha cquired n August 2001. The president/director also indicated that wned a 50 percent interest in the petitioner. The petitioner included its 2002 IRS Form 1120, that showed on Schedule E at line 1(d), that the beneficiary owned 50 percent of the petitioner's common stock and that owned 50 percent of the petitioner's common stock.

In her decision to deny the petition, the director observed that the petitioner had not submitted evidence that PT Timas acquired that information contained in the September 26, 2003 letter from regarding the petitioner's ownership conflicted with the stock certificates initially provided; and, that the petitioner's 2002 IRS Form 1120 provided additional conflicting evidence regarding the petitioner's ownership. The director concluded that the evidence submitted did not establish a qualifying relationship between the petitioner and a foreign entity.

On appeal, counsel for the petitioner provides a copy of the purchase agreement between detailing purchase of a copy of an August 2, 2001 letter fro director informing the petitioner that had purchased a 66 2/3 percent ownership i ; copies of 2001 and 2002 IRS Forms 1120X showing Schedule E at Line 1(d) amended to show tha owned 33 1/3 percent ownership in the petitioner. Counsel asserts that the stock certificates issued reflect the petitioner's actual ownership and control.

Counsel's assertion is not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution

of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Like a delayed birth certificate, the amended IRS Forms 1120 and unsworn statements attempting to remedy conflicting evidence casts doubt upon the truth of the very facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Even if purchased in August 2001, the petitioner's inability to clearly state interest in the petitioner creates questions regarding the petitioner's actual ownership. Submitting letters easily pre-dated that state that a foreign entity actually owns a controlling interest in the petitioner, and that neither an individual or foreign entity owns 50 percent of the petitioner does not qualify as independent and objective evidence. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence.

In this matter, the petitioner has not submitted independent evidence showing that a foreign entity provided the funds to purchase an interest in the petitioner. Such evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice and would comprise independent and objective evidence. Due to the numerous inconsistencies in the record regarding the petitioner's ownership, any attempt to clarify the inconsistencies must include documentary evidence from independent sources. Anything less, in this matter, is not sufficient to overcome the director's determination on this issue. 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).

The second issue in this proceeding is whether the petitioner has continuously been doing business for one year prior to filing the petition on September 23, 2002.

The regulation at 8 C.F.R. § 204.5(j)(3) states in pertinent part:

> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> * * *
>
> (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part "*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."

On August 6, 2003 the director requested evidence of the business conducted by the petitioner, such as invoices, bills of sale, and product brochures. The director specifically requested evidence that the petitioner had been doing business from August 2001, a year prior to filing the petition.

In response, the petitioner submitted its 2002 IRS Form 1120, showing gross receipts or sales in the amount of $965,615 and a products brochure for

The director observed that the petitioner had not submitted any invoices or bills of sale and that the petitioner's IRS Form 1120 showed a total income of $45,553. The director determined that the petitioner had not established that it was engaged in the regular, continuous, and systematic provision of goods or services.

On appeal, counsel for the petitioner acknowledges that the petitioner's evidence of business activity before the director was not overwhelming but that it had provided some evidence of business activity. Counsel then refers to the petitioner's ownership of C. Counsel avers that: as created in July 2001; (2) the beneficiary as the petitioner's president was authorized to hold shares of Mud King Products, LLC in his own name on behalf of the claimed parent company; (3) four individuals, including the beneficiary, initially held ; (4) on November 28, 2003 the petitioner purchased 65 percent of shares from three of the individuals, excluding the beneficiary, holding the stock; (5) on November 28, 2003, the beneficiary assigned his Mud King Products, LLC shares to the petitioner; and, (6) the petitioner as the sole owner of engages in business through its subsidiary. Counsel also submits documents relating to including a December 15, 2003 profit and loss statement and Mu LLC invoices for November and December 2003. Counsel contends that the petitioner regularly conducts business through its subsidiary, Mud King Products, LLC.

Counsel's contention is not persuasive. 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). When the petition was filed, four individuals owned Mud not the petitioner. The only connection between the petitioner an was the beneficiary's partial ownership of The record contains no probative evidence that the beneficiary's 45 percent partial ownership resulted in the petitioner's ownership and control of The sale and assignment o shares to the petitioner in November 2003 is not relevant to this proceeding. When the petition was filed in August 2002, the petitioner did not own and could not conduct business through this claimed subsidiary.

The petitioner has not submitted any evidence in the form of invoices or bills of sale to show that it had been doing business since August 2001, even though the director specifically requested this evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R.

§ 103.2(b)(2)(i). 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 petitioner has not submitted evidence that the petitioner had been doing business for one year when the petition was filed.

The third issue in this proceeding is whether the foreign entity has been doing business. The director also requested evidence that the foreign entity was doing business, such as invoices, bills of sale, and product brochures. In response, the petitioner provided a contract for manpower and equipment dated November 15, 2001 between PT Timas and an unrelated third party company. The contract indicated that it would remain effective for two years but that the contract could be terminated at any time for any reason by giving 14 days notice. The petitioner also submitted an informational catalog regarding PT Timas. The director determined that the evidence submitted did not establish that the foreign entity was engaged in the regular, continuous, and systematic provision of goods or services.

On appeal, counsel for the petitioner asserts that the two-year contract is evidence that the foreign entity is doing business. Counsel also submits a current workload table, copies of delivery orders and other documents dated in 2003, and client letters and an installation certificate dated in 1998.

Again, the petitioner's failure to adequately respond to the director's request for evidence undermines counsel's contention that the foreign entity was conducting business when the petition was filed. The AAO questions the lack of documents available between the 1998 and 2003-time period. As observed above, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Moreover, the foreign entity's two-year contract, while some evidence that the foreign entity started providing services in November 2001, does not establish that the foreign entity continued to do business throughout the two-year period. The record lacks evidence in the form of payments made, invoices submitted, or other documentation establishing the ongoing nature of the contract. Finally, as stated above, a petitioner must establish eligibility when the petition is filed. *Matter of Katigbak*, 14 I&N at 49. Providing evidence that a company may have been resurrected in 2003 does not establish eligibility when the petition is filed.

The fourth issue in this proceeding is whether the beneficiary had been employed for one year in a managerial or executive capacity for the foreign entity.

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
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> 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 June 21, 2002 letter appended to the petition, the petitioner stated that the beneficiary "provided his expertise for the establishment of [redacted] goal and structure," and "was responsible for the performance of the company by meeting shareholder business expectation and for the selection of key executive to occupy top managerial level." The petitioner also indicated that the beneficiary "was responsible for the control of the allocation of scarce resources such as money and decision making power among the organization's functional divisions."

On August 6, 2003, the director requested a definitive statement from the foreign company describing the job duties of the beneficiary at the foreign entity, including: (1) position title; (2) a list of all duties; (3) percentage of time spent on each duty; (4) number of subordinate managers/supervisors or other employees who report directly to the beneficiary; and, (5) a brief description of their job titles, duties, and educational levels and if the beneficiary did not supervise other employees, a specification of what essential function within the organization he/she manages. The director also requested clarification of the beneficiary's actual employment dates with the foreign entity prior to entering the United States as an L-1A nonimmigrant.

In response, the petitioner submitted a September 26, 2003 letter from the president/director of indicating that immediately after acquired in August 2001, the beneficiary was appointed vice-president of and was responsible for the following duties in the percentages listed:

> Assist president of the company to set short term and long term company goals and designing it [sic] strategy – 10 percent
> Managing key executive in achieving company business goal –15 percent
> Selecting key personnel to occupy managerial level – 10 percent
> Liaison with government official in obtaining new business permits – 10 percent
> Determining middle management incentives and rewards – 10 percent
> Controlling expenditures against approved budget - 25 percent
> Managing International Business expansion - 20 percent

The foreign entity indicated that the beneficiary managed six managers and seven senior supervisors and almost 167 employees in this position. The foreign entity also provided its organizational chart showing the beneficiary in the position of vice-president over all the company's departments.

The petitioner also submitted a May 19, 1999 letter in support of its petition to classify the beneficiary as an L-1 nonimmigrant intracompany transferee. The petitioner stated that the beneficiary would be ideal for the position and indicated that the beneficiary's last position had been "President responsible for the operation of a heavy equipment rental and trading business" from April 1997 to present (May 19, 1999).

The director observed that the petitioner had presented conflicting evidence about the dates of the beneficiary's foreign employment. The director noted that the petitioner initially indicated that the beneficiary worked for the foreign entity from April 1998 to October 1998; that the letter from the foreign entity indicated that the beneficiary had worked for the foreign entity since 1977; and, that the beneficiary's Form G-325A, Biographic Information, showed that the beneficiary worked for as president from April 1998 to May 1999. The director determined that the record did not establish that the beneficiary worked for at least one year in a managerial or executive capacity for the foreign entity.

On appeal, counsel for the petitioner acknowledges that the evidence previously submitted regarding the beneficiary's foreign employment contained contradictory information. Counsel submits a letter from the petitioner's vice-president explaining the previous mistake regarding the beneficiary's foreign employment; an amended Form G-325A; and, copies of the beneficiary's pay stubs from his tenure as president of from April 1997 to June 1998. Counsel also submits a letter dated June 1, 1998 purportedly detailing the beneficiary's duties for from April 1997 to June 1998.

Counsel also explains that the beneficiary is currently the director for marketing and business development of and has held that position since August 2001. Counsel asserts that the beneficiary is able to concurrently hold positions of the petitioner's president, president, and director for marketing and business development for as the three positions are related and as the director position is largely served by expanding the United States enterprise through the petitioner and

Products, LLC. Counsel submits a new organizational chart for PT Timas as of November 2001 noting that the foreign entity's previous statement that the beneficiary was its vice-president was incorrect. Counsel asserts that the foreign entity's November 2001 organizational chart shows that the beneficiary supervised the personnel manager, operations manager, field operations, and Jakarta operations and that his job description showed that the beneficiary acted in a primarily managerial capacity for the foreign entity.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). A petitioner 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.* 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 is both an executive and a manager.

The petitioner's initial description of the beneficiary's duties for the foreign entity is vague and nonspecific. For example, the petitioner states that the beneficiary "was responsible for the performance of the company by meeting shareholder business expectation and for the selection of key executive to occupy top managerial level," and "was responsible for the control of the allocation of scarce resources such as money and decision making power among the organization's functional divisions." In response to the director's request for evidence, the petitioner provided its May 19, 1999 letter in support of the beneficiary's classification as a nonimmigrant transferee. The May 19, 1999 letter only adds that the beneficiary had been president of an equipment and rental company. These general statements do not convey an understanding of the beneficiary's daily duties for the foreign entity. 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). 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 at 190.

Moreover, the conflicting information contained in the record regarding the beneficiary's employment since August 2001 casts doubt on the nature of the beneficiary's actual employment with PT Timas, the purported successor to the beneficiary's foreign employer. The foreign entity first claims that the beneficiary had been vice-president over six managers and seven senior supervisors and almost 167 employees. On appeal, counsel attempts to relate the beneficiary's foreign duties fo[redacted] to the beneficiary's duties for the petitioner while in L-1 status by asserting that, in reality, the beneficiary acted as [redacted]' director of marketing and development, a position serving the United States enterprises. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). Moreover, the petitioner's attempt, through counsel, to justify, clarify, and conform the record to circumstances that would create eligibility for the beneficiary undermines the record as a whole. A petitioner

may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).
The record does not present consistent objective evidence that the foreign entity in this matter employed the beneficiary in a managerial or executive capacity for one year prior to his entry into the United States as a nonimmigrant. Further, the inconsistencies presented for the record relating to the nature of the beneficiary's continuing employment with a foreign entity while in L-1A status undermine the petitioner's claim that the beneficiary's employment with a foreign entity was in a managerial or executive capacity.

The final issue in this proceeding is whether the petitioner has established that the beneficiary will perform in a managerial or executive capacity for the petitioner.

In a June 21, 2002 letter appended to the petition, the petitioner indicated that the beneficiary would continue in his position with the petitioner and that his duties would include:

> (1) Setting organization's goal and designing its structure; (2) managing executives in achieving company business goals; (3) selecting key executive to occupy upper managerial level; (4) determining upper management's rewards and incentives; and (5) controlling the allocation of scarce resources such as money and decision[-]making power among the organization's functional [sic] of business division.

The petitioner also provided an organizational chart combining the petitioner's and Mud King Products, LLC's structure as of April 2002. The organizational structure showed the beneficiary as president and chief executive officer supervising a finance/administrative manager and a vice-president of operations. The chart also showed an administrative clerk, a domestic sale representative, and a warehouse clerk.

On August 6, 2003, the director requested a definitive statement describing the proposed job duties of the beneficiary at the United States entity, including: (1) position title; (2) a list of all duties; (3) percentage of time spent on each duty; (4) number of subordinate managers/supervisors or other employees who report directly to the beneficiary; and, (5) a brief description of their job titles, duties, and educational levels and if the beneficiary did not supervise other employees, a specification of the essential function within the organization he/she manages.

In response, the petitioner submitted a September 29, 2003 letter on the letterhead of [redacted] LLC, and signed by the individual purportedly owning 33 1/3 of the petitioner and holding the position of vice-president that stated:

> In His position as President of the Company, [the beneficiary] is responsible for the following duties:
>
> Ensure the performance of the company meeting shareholder business expectation. (25%);
> Set short term and long term company goals, and designing it [sic] strategy (25%);
> Managing executives in achieving company business goal (15%);
> Selecting key personnel to occupy executive level (10%);

Determining upper management incentives and rewards (10%);
Controlling the allocation scare [sic] resources such as money and decision[-]making [p]ower among the organization's functional business division (15%).

The petitioner also provided organizational chart; a Texas Form C-3, Employer's Quarterly Report, for the first and second quarters of 2003, showing that employed the beneficiary and one other individual; and, 2002 IRS Forms W-2, Wage and Tax Statement issued by Mud to the beneficiary and one other individual.

The director determined that the petitioner had not provided evidence that the petitioner employed any staff and its claimed "affiliate," employed only the beneficiary and one other individual. The director concluded that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner claims that employs contract workers on a regular basis and that the beneficiary hires the contract workers and supervises other managers and executives of the company. Counsel submits contract employment agreements between several individuals and Mud to support his claim. Counsel also asserts that if the petitioner had not employed the beneficiary in an executive capacity, the beneficiary would not have been authorized to form the limited liability company. Counsel paraphrases the previously provided description of the beneficiary's duties and concludes that the beneficiary is currently employed in a managerial or executive capacity.

Counsel's assertions are not persuasive. The record does not contain evidence that the petitioner employs contract workers. employees or contract workers are not relevant to this proceeding. As determined above, the petitioner was not affiliated with the when the petition was filed. 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* 14 I&N Dec. at 49. Moreover, the employment agreements between and contract workers are not substantiated by evidence showing that contract workers were paid. 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 at 190.

Counsel's contention that the beneficiary's authorization to form evidences his executive capacity is also not persuasive. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v.* 464 U.S. 183, 188-89 n.6 (1984); *Matter of* 17 I&N Dec. 503 (BIA 1980). Moreover, counsel does not explain how the authorization to create a company comports with any of the elements of the statutory definition of "executive capacity."

On review, the petitioner's description of the beneficiary's duties for the petitioner, like the foreign entity's description of the beneficiary's duties for the foreign entity is vague and nonspecific. Ensuring the company's performance and setting goals and strategy does not describe the beneficiary's actual duties.

Moreover, the petitioner does not provide evidence of any individuals who carry out the operational and administrative functions, thereby relieving the beneficiary from performing primarily non-qualifying duties. Likewise, the record does not contain evidence of executives that the beneficiary purportedly manages or the necessity of the beneficiary determining management incentives and rewards. 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*, 14 I&N at 190. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N at 604.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

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.