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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2007**
WAC 97 061 50270

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

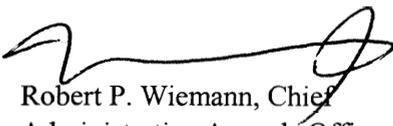
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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.


b Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition, and ultimately revoked the approval of the petition following the issuance of two notices of intent to revoke. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a California corporation, states that it is engaged in heavy machinery and technologies research, development and engineering. The petitioner seeks to employ the beneficiary as its president.

The director approved the employment-based immigrant petition on January 27, 1997. After interviewing the beneficiary in connection with his Form I-485, Application to Register Permanent Resident Status of Adjust Status in 1998, and awaiting the results of an overseas investigation, the USCIS Los Angeles District Office returned the petition to the California Service Center for further review and action on October 10, 2003. On August 4, 2005, the director issued a Notice of Intent to Revoke approval of the petition on the grounds that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the U.S. petitioner and the beneficiary's previous foreign employer have a qualifying relationship. After reviewing the petitioner's timely response, the director issued a second Notice of Intent to Revoke on the same grounds on December 23, 2005.

After reviewing the petitioner's response to the second Notice of Intent to Revoke, the director revoked the approval of the petition on November 03, 2006. The director concluded that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that the petitioner's description of the beneficiary's duties included a combination of vague, non-specific responsibilities and tasks which do not fall under the statutory definitions of managerial or executive capacity. The director also acknowledged the petitioner's claimed organizational structure as of the date of filing, and concluded that the beneficiary would not be relieved from performing routine operational activities associated with the business.

On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the petitioning company, and asserts that the small size of the company does not preclude the beneficiary from qualifying as a function manager. Counsel further asserts that the petitioner submitted evidence that the beneficiary supervises professional employees. Counsel submits a brief in support of the appeal.

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 or 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, 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.

Following approval of an immigrant or nonimmigrant petition, the director may revoke approval of the petition in accordance with the statute and regulations. 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 "good and sufficient cause" and the revocation of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals (BIA) has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

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

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. at 590.

As a preliminary point, the AAO stresses that, in this proceeding, the petitioner must establish that the petitioner and beneficiary were eligible for the benefit sought at the time the instant petition was filed on December 27, 1996. 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 evidence in the record of proceeding dates from 1995 through 2006. Federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status

is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41. The petitioner bears the ultimate burden of establishing eligibility for the benefit sought, and that burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petition approval in this matter was ultimately revoked due to the director's realization that the petition was erroneously approved in January 1997, rather than based on a conclusion that the beneficiary and petitioner became ineligible for the benefit sought subsequent to the approval of the petition. Accordingly, the AAO will confine its analysis of the evidence to documentation that is contemporaneous with the beneficiary's priority date of December 27, 1996.

The sole issue addressed in the revocation decision is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 immigrant visa petition was filed on December 27, 1996. The petitioner stated on Form I-140 that the beneficiary would serve as president of the two-person U.S. company. In a letter dated November 6, 1996, the petitioner described the beneficiary's duties as follows:

His job description is to direct and participate in the management of global marketing, import and export of machinery per customers' specs and requirement, establish the goals, plans and policies of the department, set up company regulations and strategies in the competitive markets, exercise important decision making relating to all fields of the department, coordinate the work among the different groups of the department, in charge of the recruitment of staff of which he has the rights to hire and fire, only receive general supervision from the chairman of the board.

In a separate, undated letter, also submitted in support of the initial petition, the petitioner provided the following explanation regarding the beneficiary's duties:

[The beneficiary] . . . oversee[s] our international development with the international units. [The beneficiary] managed and delegated responsibility to different managerial executives. Each of the management level in turn have technology and/or engineering personnel reporting to them. In addition, the group managers and all staffs from our U.S. units report to [the beneficiary].

In addition, [the beneficiary] has authority to recruit, hire, train, promotion [sic], terminate his staff. He also formulated and executed business policies pertaining to product planning and standards applied in technical support and service which consist with head office requirement for international operations.

* * *

His managerial duties include the complete management of the district, including control of supervisory and professional personnel.

* * *

In addition, this position will be responsible for a wide range of executive and managerial functions. [The beneficiary] will be responsible for managing and directing all development activities of international subsidiaries. This includes communicating the technological and development direction of headquarter to our international offices on a regular basis. [The beneficiary] will routinely meets [sic] with various technical specialist [sic] from the international units and with managers to ensure our corporate philosophy is understood and is

being delivered accurately. [The beneficiary] will represent the unique concerns and requirements of the international operations to headquarters and provide significant contributions to the formulation of strategic product plans to ensure that the business and strategic policies are effectively incorporated into our international business activities.

In the area of human resources management, [the beneficiary] will exercise authority in regard to employment, termination, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions and remuneration. He will conduct performance reviews and ensure that his staff follow corporate procedures. [The beneficiary] will exercise wide latitude in discretionary decision-making and receives only general guidelines from the Chairman of the board.

The petitioner submitted a copy of its California Form DE-6, Quarterly Wage and Withholding Report, for the third quarter of 2006, which confirms the U.S. company's employment of the beneficiary and one other employee.

On the basis of this information, the director approved the immigrant petition on January 27, 1997.

On August 4, 2005, the director issued a notice of intent to revoke approval of the petition. The director advised the petitioner that the record at the time of filing contained insufficient evidence to demonstrate that the beneficiary would be employed in a managerial or executive capacity. The director noted that there was no evidence that the beneficiary would function at a senior level in an organizational hierarchy, or that he supervised managerial, professional or supervisory personnel. Rather, the director observed that the beneficiary appeared to be acting as a first-line supervisor of one employee who had not been shown to be a professional, as the petitioner had not provided the job title, job duties or position requirements for the beneficiary's subordinate.

In a response letter dated August 30, 2005, the petitioner provided the following description of the beneficiary's duties:

[The beneficiary] has been in charge of setting the company's performance objectives and establishing the policies for meeting those performance objectives. He is in charge of evaluating and developing the company's overall marketing strategy, based on his knowledge of US market characteristics, and cost and markup factors, and decides our pricing strategies, balancing the company's objectives and need for customer satisfaction. He also uses sales forecasting and strategic planning to ensure the sale and profitability of our products, by analyzing business developments and monitoring market trends. He has the authority to enter into contracts on behalf of [the petitioner] and to establish the company's budget and budgetary control systems.

[The beneficiary] has wide discretion in making these strategic decisions and performs these functions with only limited general oversight by the chairman of the Board and the management of [the foreign entity].

The petitioner further stated that the beneficiary "has made a large number of important strategic decisions which have significantly impacted the company's current direction." The petitioner stated that the beneficiary oversees two sales engineers, [REDACTED] (who is also identified as Vice President – Sales) and [REDACTED] who are responsible for selling OEM components for use in agricultural machinery manufactured in the United States, and who are required to possess a bachelor's degree in a technical field.

In a letter dated August 31, 2005, counsel for the petitioner asserted that the beneficiary is clearly employed in an executive capacity based on his responsibility for directing the management of the petitioning company, "a major marketing component of the parent company." Counsel stated that the beneficiary "is establishing the goals and policies of the US company by setting performance objectives and establishing the policies for meeting those objectives," and that he "clearly exercises wide latitude in discretionary decision making." Counsel further contended that the beneficiary meets the criteria of a functional manager, noting that he "clearly manages an essential function with the organization, since he sets the company's performance objectives and establishes the policies for meeting those performance objectives," and "sets the company's overall strategy for marketing its products." Counsel further emphasized that the two sales engineers managed by the beneficiary are professional level employees.

The director issued a second Notice of Intent to Revoke on December 23, 2005, requesting specific evidence in support of the claim that the beneficiary would be employed in a managerial or executive capacity as of December 27, 1996 when the immigrant petition was filed. The director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties in the United States, including a "typical day" description for the beneficiary; (2) a copy of the U.S. company's organizational chart depicting its managerial hierarchy and staffing levels as of the date of filing the petition; (3) job titles and a brief description of job duties and educational qualifications for all employees under the beneficiary's supervision; and (4) copies of California Forms DE-6, Quarterly Wages and Withholding Reports, for the last two quarters of 1996 and for each quarter of the years 1997 through 2005, submitted in a sealed envelope from the California Employment Development Department.

The petitioner submitted a partial response dated January 19, 2006 and requested additional time to submit sealed copies of its Forms DE-6, which were subsequently provided in May 2006. The response included a letter from the beneficiary, also dated January 19, 2006, in which he provided the following description of his duties as president:

I am in charge of setting the company's strategic sales goals and overall marketing strategy and overseeing the work of our sales engineers in order to implement this strategy. In order to do this, I need to make sure that I am constantly receiving the latest and best information regarding developments and trends that will affect the market for machine tools and high voltage electrical components as well as the price and availability of the raw materials and critical components needed to produce these items.

One example of the kind of information that is necessary to do my job is the metal market. The price of almost everything we deal in, including machine tools and high voltage electrical components, is highly sensitive to changes in the price of the various metals that are used in their production. We are in a highly competitive business in which small price deviations can spell the difference between profitable sales and financial disaster. For this reason, I am

constantly studying trends in the metals market, by reviewing prices and price trends on the London Metal Exchange as well as the Wall Street futures market.

I also need to be constantly aware of business developments and market conditions affecting our customers so that I can develop strategies to meet their evolving needs and direct our sales engineers in meeting those needs. This requires attention to market conditions and technical developments, as well as face to face meetings with representative of our customers to inquire about their business developments.

A typical day for me combines research and analyses of the information needed to do my job with time spent overseeing the work of our sales engineers and developing and articulating strategies that take advantage. Because routine administrative tasks are not a major part of my job, no two days are exactly alike. Nonetheless, here is one description of a fairly typical work day for me:

At 9:00 am, I arrived at my office, sit down at my computer and review my faxes and email. I have received several emails from executives in our parent company in China regarding their future production goals and I have to review them and see how this affects our current marketing strategy. I then log onto the internet to check on the latest prices on the London metals market. I then review a number of reports from our sales engineers.

I then drove to the Burbank Airport Hilton for a meeting with the International Sales Manager of Cooper Power Systems.¹ The Sales Manager explained that they are considering the possibility of setting up a new warehouse in Shanghai, China in order to do business more directly with Chinese customers. We discussed a number of issues that would arise through this move, including ordering, shipment and payment systems and technical issues arising from the move, both in China and the U.S. We continued our discussion over a late lunch.

I then returned to my office where I informed our sales engineers of the possible development and discussed the potential ramifications for our high voltage parts business. After our discussion, I did further research on market conditions and began work on a report on the meeting and other recent developments for our parent company.

The petitioner also submitted an organizational chart stated to depict the U.S. company's structure as of the date the petition was filed. The chart shows that the beneficiary supervised: (1) a vice president/sales manager, who plans, manages and sells agricultural supplies and machine tools, provides feedback to the beneficiary, and assists the beneficiary with quality and quantity of work performed; (2) a sales manager, who sells agricultural supplies and machine tools and "purchases merchandises from factory"; and (3) a "Ningbo Representative Officer," who is responsible for the sale of "Ningbo merchandises" and for contacting Ningbo factories. The petitioner indicated that the vice president/sales manager is on salary, the sales manager receives both salary and commission, and the Ningbo representative officer is paid by commission.

¹ The record contains an international distributor agreement signed between [REDACTED] and [REDACTED] the petitioner, dated September 16, 1998, which appoints the U.S. company as the distributor of [REDACTED] products in the Zhejiang province of China.

The petitioner also submitted copies of its California Forms DE-6 for 1996, which show that the sales manager received a monthly salary of \$800 for the first four months of the year only and was no longer employed at the time the petition was filed. The record contains no evidence of commission payments to the sales manager or the Ningbo representative office. The petitioner's 1996 IRS Form 1120, U.S. Corporation Income Tax Return, has not been provided for the record. It is noted that the petitioner's 1997 Form 1120 indicates commission payments of only \$1,096.

The director revoked the approval of the petition on November 3, 2006, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The petitioner acknowledged the petitioner's description of the beneficiary's "typical day" and concluded that the duties performed are not typically managerial or executive as defined by the statute. The director found the duties were more indicative of a sales person or marketing employee. The director further observed a discrepancy between the petitioner's organizational chart and payroll records, concluding that the petitioner had not provided evidence of an organizational structure sufficient to elevate the beneficiary to a position that is higher than a first-line supervisor of non-professional employees.

The director determined that the beneficiary would reasonably be required to assist with the day-to-day operational tasks of the petitioner's business. The director also found insufficient evidence to establish that the beneficiary would be employed as a function manager.

On appeal, counsel for the petitioner asserts that USCIS abused its discretion by revoking the approval of the petition without good cause. Counsel contends that the director erroneously based his determination on the size of the petitioning entity and the number of employees supervised by the beneficiary. Counsel asserts that the small size of the company does not preclude the beneficiary from qualifying as a functional manager.

Counsel references specific U.S.-manufactured systems and equipment that have been sold and exported to China by the petitioning company, and states that the beneficiary trained and managed "a professional team of supervisors, sales and engineers," to research and develop the equipment for the customer. Counsel further states that the beneficiary supervises the work of two sales engineers who are responsible for selling OEM components to manufacturers, and asserts that the employees should be considered professionals based on the U.S. Department of Labor's Occupational Information Network ("O*Net") classification system. Counsel asserts that the beneficiary is "running a multiple million business with a team of professionals in very sophisticated fields." Counsel concludes that USCIS should not judge the petitioning company based on how many people it has hired, but must also consider the nature of the business. Counsel cites several unpublished decisions in support of these assertions.

Upon review of the record, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity as of the date the petition was filed.

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). Here, although specifically addressed by the director in the notice of revocation, the petitioner has declined to clarify the specific managerial or executive job duties to be performed by the beneficiary as president of the U.S. company as of December 1996 when the petition was filed.

The regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to submit a clear description of the job duties to be performed by the beneficiary in the petitioning entity. At the time of filing, the petitioner indicated in its letter dated November 6, 1996 that the beneficiary's duties would include "direct . . . the management of global marketing," "establish the goals, plans and policies of the department," "set up company regulations and strategies," "exercise important decision making relating to all fields of the department," "coordinate the work among the different groups of the department," and "receive general supervision from the chairman of the board." These statements merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B) 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Furthermore, it is unclear how the beneficiary coordinated activities between and developed strategies for "departments," and "different groups within the department," given that the petitioner employed only a president and a vice president/sales manager as of the date of filing and does not appear to have been organized into departments or other sub-divisions. The position description provided little understanding as to what actual duties the beneficiary performed within the context of the petitioner's business. The petitioner also stated that the beneficiary's duties include "import and export of machinery per customers' [specifications] and requirement[s]," but did not indicate whether the beneficiary was directly responsible for import and export-related activities, or whether he managed these duties through a subordinate employee. 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 AAO acknowledges that the petitioner's initial submission included a second letter from the petitioner with a description of the beneficiary's duties. Although both letters were signed by the same company representative, the two letters contain dissimilar position descriptions. The second letter states that the beneficiary, as president of the petitioning company, would have executive responsibility for "all development activities of international subsidiaries," would delegate responsibility to "different managerial executives" who in turn supervise technology and engineering personnel, and would have authority over "the group managers and all staffs from our U.S. units." Thus, this description implied that the beneficiary would be overseeing more than one U.S. subsidiary, and in fact, all of the foreign entity's international subsidiaries, while the concurrently submitted description represented the beneficiary as the manager in charge of a two-person import-export company. 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). The AAO notes that subsequent position descriptions submitted by the petitioner make no reference to the beneficiary's responsibility for overseeing "international subsidiaries" or managing subordinate "group managers."

Based on the petitioner's submission of two vague and inconsistent position descriptions with the initial petition, the AAO concurs that the approval of the petition was in error, contrary to the regulations, which require the petitioner to clearly describe the position offered to the beneficiary. See 8 C.F.R. § 204.5(j)(5). The director had sufficient grounds for issuing the notice of intent to revoke the approval of the petition.

The director subsequently provided the petitioner with two opportunities to clarify the nature of the beneficiary's duties. However, the petitioner's responses to the director's notices did little to shed light on the nature and scope of the beneficiary's duties as of the date the petition was filed. For example, in its letter dated August 30, 2005, the petitioner stated that the beneficiary is "in charge of setting the company's performance objectives and establishing the policies for meeting those performance objectives," "in charge of evaluating and developing the company's overall marketing strategy," "has wide latitude in making these strategic decisions," and "performs these functions with only limited general oversight by the chairman of the Board." 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Again, 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 also indicated that the beneficiary analyzes business developments, monitors market trends, "uses sales forecasting" . . . "to ensure the sale and profitability of our products," and "has the authority to enter into contracts." However, the petitioner did not clearly indicate who on the petitioner's staff researches and analyzes market trends and business prospects or prepares sales forecasts, or discuss the nature and scope of the contracts entered by the beneficiary. 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's response to the first Notice of Intent to Revoke was insufficient to establish that the beneficiary would be relieved from performing non-qualifying sales and marketing tasks.

Finally, although the petitioner eventually provided a description of the beneficiary's "typical day," as noted by the director, several of the duties described did not fall within the traditional statutory definitions of managerial or executive capacity. For example, the beneficiary stated that he is "constantly studying trends in the metals market by reviewing prices and price trends," pays "constant attention to market conditions and technical developments" affecting the petitioner's customers, and meets with customers to inquire about their business developments. Based on these representations, the beneficiary devotes a significant portion of his time to non-managerial research and analysis tasks, rather than delegating these functions to lower-level personnel.

While the AAO does not doubt that the beneficiary exercises discretion over the U.S. company as its president and as the senior member of its two-person staff at the time of filing, the definitions of executive and managerial capacity have two specific requirements. 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). Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion is actually non-managerial or non-executive. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather, the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The petitioner has repeatedly claimed that the beneficiary supervises two "sales engineers," although the record also contains an organizational chart indicating that at the time of filing, the company employed a vice president/sales manager, a sales manager and a "Ningbo representative officer." 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. at 591-92. The documentary evidence submitted confirms that the petitioner's staff as of the date of filing included the beneficiary and [REDACTED], who is referred to as the vice president/sales manager, and said to be acting as a "sales engineer." Such evidence is consistent with petitioner's initial statements that the company had two employees at the time the petition was filed.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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."

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not clearly described the duties performed by the beneficiary's subordinate employee at the time of filing. Counsel's indication that the duties are comparable to those of a "sales engineer" as described in the U.S. Department of Labor's O*Net occupational classification scheme is not persuasive and cannot be accepted in lieu of a detailed description of the duties performed by this employee as of December 1996. 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).

Moreover, even if the petitioner had established that the beneficiary's sole subordinate employee at the time of filing was employed in a professional capacity, the record as a whole does not establish that supervision of this employee was the beneficiary's primary duty.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO acknowledges that in certain situations, even a beneficiary who is the sole employee of a company may qualify as a manager or executive. However, it is the petitioner's obligation to establish through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary.

At the time of filing, the petitioner was a two-year old machinery import and export trading company, with sales of approximately \$138,000 in 1995 and \$397,000 in 1997. As such, the petitioner reasonably requires employees to research the targeted import and export markets and industry trends, to market the petitioner's products to current and potential U.S. and foreign customers, to interact with customers to determine requirements and to take orders, to interact with manufacturers to ensure timely fulfillment of orders, to arrange for import and export of the goods being traded between the U.S. and China, to provide customer service, and to perform the routine financial, administrative and clerical duties associated with operating an import/export business. In December 1996, the petitioner employed the beneficiary as president, and one vice president/sales manager whose duties, though only briefly described, appear to be limited to interactions with U.S. customers seeking to import equipment from China.

Accordingly, the petitioner has not established that the beneficiary had subordinate employees to relieve him from performing the majority of the non-qualifying tasks associated with operating the petitioner's business at the time the petition was filed, including market research, sales and marketing of exports to the Chinese markets, making import and export arrangements, and administrative duties. Therefore, the director's conclusion that the beneficiary was required to perform a number of these non-managerial duties at the time the petition was filed was not based on unfounded speculation, as suggested by counsel. It would be unreasonable to reach any other conclusion based on the evidence presented, and neither the petitioner nor counsel has submitted any new evidence in this proceeding that would overcome this conclusion. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

On appeal, counsel correctly asserts that "the small size of the company does not preclude the beneficiary's position qualifies [sic] as a 'functional manager.'" The term "function manager" applies generally when a

beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In this case, counsel suggests that the beneficiary may be considered a function manager because he "sets the company's performance objectives" and "sets the company's overall strategy for marketing its products." Counsel provides no clear basis for this claim, and no indication as to what proportion of the beneficiary's time is devoted to managing these claimed "functions" of the petitioning organization. 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, as discussed above, the record does not establish that the beneficiary performed primarily managerial or executive duties as of the date of filing. Counsel's only support for his assertion that the beneficiary would be employed as a function manager is an unpublished AAO decision. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the foregoing discussion, the AAO finds that the director's notice of revocation was properly issued for "good and sufficient cause," and that the revocation of the petition approval was warranted. *See Matter of Ho*, 19 I&N Dec. at 590. Accordingly, the appeal will be dismissed.

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.