U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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JAN 11 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 00 005 52640

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, California Service Center, initially approved the employment-based immigrant visa petition. Upon review, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the preference visa petition, and his reasons therefore, and ultimately revoked the approval of the petition on January 16, 2004. 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 California in May 1994. It is engaged in international trade and retailing furniture. 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 initially approved the petition on January 19, 2001. Upon subsequent review the director determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) that the beneficiary had been or would be employed in a managerial or executive capacity for the petitioner; or (3) its ability to pay the proffered annual wage of $35,000. The director issued a notice of intent to revoke approval on March 11, 2003 detailing the above grounds for revocation.

Upon review of the documentation submitted in response to the notice of intent to revoke, the director revoked the approval of the petition on January 16, 2004, concluding that the petitioner's evidence did not overcome the grounds of revocation.

On appeal, counsel for the petitioner asserts that the director failed to evaluate the evidence submitted in rebuttal to the notice of intent to revoke.

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).

Citizenship and Immigration Services (CIS) regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

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 its 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 is whether the petitioner has established its ability to pay the beneficiary the proffered wage of $35,000 per year.

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.

When 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. In the present matter, the petitioner demonstrated that it employed the beneficiary prior to filing the petition. However, the petitioner did not submit evidence establishing that it had previously paid the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In this matter, the petitioner's 1999 Internal Revenue Service (IRS) Form 1120 showed that it had sufficient net income to pay the beneficiary the proffered wage. The petitioner had the ability to pay the beneficiary the proffered wage when the petition was filed.

The record also contains the petitioner's 2000, 2001, and 2002 IRS Forms 1120. The IRS Forms 1120 and the beneficiary's IRS Forms W-2, Wage and Tax Statement, show that the petitioner paid the beneficiary $24,000 to $30,000 in each of those years. The record does not clearly show that the petitioner had the ability to pay the remaining portion of the beneficiary's wage in 2000 and 2001. However, the difference in the sum actually paid to the beneficiary for 2000 and 2001 and the proffered wage is not significant. The record supports the petitioner's claim that it had the ability to pay the beneficiary more than the proffered wage in 2002. Upon review of the totality of the record, the petitioner has established its ability to pay the beneficiary the proffered wage when the petition was filed. The record also contains evidence that the petitioner had the ability to pay the beneficiary the approximate proffered wage in the years subsequent to filing the petition and paid the beneficiary an amount close to the proffered wage in all years subsequent to filing the petition. The record sufficiently establishes the petitioner's ability to pay the proffered wage.

The second 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.

The director pointed out a number of discrepancies between the petitioner's claimed qualifying relationship with the beneficiary's foreign employer and the petitioner's IRS Forms 1120. For example:

The foreign company [redacted] (LHLD), transferred a total of $240,000 to the petitioner in July and November 1995 and the petitioner issued a stock certificate to LHLD in April 1994 in the amount of 150,000 shares.

The petitioner's 1997 IRS Form 1120 shows that the beneficiary owned 25 percent of the petitioner and the petitioner's common stock was valued at $7,000.

The petitioner's 1998, 1999, and 2000 IRS Forms 1120 show that the beneficiary owned 100 percent of the petitioner and the petitioner's common stock was valued at $7,000.

In the notice of intent to revoke, the director determined that the inconsistencies in the record precluded a conclusion that the petitioner and the foreign entity enjoyed a qualifying relationship.

In rebuttal, counsel for the petitioner claims that two bookkeeping mistakes on the petitioner's earlier tax returns confused the qualifying relationship and have since been corrected. Counsel asserts that the beneficiary owns 95 percent of [redacted] Co. [redacted] which was formerly known as LHLD, and tha[redacted] owns 100 percent of the petitioner. Counsel claims that a bookkeeping mistake confused two bank deposits in 1994, and erroneously labeled a checking account deposit of $7,000 as $7,000 for common stock and two deposits totaling $150,000 as paid-in capital, when the reverse reflected the actual circumstances. Counsel submitted a March 25, 2003 letter signed by the petitioner's accountant indicating that the beneficiary owned no stock in the petitioner and that [redacted] owned 100 percent of the petitioner. The petitioner's accountant also attached copies of the petitioner's 2000 and 2001 amended IRS Forms 1120 and noted that the IRS did not accept amended tax returns for previous years.

The director observed that the petitioner's amended tax returns had not been signed and that the petitioner had not provided evidence that the amended returns had been filed with the IRS. The director determined that the petitioner's evidence did not resolve the inconsistencies found in the record.

On appeal, counsel for the petitioner submits a statement by the petitioner's accountant indicating that he prepared the petitioner's amended 2000 and 2001 IRS Forms 1120 on April 4, 2003 and filed the amended returns with the IRS within a week of preparation. The petitioner's accountant also stated that he had prepared the petitioner's 2002 Form 1120 on May 8, 2003 and filed the return within a week of its preparation. Counsel submits copies of signed amended Forms 1120 for 2000 and 2001 and the petitioner's 2002 IRS Form 1120. The amended returns and the petitioner's 2002 return reflect that a foreign entity, Tianyi, owns the petitioner and that the petitioner's common stock is valued at $158,493. Counsel asserts that the evidence submitted establishes the beneficiary's eligibility for this visa classification.

Counsel's assertion is not persuasive. The record demonstrates that LHLD, a foreign entity purchased the petitioner's stock in 1994 and 1995 and was subsequently issued the petitioner's stock certificate for 150,000 shares. The petitioner initially stated that the beneficiary's foreign employer, was the successor-in-interest to LHLD, when was reorganized from collectively owned company to privately held business under local government's policy changes in 1999." The petitioner provided a copy of a statement dated May 18, 1999 purportedly filed with the and Industry Administration. The statement indicated that Engineering Co. had changed its name The record contains no other evidence that LHLD and are the same company or that is a successor company to LHLD.

The lack of information regarding the transfer of interest between LHLD and coupled with the petitioner's initial identification of the beneficiary as an owner of the petitioner, casts doubt on the validity of the qualifying relationship between the petitioner and the beneficiary's foreign employer. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In addition, the amended tax returns filed years after the initial issuance of stock in an effort to correspond with the issue of stock raise serious questions regarding the truth of the 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).

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). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). The petitioner has not provided sufficient evidence of a qualifying relationship in this matter.

The last issue in this proceeding is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

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
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> 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;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a July 28, 1999 letter accompanying the petition, the petitioner stated that the beneficiary had been performing the following duties:

> Reviewing current company reports, including all areas of financial, operational, management, and marketing aspects of the entire company; establishing company policies and corporate objectives; acting on behalf of the company to review and negotiate proposals and contracts from various vendors in the US; setting up internal management guidelines and policies; oversees functional departments and decides the hiring of higher corporate officials.

The petitioner further stated that the title of the beneficiary, "president," is self-explanatory and that the beneficiary has been and will be "in charge of every major aspects of the company and must also direct the entire management of the company." The petitioner added that the beneficiary is the "key executive of planning and directing the entire operation," and "also is responsible for coordinating with the office in China, and conferring with selected important customer and clients."

In an August 29, 2002 response to the director's request for further evidence, the petitioner stated that the beneficiary had conceptualized the petitioner's business in the United States, conducted a market survey to determine whether the "idea" would succeed in the U.S., registered the business as a corporation and specifically is responsible for:

1. Reviewing various company reports including financial, operational, management, and marketing planning for the US entity;
2. Establishing company policies in contractual relationships with outside vendors and suppliers;
3. Representing the US business entity in negotiating and entering contractual relationships with various furniture manufacturers, wholesalers, and retailers;
4. Setting up internal guidelines and policies regarding the employment of staff, work performance evaluation, budget guideline, and operational procedures;
5. Overseeing and implementing corporate objectives and sales revenues, and hiring sales representatives as the needs [sic] arises;
6. Participating and coordinating promotion campaigns held in the US and China and provide input for sales teams and staff to ensure successful operation in the events;
7. Developing organizational policies to coordinate functions and operations between divisions and departments, and establishing responsibilities and procedures for attaining objectives;
8. Planning labor and public relations policies designed to improve US business entity's image and relations with its clients, suppliers, and other business alliances. Theses [sic] may included advertising and networking;
9. Initiating and modifying strategic marketing plans to US business entity's business objectives, establish administrative and personnel policies; and,
10. Reviewing analyses of activities, costs, operations, and forecast data to determine department or division progress toward stated goals and objectives.

The petitioner's organizational chart as of October 1999 detailed the positions in the organization as president (the beneficiary's position), a vice-president, an import/export department manager, an accountant, and two employees in the petitioner's retail carpet and blind shop. The petitioner's California Form DE-6, Employer's Quarterly Return, for the quarter ending December 31, 1999, the quarter in which the petition was filed, confirmed the employment of five individuals, although one individual was employed part-time.

In a May 8, 2003 rebuttal to the director's notice of intent to revoke approval of the petition, the petitioner reiterated that the beneficiary had provided overall direction for the retail, trade, business development, and other domestic activities of the petitioner. The petitioner listed several actions taken by the beneficiary in his capacity as the petitioner's president. The petitioner noted that:

> The beneficiary had directed the establishment of a retail carpeting and home textiles business in San Francisco, California. The petitioner also noted that this business had been closed in late 1999 for urban redevelopment and that the beneficiary made the decision to relocate the business to Las Vegas, Nevada. The Las Vegas business was opened at the end of 2000;
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> The beneficiary directed the creation of an export company for the sale of California wine to China for the time period between 1997 and 2001;
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> The beneficiary oversaw the formation (1997) and subsequent dissolution (2001) of Q.Z. Investment Group, Inc.;
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> The beneficiary entered into a marketing agreement on behalf of [redacted] to market furniture in China (1999);
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> The beneficiary ordered feasibility studies for opening a theme restaurant in Las Vegas, Nevada (October 2000) and opening a Color Me Mine pottery franchise in China (1997), directed the establishment of a home décor retail shop (2001) and retail computer store/PC game boutique (2003), and obtained distribution rights for diesel fuel additives (2002).

The petitioner also indicated that the beneficiary spent: 35 percent of his time in senior-level meetings with investment bankers, investors, legal and financial advisors, and with executives and U.S. political leaders regarding ongoing and prospective business activities of both the petitioner and [redacted] 25 percent of his time overseeing general domestic business operations and receiving reports from and delegating to the petitioner's vice-president and manager of retail operations; 25 percent of his time in senior-level meetings with business partners in China and overseeing [redacted] activities in China with respect to the petitioner; and 15 percent of his time planning for the company's future activities and investments. The petitioner noted that the petitioner's vice-president supervised the managers of the petitioner's home décor and computer store retail operations as well as gathering information, presenting options, and making recommendations to the beneficiary and then helping to implement the beneficiary's directives.

The director determined that the petitioner's job descriptions did not establish the managerial or executive capacity of the beneficiary's position, but rather confirmed that the beneficiary would be involved primarily in operational tasks. The director also determined that the petitioner had not provided sufficient evidence to establish that the beneficiary's position was more than a first-line supervisor of non-professional employees. The director further determined that the petitioner had not established that the beneficiary's position was a functional manager position.

On appeal, counsel for the petitioner contends that the beneficiary in this matter relies on professional managers and employees to carry out the day-to-day functions of his firm. Counsel claims that the petitioner's vice-president is a professional businessperson with experience in marketing, management and administration. Counsel describes the vice-president's duties relating to the petitioner's businesses in Nevada and reiterates that the vice-president provides advice or recommendations and then implements the beneficiary's executive decisions through subordinate staff. Counsel also describes the duties of the petitioner's marketing manager for the petitioner's operation of the home décor retail shop in Nevada. Counsel re-states previous descriptions of the beneficiary's duties and concludes that the beneficiary's activities are activities of an executive and senior manager.

Counsel's contention is not persuasive. The AAO must first consider the facts in support of the petition 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 Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). In addition, 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. *See* 8 C.F.R. § 204.5(j)(5). 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.

When this petition was filed, the petitioner's primary business appeared to be a retail carpeting and home textiles business in San Francisco, California that had just been closed. The petitioner points out that the beneficiary also oversaw the creation and dissolution of an investment company and a wine export company, explored the possibility of opening a pottery franchise in China, and entered into an agreement on his own behalf to market furniture in China. The record does not clarify how these businesses relate to the petitioner other than through the beneficiary's activities as an entrepreneur. The petitioner's Las Vegas businesses did not open until a year or more after the petition was filed; thus the activities and the employees of the various businesses are not considered pertinent to the petition.

The petitioner indicated that the beneficiary had conceptualized the petitioner's business in the United States, conducted a market survey to determine whether the "idea" would succeed in the U.S., and registered the business as a corporation. The AAO observes that the beneficiary may be an entrepreneur and businessman searching for profitable investments in the United States but the beneficiary's search for and creation and dissolution of various businesses do not establish that the beneficiary is a manager or an executive for the petitioner. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner's description of the beneficiary's daily responsibilities is general. For example, the petitioner states that the beneficiary is responsible for "[r]eviewing various company reports," and "[e]stablishing company policies in contractual relationships with outside vendors and suppliers," and "[r]epresenting the US business entity in negotiating and entering contractual relationships." These duties are indicative of an individual who negotiates contracts to set up the company's operational base. The petitioner also claims that the beneficiary is responsible for "[p]articipating and coordinating promotion campaigns" and "[i]nitiating and modifying strategic marketing plans," duties that are indicative of an individual who is marketing and promoting the petitioner's services. However, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also states that the beneficiary is responsible for "[s]etting up internal guidelines and policies," and "[o]verseeing and implementing corporate objectives and sales revenues, and hiring sales representatives as the needs [sic] arises," and "[d]eveloping organizational policies to coordinate functions and operations between divisions and departments," and "[p]lanning labor and public relations policies," and "establish[ing] administrative and personnel policies." Incorporating elements of the definitions of managerial or executive capacity is not sufficient to meet the petitioner's burden of proof. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner's general statement that the beneficiary provides overall direction for the retail, trade, business development, and other domestic activities of the petitioner does not delineate the beneficiary's actual duties in accomplishing these tasks. 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. at 1103.

In this matter the petitioner's descriptions of the beneficiary's duties fail to provide clear distinctions between the beneficiary's managerial or executive duties and the non-qualifying duties of an individual setting up and operating a domestic business.

The AAO observes that in December of 1999 the petitioner employed the beneficiary, an individual in the position of vice-president/import/export manager, an accountant, and two retail employees. The petitioner does not provide adequate descriptions of the duties of the individuals subordinate to the beneficiary when the petition was filed. 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). On appeal, the petitioner notes that the petitioner's vice-president supervised the managers of the petitioner's home décor and computer store retail operations as well as gathering information, presenting options, and making recommendations to the beneficiary and then helping to implement the beneficiary's directives. As observed above when the petition was filed, the petitioner operated a retail carpet and home textile shop that was in the process of closing down. The record does not include information regarding the petitioner's vice-president/import/export manager's specific duties when the petition was filed. The AAO cannot conclude that the beneficiary's subordinates relieved the beneficiary from primarily performing non-qualifying duties when the petition was filed. The petitioner's subsequent material changes to the beneficiary's position cannot be considered within the adjudication, including the revocation, of this

petition. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive. The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue.

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.