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FILE: [REDACTED]
LIN 01 073 55658

Office: NEBRASKA SERVICE CENTER

Date: **SEP 14 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

Eric Halden
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially approved the employment-based petition. Upon subsequent review of the record, the director issued a notice of intent to revoke and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Illinois in April 1996. The petitioner imports, wholesales, and retails fabrics and garments. The petitioner seeks to permanently employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an immigrant as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

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 procedural history of this matter is complex and requires a brief recitation of past actions on the part of the petitioner and Citizenship and Immigration Services (CIS).

On December 4, 2000 the petitioner filed the Form I-140 petition. On February 8, 2001, the director determined without requesting further evidence that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity. The petitioner submitted an appeal asserting that the beneficiary clearly was acting in an executive capacity and that the petitioner had not been given the opportunity to clarify or augment the information in the record. The AAO remanded the matter for further consideration noting that the record did not contain sufficient evidence to demonstrate eligibility on several different issues.

On May 9, 2003, the director requested further evidence and the petitioner provided a response on July 31, 2003.¹ The director approved the petition August 5, 2003. Upon review of the record, including evidence submitted in support of a second Form I-140 petition, the director issued a notice of intent to revoke on May 25, 2004. On June 28, 2004 the petitioner provided rebuttal to the notice of intent to revoke. However, the director ultimately determined that the petitioner had not established that: (1) the beneficiary had been employed for one year in a managerial or executive capacity for the foreign entity or (2) the beneficiary would be employed in a managerial or executive capacity for the petitioner. The director revoked approval of the petition on August 10, 2004. Counsel for the petitioner timely filed an appeal of the revocation decision and submitted a brief and documentation.

The record of proceeding in this matter is lengthy, comprising seven volumes. Because all of the discussed evidence is contained in the record of proceeding, the AAO decision will not analyze or recite every document contained in the record. In the interest of brevity, this decision will refer only to the critical documents in this matter.

The first issue to be reviewed in this proceeding is whether the beneficiary was employed in a managerial or executive capacity for the foreign entity prior to entering the United States as a nonimmigrant.

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;

¹ The petitioner also submitted a second Form I-140 petition on June 26, 2003 (LIN 03 211 50334) that the director ultimately denied and is now on appeal before the AAO. The appeal in that matter will be addressed in a separate decision.

- 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.

The petitioner initially provided a May 25, 1996 letter describing the beneficiary's duties for the foreign entity as:

To manage all aspects of Exports Business which includes Export Market Planning, Visiting Prospective and Existing buyers in their respective countries; Negotiating orders with the Foreign Companies; Dealing with the Financial Institutions, and Government Agencies; and co-ordinating [sic] the activities of the firm. As "Proprietor (Cheif [sic] Executive)", [sic] he supervises and directs 6 (six) employees who hold the following positions:

1. General Manager;
2. Manager – Marketing;
3. Manager – Production;
4. Manager – DOCUMENTATION;
5. Manager – Warehouse;
6. Accountant

The director did not address the nature of the beneficiary's foreign employment in the February 8, 2001 denial. On February 27, 2003, the AAO remanded the matter to the director observing that the petitioner had not established that the beneficiary had been employed abroad in a managerial or executive capacity, but appeared at most, to be a first-line supervisor of six non-managerial, non-professional, and non-supervisory employees.

On May 9, 2003, the director requested evidence to establish that the beneficiary had at least one year of full-time employment in a managerial or executive capacity within the three years preceding his entry into the United States as a nonimmigrant. In the petitioner's July 31, 2003 response, counsel for the petitioner referenced the previously submitted May 25, 1996 letter, claimed that the foreign entity employed 12 individuals in 1996, and attached a document identified as a payroll record. The document identified as the foreign entity's payroll record is an undated letter purportedly signed by the foreign entity's accountant and general manager. The letter indicates that from July 1, 1994 through June 30, 1995, the foreign entity employed the beneficiary as the proprietor, as well as a general manager, a marketing manager, a production manager, an assistant marketing manager, an accountant, a documentation manager, a warehouse manager, an assistant accountant, an assistant warehouse manager, a delivery in charge person, and a dispatcher.

The director approved the petition based on this limited information.

In the May 25, 2004 notice of intent to revoke, the director determined that based on the above information, the petitioner could not establish that the beneficiary's position satisfied the fourth element of the executive capacity definition. The director also determined that the petitioner had not established that the beneficiary's duties satisfied the first, second, or fourth element of the managerial capacity definition. The director specifically noted that the evidence did not demonstrate that the foreign entity's six employees provided market planning, visited prospective and existing buyers, negotiated orders, and dealt with financial institutions and government agencies. The director accorded less weight to the undated "payroll record" because it presented a different version of the foreign entity's hierarchy than had been originally submitted. The director noted, however, if the "payroll record" had been considered it would not alter the conclusion that the beneficiary extensively engaged personally in export activities rather than primarily in a managerial capacity.

In rebuttal, counsel for the petitioner contended that the beneficiary is and always has been the highest-level executive in both the U.S. and foreign entities. Counsel argued that the director's position that the beneficiary does not satisfy the criteria detailed in the definition of executive capacity is absurd. Counsel asserted that the beneficiary's foreign position was also a managerial position. Counsel claimed that the May 25, 1996 letter listed only the positions directly under the beneficiary's supervision; and that the beneficiary's subordinates supervised the remaining five employees. Counsel also contended that the beneficiary managed the foreign entity, supervised and controlled the work of other supervisory and/or professional employees, had the authority to hire and fire all personnel, and exercised direction over the day-to-day operations of the entire foreign entity.

Counsel also included a list of the foreign entity's positions with job descriptions. The petitioner indicated that:

- (1) the general manager was in charge of the marketing, acquisitions, production, and quality control departments; supervised the supply chain to ensure quality control; negotiated loans; was in charge of overseas marketing and promotions; and reported directly to the beneficiary as proprietor;
- (2) the marketing manager researched and developed potential export markets and trends, managed the daily operations of the marketing department, traveled to market-target countries, was in charge of overseas customers, maintained contact with Pakistani delegations and chambers of commerce in market-target countries, and reported to the proprietor and general manager;
- (3) the production manager was in charge of production, coordinated the supply chain to ensure quality, supervised the quality control of purchases at the weaving, dyeing, and printing of raw textiles level, had control of quality and export packaging, coordinated the dyeing and printing mills, reported to the general manager and the marketing manager;
- (4) the assistant marketing manager was in charge of textiles sampling, for collecting and forwarding samples to buyers, for developing different models based on customer's requests, scheduling and organizing foreign business travel for higher-level executives, and reported to the marketing manager and the production manager;
- (5) the accountant was responsible for internal audits, supervising the company's accounts, negotiating letters of credit, loans, and bank guarantees, reconciling accounts with overseas purchasers, preparing documents for export transactions, coordinating with the chartered accountant, and reported to the general manager and the proprietor;
- (6) the documentation manager prepared export-import documents, was in charge of logistics operations, including bills of lading, airway bills, guarantees, and non-quota certifications, coordinated transactions with customs-brokers, warehouse operations, and the company's accountant and reported to the marketing manager and the accountant;
- (7) the warehouse manager was in charge of daily final quality control, pre F.O.B. delivery, for selection of sub-standard goods for reprocessing, maintaining and managing inventory, final control over all export packages, controlling the performance of contractors and subcontractors in the shipping process, and reported to the production manager and documentation manager;
- (8) the assistant accountant was in charge of daily accounting operations, in charge of petty cash, accounts payable and the payroll and reported to the accountant;
- (9) the assistant warehouse manager randomly checked goods for quality control purposes, listed improper packaging, returned defective items, verified inventory, ensured quantitative control of the flow of goods into and out of the warehouse, and reported to the warehouse manager;
- (10) the delivery-in-charge person implemented all local shipments of goods, delivered goods to and from all aspects of the supply-chain, maintained contact with personnel and directed expedition of personnel, and reported to the warehouse manager; and,
- (11) the dispatcher implemented supply chain and export delivery and reported to the delivery-in-charge person.

On August 26, 2004, the director revoked the approval of the petition, determining that the May 26, 1996 letter was more credible than the late submitted and undated payroll letter. The director also defended his interpretation of the "plain statutory language" in section 101(a)(44)(B)(iv) of the Act which requires that an executive must receive direction from higher-level executives, a board of directors or shareholders. The director implied that a sole proprietor of a foreign entity sole proprietorship could never satisfy the criteria outlined in section 101(a)(44)(B)(iv) of the Act. The director dismissed counsel's assertion that the beneficiary was an executive because he held the most senior position in the foreign entity. The director also observed that the petitioner initially did not claim that the beneficiary's position was an executive position but focused instead on the managerial aspect of the position. The director determined that the 1996 letter raised doubt that the beneficiary performed primarily managerial tasks rather than personally engaging in the foreign entity's business. The director determined that even if the foreign entity employed 12 individuals, the petitioner had not provided sufficient information to establish that the foreign entity employed sufficient personnel to carry out the daily operations of the foreign entity. The director also analyzed the description of the beneficiary's job duties and concluded that the petitioner had not provided evidence that the beneficiary's subordinates at the foreign entity relieved the beneficiary from performing operational tasks.

On appeal, counsel for the petitioner asserts that the foreign entity's financial statements for the July 1, 1994 through June 30, 1995 time period substantiate the petitioner's claim that the foreign entity employed 12 individuals. Counsel also notes that the director ignored the foreign entity's claim that it used the services of independent contractors and laborers for packing, quality control, and local shipping. Counsel contends that the director ignored the fact that five of the beneficiary's subordinates held bachelor's degrees. Counsel also finds that the director is preoccupied with the beneficiary's negotiations with foreign business partners and clients and disagrees with the director's conclusion that the beneficiary is not managing this function but performing the function. Counsel asserts that a review of the petitioner's organizational chart shows that the beneficiary managed the entire organization, supervised the work of other professional or supervisory personnel, had the authority to hire and fire personnel, and exercised discretion over the day-to-day operations of the organization.

Counsel continues to contend that the beneficiary also satisfies the criteria found in the definition of executive capacity and disagrees with the director's interpretation of the plain statutory language in section 101(44)(B)(iv) of the Act.

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). In this matter, the petitioner initially provided a general statement of the beneficiary's duties for the foreign entity and did not clarify whether the beneficiary claimed to have primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A 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.

Counsel's contention that the beneficiary's foreign position satisfied the criteria set out in the definition of executive capacity is not persuasive. The AAO acknowledges that the director's interpretation of section

101(a)(44)(B)(iv) of the Act is improperly restrictive and will be withdrawn; however upon review of the record, the petitioner has not provided consistent evidence that the beneficiary will perform primarily executive duties. The failure in this regard relates to the incomprehensible evidence presented in rebuttal to support the beneficiary's direction of the foreign entity's management of the organization. Likewise, the failure of the petitioner to establish that the beneficiary performed primarily managerial duties for the foreign entity relates to the same incomprehensible evidence presented to support the beneficiary's management of the organization.

The petitioner initially provided a brief statement describing the duties of an entrepreneur building his sole proprietorship to export fabric and garments. In this statement, the petitioner provided a realistic description of the beneficiary visiting prospective and existing buyers, negotiating orders, and dealing with financial institutions and government agencies. The beneficiary also supervised six employees. The evidence initially submitted did not support a conclusion that the beneficiary had been performing primarily executive or managerial duties. Rather the evidence suggested that the beneficiary was spending a majority of his time on day-to-day functions including sales, administrative duties, and first-line supervisory duties. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *Id.*

The petitioner's second iteration of the beneficiary's duties for the foreign entity contained an undated document showing the foreign entity employed twelve individuals in the year prior to the beneficiary's entry into the United States as a nonimmigrant. The letter did not describe the employees' duties and did not include an organizational chart or other information to assist in determining the role of each of the employees in the foreign entity's organization.

The director improperly approved the petition based on this limited and unsubstantiated evidence concerning the beneficiary's role in the foreign entity's organization.

Only in rebuttal to the director's notice of intent to revoke does the petitioner provide a description of the beneficiary's subordinates' duties and an outline of the foreign entity's organizational structure. It is this undated document labeled "organizational chart" that confuses the record and casts doubt on the actual organizational hierarchy of the foreign entity. For example, the "organizational chart" indicates that the general manager, the beneficiary's direct subordinate, is in charge of marketing, acquisition, production, and the quality control departments and that the marketing manager and the production manager report to the general manager. The documentation manager, for some reason, reports to the marketing manager and the accountant. The AAO observes that the "organizational chart" shows the accountant reporting to both the beneficiary and the general manager. Moreover, it is not clear why a "documentation manager" and a "warehouse manager" initially listed as the beneficiary's direct subordinates are now identified as being in a secondary or tertiary tier of the foreign entity's organizational hierarchy. Further, it is not clear why both the general manager and production manager are charged with either supervising or coordinating the supply chain to ensure quality control. Furthermore, it is not clear why an assistant marketing manager would report to

both the production manager and the marketing manager. The information in this matter supplied after CIS's questioning of the beneficiary's managerial or executive capacity for the foreign entity does not clarify the beneficiary's role but confuses the foreign entity's managerial hierarchy. 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). 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 petitioner's addition of employees to the foreign entity's payroll as well as the petitioner's indication that the foreign entity used independent contractors and laborers is not supported in the record. 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)). Contrary to counsel's claim, the foreign entity's financial statements do not verify the foreign entity's number of employees nor does the record contain work product or other documentation that confirms the foreign entity's employment of individuals in positions other than those initially submitted.

Finally, the petitioner has not sufficiently elaborated on the beneficiary's duties for the foreign entity, relying instead on counsel's assertions and conclusory statements. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, 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). In this matter, the initial description of the beneficiary's duties for the foreign entity show that the beneficiary performs marketing, promotion, public relations, and sales duties. The petitioner has not provided evidence that these duties were incidental rather than primary duties associated with the foreign entity's day-to-day operations.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner's description of the beneficiary's actual daily duties is more indicative of the beneficiary's involvement in providing the foreign entity's routine administrative and operational tasks associated with marketing, public relations, and sales. Based on the record of proceeding, the beneficiary's job duties for the foreign entity were principally composed of non-qualifying duties that precluded him from functioning in a primarily managerial or executive role. The petitioner's job descriptions for the beneficiary and his claimed subordinates do not establish that the beneficiary performed primarily managerial or executive duties for the foreign entity. For this reason, the petition will not be approved.

The second issue to be reviewed in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

The petition was submitted on December 4, 2000. In a September 1, 2000 letter appended to the petition the petitioner offered the beneficiary employment in the position of president. The petitioner stated:

In his capacity as President, [the beneficiary] is responsible for directing the management and administration of our company. He establishes goals and policies relating to investments, structure organization, distributions of assignments, creation of new projects and plan development. He also implements strategies to increase our productivity and reduce our operational costs.

The record also contains a June 9, 2003 letter appended to the petitioner's second Form I-140 filed on behalf of the beneficiary on June 26, 2003.² The petitioner provided a similar position description and added that the beneficiary "investigates investment opportunities and invests capital to expand business operations; establishes and negotiates contracts; and directs the hiring, firing and training of employees."

The record also includes the petitioner's Illinois UI-40, Employer's Contribution and Wage Report, for the first quarter of 2001.³ The Illinois UI-40 shows the petitioner doing business as "Poshak" and employing four individuals. The petitioner indicated on the Form I-140 that it employed seven individuals.

On May 9, 2003, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity for the petitioner. The director requested additional evidence including a supplemental job description for the beneficiary's position, the dates of employment, job titles, specific job duties, types of employees supervised, if any, level of authority and title, and level of authority of the alien's immediate supervisor. The director also requested the petitioner's organizational chart showing the alien's position in the United States in relation to others in the company.

On July 31, 2003, counsel for the petitioner responded to the director's request for additional evidence. Counsel asserted that the beneficiary qualified as both a manager and an executive. Counsel attached the petitioner's July 24, 2003 statement describing the beneficiary's position. The petitioner listed the beneficiary's duties as:

- Directs the management and administration of the company.
- Establishes goals and policies relating to investments, structure organization, distributions of assignments, creation of new projects and development plans.
- Implements strategies to increase productivity and reduce operational costs.

² The second Form I-140 petition (LIN 03 211 50334) is also on appeal. The AAO will address that appeal in a separate decision.

³ The petition that is subject to this decision was filed in the last quarter of 2000; thus the petitioner's 2000 Illinois fourth quarter UI-40 is the most relevant document when substantiating the petitioner's number of employees. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

- Designs and implements programs to improve operational efficiencies, profit margins, employee morale, and sales revenues.
- Investigates investment opportunities and invests capital to expand business operations.
- Defines, implements and oversees operating and financial objectives.
- Develops short-term and long-term plans and proposals with supporting budget forecasts and financial estimates for each operational area of the business.
- Sets operating standards for the two retail locations, and sets sales goals.
- Establishes and negotiates contracts.
- Directs hiring/firing of independent contractors.
- Exercises exclusive discretion and latitude over company policies and decisions.

The petitioner stated that, Ghulam Hashmi, the general manager, would be responsible: for day-to-day management and overseeing the two retail operations and financial operations; for monitoring business plans, investment agendas, daily and monthly sales, economic conditions, competition, and product demand; for selecting methods to transport goods, establishing relationships with shipping companies and customs brokers, coordinating receiving and shipping of merchandise with the store managers, setting up insurance coverage, and organizing exhibits. The petitioner did not indicate when it employed Ghulam Hashmi.

The petitioner indicated that [REDACTED] position as marketing and business development manager would include responsibilities for developing and implementing marketing and sales plans, monitoring market conditions, studying competition, and forecasting consumer demand, as well as, making suggestions for improving business and maximizing profits, directing advertising activities, organizing sales and promotions, coordinating marketing efforts with the two store managers, overseeing business development activities, researching new business locations and markets, establishing commercial relationships and seeking partnerships to expand the cellular phone business. The petitioner did not indicate when it employed Nadeem Khan.

The petitioner noted that Naseem Chaudhry, as the Poshak store manager, would oversee the daily operations of the retail store, implement the company's retail and marketing plans, ensure the efficient operation of sales, operating and administrative functions at the Poshak location, as well as, investigate, establish and maintain client relationships, prepare sales and marketing plans, identify potential customers and market needs, establish sales objectives and goals, evaluate competition, recommend improvements, monitor invoicing, storage and security of inventory, direct the inflow/outflow of merchandise, conduct inventory counts, have responsibility for bank deposits and daily balancing of register, manage exhibits at business exhibitions, conferences and conventions, and supervise, train, and advise store salespersons. The petitioner indicated that it had employed Naseem Chaudhry since June 1997. The petitioner provided the same description of responsibilities for Parveen Chaudhry as manager of the Rewaj store and indicated that this individual had been employed since October 1998.

The petitioner also provided a position description for Rana Khan, the senior sales associate, for the Poshak store. The petitioner indicated that the sales associate was responsible for the day-to-day sales operation, processing sales transactions, organizing store displays, monitoring inventory, and attending to customer needs and inquiries. The petitioner noted that it had employed the sales associate since November 1999. The

petitioner provided a similar position description for a sales associate, Amir Khatoon, for the Rewaj store and noted that this individual had been employed from October 1999 to October 2001 and had rejoined the store in December 2002.

The petitioner also provided a position description for Abdul Rauf, a cellular operations manager, but did not indicate when the individual started working for the petitioner.

As noted above, the petitioner's first quarter 2001 Illinois UI-40 showed the petitioner doing business as "Poshak" and employing four individuals. The Illinois UI-40 showed that Parveen Chaudhry was employed for 13 weeks in the quarter; that Naseen Chaudhry was employed for almost nine weeks; and two other individuals whose names do not correspond to any of the petitioner's listed employees were employed for almost nine weeks in the quarter. The petitioner's Illinois UI-40 does not list the individuals purportedly employed as the petitioner's general manager, marketing and business development manager, or cellular operations manager.

The director approved the petition on this limited information. On May 25, 2004, the director issued a notice of intent to revoke approval, observing that: the petitioner was not sufficiently developed to support an executive position; that there was no reasonable basis for the petitioner to employ six managers; that the petitioner's 2001 and 2002 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, showed the petitioner had paid only \$71,671 and \$81,317 respectively in salaries and wages which did not support the petitioner's claimed management structure; and that the beneficiary's duties did not satisfy sections (A), (B), or (D) of the definition of managerial capacity at 8 C.F.R. § 204.5(j)(2) as the beneficiary appeared to be personally engaged in disqualifying activities rather than primarily in a managerial capacity.

In rebuttal, counsel for the petitioner contended that the director does not set forth an analysis, rationale, or basis for concluding that the petitioner is not sufficiently developed to support an executive position. Counsel acknowledged that some of the petitioner's employees did not work full-time. Counsel asserted that both the general manager and the marketing manager are responsible for the day-to-day business operations and marketing functions. Counsel concluded that based on the evidence submitted, the petitioner had met its burden of proof and that the beneficiary is clearly eligible for the benefit sought.⁴

On August 10, 2004, the director revoked approval of the petition, determining that: (1) the petitioner had not submitted additional evidence to show that the petitioner was sufficiently developed to support an executive position; (2) even if the petitioner could support an executive position, the record was insufficient to establish that the beneficiary would devote the majority of his time to executive or managerial duties; (3) counsel's

⁴ The record also contains an undated list of the petitioner's employees and their job duties that differs from the July 24, 2003 statement. It is unclear if this undated list was submitted in rebuttal to the director's notice of intent to revoke or was submitted in response to the director's request for further evidence in the second submitted Form I-140 petition (LIN 03 211 50334). The list of employees shows that: Arif Rehman is the general manager; Ghulam Hashmi is the marketing and business development manager; Naseem Chaudhry is the Poshak store manager; Parveen Chaudhry is the Rewaj store manager; Amir Khatoon is the cellular operations manager; and Rana Khan is the Poshak senior sales associate.

explanation that some of the petitioner's employees worked part-time detracted from the petitioner's claim to have an effective subordinate tier of managers who would relieve the beneficiary from performing day-to-day retail activities; (4) the beneficiary would primarily supervise employees who performed retail duties; and, (5) the beneficiary would directly perform disqualifying activities rather than be employed primarily in a managerial capacity.

On appeal, counsel for the petitioner asserts that the petitioner is a substantial retail store capable of supporting a full-time executive or manager. Counsel notes that the beneficiary is the highest-level executive at the U.S. entity and that the general manager and marketing manager are responsible for the day-to-day business operations and marketing functions. Counsel contends that even if the beneficiary were not supervising any employees or was the sole employee, he is functioning at a senior level within the organizational hierarchy and clearly qualifies for the benefit sought.

Counsel's assertions are not persuasive. The record does not substantiate that the petitioner employed the general manager, the marketing/business development manager, or the cellular operations manager when the petition was filed. As referenced above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The record reveals that the petitioner was paying salaries to only four individuals when the petition was filed. Further, a realistic reading of the record reveals that the duties of two of the employees consisted of selling the petitioner's product. The record does not disclose the position, title, or duties of the two other salaried employees. The record is insufficient to establish that the petitioner employed sufficient personnel in its two "retail" shops to relieve the beneficiary from performing primarily tasks associated with the administration and operation of the two "retail" shops.

In addition, the petitioner's description of the beneficiary's duties is not comprehensive. The petitioner paraphrased elements of the definitions of managerial and executive capacity without conveying an understanding of the beneficiary's daily duties. For example, the petitioner indicated that the beneficiary would direct the management and administration of the company, establish goals and policies relating to investments, distribute assignments, create new projects and development plans, develop short-term and long-term plans and proposals, direct hiring and firing of contractors, set operation standards and sales goals, and exercise exclusive discretion and latitude over company policies and decisions. See sections 101(a)(44)(B)(i),(ii), and (iii) and 101(a)(44)(A)(iii) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner indicates it is the beneficiary who will be responsible for investigating investment opportunities, establishing and negotiating contracts, and designing and implementing programs to improve operational efficiencies, profit margins, employee morale and sales revenues. These are duties indicative of an individual providing market research, purchasing, and supervisory duties, rather than managerial or executive duties as defined in the statute. Again, 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. at 604.

Finally, counsel's assertion that even if the beneficiary is the petitioner's sole employee, the beneficiary is functioning at a senior level within the organizational hierarchy and clearly qualifies for the benefit sought is unsubstantiated. Again, the petitioner has not provided substantive evidence that the beneficiary performs primarily managerial or executive duties as defined in the statute rather than the necessary and routine duties of a small retail company. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner has not established that the beneficiary's position comprises primarily managerial or executive duties or that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. In the present matter, the petitioner has not established the basic eligibility requirement that the beneficiary is primarily performing managerial or executive duties. On review of the record, the decision of the director will be affirmed.

The final issue in this decision is whether the director's decision violates established CIS policy. On appeal, counsel acknowledges that the director is not required to approve petitions where eligibility has not been demonstrated but asserts that it would be wrong to apply this general principal to this matter and ignore the history of the matter. Counsel observes that the director has approved four separate L-1A petitions (including two extensions involving lengthy requests for evidence) as well as a Form I-140 petition that was remanded from the AAO, followed by a request for further evidence. Counsel contends that it defies all logic to claim that the director made error after error in approving the initial L-1A petition and three separate L-1A extensions and then approving the Form I-140 petition after a remand, request for evidence, and response.

Counsel claims that the approval of this petition was not revoked based on evidence of fraud or newly discovered evidence but was revoked solely because the officer reviewing this matter disagreed with the prior subjective determinations of the officer who approved the Form I-140 and the officers who approved the Forms I-129, L-1A petitions. Counsel alleges that such action is without factual or legal basis and also violates a memorandum issued by William R. Yates, Associate Director for CIS Operations.⁵ Counsel further argues that such action creates an atmosphere of uncertainty for petitioners who have expended capital, resources, and time and cannot reasonably rely on the force of a previously approved petition and/or prior determination(s). Counsel argues that the director is unjustifiably preoccupied with an alleged discrepancy regarding the beneficiary's foreign employment and that the observation of this discrepancy suggests that the officer was looking for a way to revoke approval of the petition. Counsel also notes that the director misinterpreted section 101(a)(44)(B)(iv) of the Act. Finally, counsel, citing *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), contends that CIS is not authorized to revoke the approved petition.

⁵ Memorandum of William R. Yates, Associate Director for Operations, USCIS, HQOPRD 72/111.3 (April 23, 2004) ("Yates Memo").

First, 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 approval of an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). More specifically, section 205 of the Act, 8 U.S.C. 1155 (2005), states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

Regarding 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 un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec.450 (BIA 1987)).

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).

Contrary to counsel's claim that the director arbitrarily revoked approval of the Form I-140 petition, the initial review of the Form I-140 petition and supporting documents resulted in a denial that the director subsequently affirmed on motion. Only after remand and submission of further evidence was the petition improperly approved. The AAO notes that the record contained inconsistencies, unsubstantiated evidence, and an incomprehensible machination of the foreign entity's organizational hierarchy when the director improperly approved the Form I-140 petition.

Counsel suggests that the approvals of the previous nonimmigrant petitions were based on the same eligibility criteria as the current immigrant petition. Counsel asserts that the director erred in denying the petition because the director did not abide by the standards discussed in the Yates Memo. It should be noted, however, that the "material error" standard discussed in the Yates Memo applies strictly to nonimmigrant extensions. As the present matter involves the statutory denial of an immigrant visa petition, the "material error" standard does not apply to this matter.

With regard to the similarity of the eligibility criteria, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See*

§§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

It is also noted that although counsel mentions the previous nonimmigrant approvals, counsel neglects to discuss the director's initial denial of the Form I-140 petition. Furthermore, the AAO is not bound or estopped by the previous decisions of the service center director. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Regardless, the prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Counsel should further note that the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597.

Accordingly, the AAO does not find that the director's decision should be overturned based on the cited memorandum or to establish certainty for petitioners who may have expended capital, resources, and time in an attempt to qualify for this visa classification. The AAO is without authority to allow equitable considerations to supercede the statute or regulations.

Counsel's contention that *Firstland Int'l, Inc. v. Ashcroft*, precludes CIS from revoking previously approved petitions, is without merit. In the *Firstland* opinion, the court interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his

journey to the United States. *Firstland*, 377 F.3d at 130. Counsel observed that the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.⁶

Moreover, according to the Form G-28 submitted on appeal, the petitioner is located in Chicago, Illinois; thus, this matter did not arise in the Second Circuit and *Firstland* was never a binding precedent for this case. Even as a merely persuasive precedent, moreover, *Firstland* is no longer good law.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

The petition will be denied 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. Here, that burden has not been met and the director's decision to revoke approval of the petition will be affirmed.

ORDER: The appeal is dismissed.

⁶ The *Firstland* opinion summarily overturned 35 years of established agency precedent. See *Matter of Vilos*, 12 I&N Dec. 61 (BIA 1967). Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the beneficiary entered the United States as a nonimmigrant prior to filing the Form I-140 immigrant petition and prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the beneficiary of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited until after he or she arrived in the United States to file the petition.