U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B4.

[redacted]

DATE: JUN 20 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [redacted]

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center revoked the previously approved preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the approval of the petition will be revoked.

The petitioner is a Texas corporation that is engaged in retail and investment. The petitioner seeks to employ the beneficiary as its director and 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.

On May 17, 2010, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the United States Citizenship and Immigration Services' ("USCIS") Notice of Intent to Revoke ("NOIR") and has not overcome the grounds for revocation.

The record of proceeding before the AAO contains: (1) the Form I-140 and supporting documentation, filed May 4, 2005; (2) the director's NOIR, dated February 10, 2010; (3) the petitioner's response to the NOIR; (4) the director's May 17, 2010 notice of revocation; and (5) the timely filed Form I-1290B. The AAO reviewed the record in its entirety before issuing its decision.

On May 4, 2005, the petitioner filed the Form I-140 to classify the beneficiary as an employment-based immigrant. The director approved the petition. On February 10, 2010, the director notified the petitioner of his intent to revoke approval of the immigrant petition. In the notice of intent to revoke, the director stated that Customs and Border Protection Inspections' records revealed that at the time of application for admission into the United States as a visitor on October 21, 2001, the "beneficiary stated that he was a project consultant for his own company named North/South." The director also noted that this information contradicts the Biographic Information Form G-325A in which the beneficiary stated that he was employed as Advisor Director for the parent company from September 1999 until October 2001. The director also noted that the petitioner is "not in good standing as it has not satisfied all franchise tax requirements" based on an inquiry from the Texas Comptroller of Public Accounts.

In response to the director's NOIR, the beneficiary stated that he did in fact work with the parent company until October 2001. He also stated that in October 2001, he left his employment with the foreign company and "proceeded to USA with the concept of starting my own business." Thus, the beneficiary explained that the statement made to the officer when entering the United States was accurate as he left his employment with the parent company and had the intention of starting a new business.

In response to the petitioner's lack of good standing with the state, the beneficiary stated the following:

> In order to continue its business [the petitioner] maintained and paid all relevant taxes. Please be aware that most businesses are passing through a very difficult business environment in the last few years. Some oversight in this matter may have occurred but this has now been rectified. In the last few years with thousands of businesses closing down, this has not been an easy task and need some understanding and consideration.

The petitioner submitted an affidavit from the chief executive officer of the parent company stating that the beneficiary "had worked with [the parent company] since September 1999 to October 2001, his last position was as director (Business and operation) before he left for USA." The petitioner also submitted

an affidavit from the former chief executive officer of the parent company. The affidavit stated that the beneficiary joined the parent company in September 1999 and "he left the company in October, 2001 to proceed to USA and informed us that he had intended to start his own business."

In response to the NOIR, the petitioner also submitted a letter from the Texas Comptroller of Public Accounts stating that the petitioner, as of March 1, 2010, is in good standing.

On May 17, 2010, the director revoked the petition concluding that the petitioner did not submit sufficient evidence in rebuttal to the NOIR and has not overcome the grounds for revocation.

On appeal, counsel for the petitioner states that the beneficiary's employment status changed in October 2001 as he left his employment with the parent company and was self-employed at the time he entered the United States in October 2001. Counsel also explained that the director was incorrect in stating that the affidavits submitted in response to the NOIR contained inconsistent evidence regarding the date the beneficiary began his employment with the parent company. The AAO will withdraw the director's statement that the affidavits submitted by the petitioner had inconsistent statements of the date the beneficiary commenced his employment with the parent company. Both affidavits state that the beneficiary began his employment with the parent company in September 1999.

Counsel for the petitioner also states that even though the petitioner was not in good standing, it never lost the right to conduct business in the state of Texas. Counsel contends that the petitioner continued to do business during the time the petitioner was not in good standing with the state of Texas.

In the notice of revocation, the director concluded that the petitioner did not provide sufficient evidence to establish that the beneficiary was in an executive or managerial capacity when employed abroad for one year in the three years preceding his admission as a nonimmigrant.

Upon review, the information submitted by the petitioner is not sufficient to overcome the director's concerns. The petitioner provided two affidavits from the previous and current chief executive officers of the beneficiary's foreign employer that state the beneficiary ended his employment in October 2001. The beneficiary also provided an affidavit stating that he ended his employment with the parent company in October 2001 and was self-employed at the time he entered the United States. Thus, the petitioner provided sufficient evidence to establish that the beneficiary was employed with the parent company for more than one year in the three years preceding his admission as a nonimmigrant. However, the petitioner failed to provide evidence that the beneficiary was employed abroad in a managerial or executive capacity.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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

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 examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary was employed by the foreign company in a qualifying managerial or executive capacity. On review, the petitioner did not provide a description of the beneficiary's duties when he was employed with the foreign company. Instead, the petitioner only provided affidavits that stated the beneficiary was a Senior Manager of Business Development and was later promoted to the position of Director/Advisor Business and Operations. The petitioner also provided an organizational chart of the foreign company but did not list any duties performed by the beneficiary or any other position listed in the organizational chart. The petitioner failed to provide a description of the beneficiary's duties to demonstrate what the beneficiary did on a day-to-day basis. The regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Based upon the lack of a comprehensive job description, it cannot be concluded that the beneficiary was employed by the foreign company in a managerial or executive capacity.

The second issue noted in the director's decision is that the petitioner was not in good standing. As noted above, the petitioner provided a letter from the Texas Comptroller of Public Accounts that stated the petitioner was in good standing as of March 1, 2010. On appeal, the beneficiary stated that the "non-payment of the franchise tax was a purely unintentional oversight on my part, as I had serious health issues including heart disease and depression." The beneficiary also stated that the petitioner "has continued to do business, was entering into contracts and insuring its interests – in short, continuing to operate as a business because I did not remember the franchise tax had not been paid." The explanation on appeal made by the beneficiary that he forgot to pay the franchise tax differs greatly from the

information made in response to the NOIR whereby the beneficiary stated in a letter dated February 22, 2010 "please be aware that most businesses are passing through a very difficult business environment in the last few years." It is not clear why the beneficiary alludes to economic difficulties for not paying the franchise taxes but on appeal, states that it was an oversight by the beneficiary and that he forgot to pay the franchise taxes. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the evidence is not sufficient to establish that the petitioner is doing business. On appeal, the petitioner submits a filing made to the County Clerk of Harris County, Texas for a certificate of operation for [redacted] filed under the ownership of the petitioner. The petitioner also submits a copy of insurance for commercial general liability for the petitioner from October 5, 2009 until October 5, 2010. The petitioner also submits a Claim of Mechanic's Lien in which the petitioner is the claimant.

The documentation submitted by the petitioner is not sufficient evidence to establish that the petitioner is doing business or was doing business when it was not in good standing. The lack of any tax documents make it impossible to determine if the petitioner is doing business. Evidence of insurance is not sufficient evidence to establish that the petitioner is doing on-going business. The records lack any quarterly wage reports to indicate the petitioner's employees, receipts, balance sheets, tax documents or sales invoices. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).
Beyond the decision of the director, the petitioner did not submit evidence to establish that it would employ the beneficiary in the United States in a qualifying managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

An analysis of the record does not lead to an affirmative conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. In the April 25, 2005 support letter, the petitioner indicated that the beneficiary's job responsibilities as director and president will include the following:

> As the key member of the team, the position is responsible for all aspects of management practice including resource allocation, budget and policy decision making and entering into negotiations and contracts on behalf of the company. The position manages, develops, and directs implementation of entire range of corporate issues.

- Provide leadership in the designated area of business expansion and Marketing regarding establishing key performance indicators; coordinate efforts to put measures into place and monitor the corporate performance against established targets.
- Lead corporate efforts to reach annual targets and develop clear action plans in response to issues identified in company business plan.
- Coach the managerial team on methods and means to improve overall performance by unleashing the individual potential.

On the Form I-140, the petitioner stated that it had 10 employees and an estimated gross annual income of $875,000.00. Upon review of the record, the petitioner did not present any evidence of the employees hired by the petitioner. The petitioner did not provide an organizational chart, a list of employees and the duties performed by each employee, or tax documents such as quarterly wage reports or Forms W-2. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature. The job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of the organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff comprised of professional, managerial or supervisory employees, nor has it indicated that she is charged with managing an essential function of the petitioning organization. *See* section 101(a)(44)(A) of the Act. Therefore, the AAO is not persuaded that the beneficiary would be employed in a primarily managerial capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

Counsel's statements on appeal do not overcome the director's concerns. Counsel did not provide sufficient evidence to overcome the findings of the director. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is revoked.