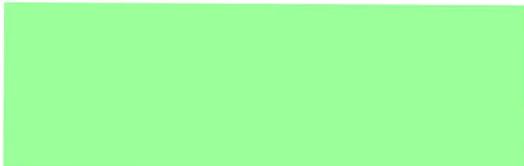
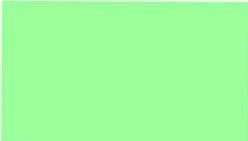


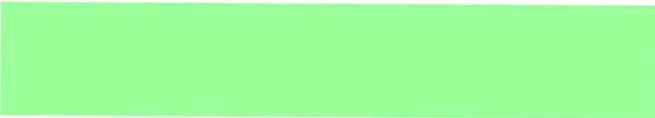
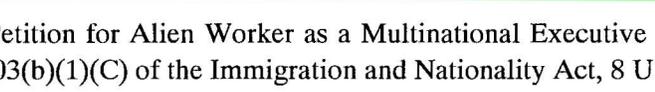


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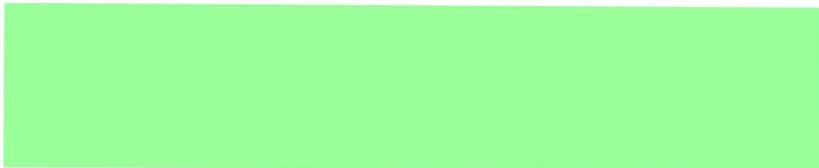


DATE: **JUN 29 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center ("the director") initially approved the employment-based preference visa petition. Based on additional information and further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director served the petitioner with a notice of his intention to revoke (NOIR) approval of the preference visa petition and subsequently revoked approval of the Immigrant Petition for Alien Worker (Form I-140).

The petitioner filed a timely appeal of the decision but the Administrative Appeals Office (AAO) rejected it as improperly filed in accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(I). Subsequently, the petitioner filed a motion to reopen or reconsider the AAO's decision, asserting that the appeal should not have been rejected. The director dismissed the motion as untimely and advised the petitioner that it could file an appeal. The matter is now before the AAO for a second time on appeal. As a matter of administrative discretion, the AAO will consider the merits of the petitioner's claims and grant a *de novo* review of the record on certification.¹ The AAO will affirm the director's decision to revoke the approval of the petitioner's Form I-140.

The petitioner, a Texas corporation claiming to operate two gift shops, seeks to employ the beneficiary as its executive director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

Although the director initially approved the petitioner's Form I-140, a Department of Homeland Security, Office of Fraud Detection and National Security (FDNS) report dated September 22, 2009 provided potentially derogatory information about the continued operations of both the petitioner and the foreign entity. Additionally, in reviewing the record of proceedings, the director determined that the record as it existed at the time of approval was lacking certain required initial evidence and thus the petition should not have been approved. Accordingly, the director issued a notice of intent to revoke (NOIR) the approval of the petition on January 19, 2010.

After considering the petitioner's response to the NOIR, the director revoked the approval of the petition on March 12, 2010 concluding that the petitioner had failed to overcome all of the bases for revocation. Specifically, the director revoked the approval based on a finding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (2) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (3) that the petitioner and the beneficiary's foreign employer have a qualifying relationship. The director's ultimate conclusions were based primarily on the evidence of record as opposed to the findings of the FDNS report.

¹ Like any USCIS office, the AAO may avail itself of the certification process. See 8 C.F.R. § 103.4(a). As a matter of administrative discretion, the AAO may certify a decision to itself for review. The AAO limits this practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations . . ." *Matter of Jean*, 23 I&N Dec. 373, 380 n 9 (AG 2002). Based on procedural errors by the director in the treatment of the petitioner's motion, the present case warrants such review.

I. The Law

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 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 petition, the director may revoke approval of the petition in accordance with statute and regulations. Section 205 of the Act, 8 U.S.C. § 1155, 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 204. 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. at 590.

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. *Id.*, 19 I&N Dec. 582, 590 (BIA 1988).

Finally, 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 USCIS 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. 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'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).

II. Managerial or Executive Capacity

The first two issues the AAO will address in this decision call for an analysis of the beneficiary's proposed position and past foreign employment. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad, and would be employed in the United States, in a qualifying 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) 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.

A. U.S. Employment

According to the Form I-140, at the time the petition was filed the petitioner had five employees and was engaged in retail sales and services through the operation of three separate gift shop locations in the [REDACTED] area.

The record reflects that the original petition filed on June 5, 2002 included little or no information pertaining to the beneficiary's proposed job duties. The petitioner's initial evidence included a copy of the company's 2001 IRS Form 1120, U.S. Corporation Income Tax Return, which showed \$10,798 in salaries and wages paid. The evidence also included bank statements and sales and use tax returns indicating that the company was operating three retail gift stores (designated as [REDACTED]). The petitioner also submitted a copy of its Texas Employer's Quarterly Report as evidence of wages paid to employees in first quarter of 2002. The petitioner employed five employees as of March 2002 and paid wages of \$10,500 to the beneficiary during that quarter, while the remaining employees received wages of \$3,118.75, \$1,440, \$544.25, and \$206.50, respectively.

The director issued a request for evidence on July 24, 2003. With respect to the proposed U.S. employment, the director requested: the beneficiary's duties as executive director; names, titles and job duties for employees; a work schedule for employees including the hours of operation; a copy of the petitioner's 2002 corporate tax return; and copies of checks verifying the payment of wages for May and June 2003.

In a letter dated October 20, 2003, former counsel stated that the petitioner was operating three gift shops with operating hours of 10:00 a.m. to 6:00 p.m., six days per week. The petitioner described the beneficiary's job duties as follows:

- Establish policies and procedures for marketing, sales, inventory requisition, contract procurement and contract negotiation;
- Direct the hiring, firing, supervision and placement of employees;
- Develop implement and revise as necessary company policies, procedures and business plans;
- Oversee and evaluate the implementation of company policies, procedures and plans and provide ongoing assessment as to the extent to which same are achieved;
- Formulate strategies to establish and develop the new enterprise and oversee the implementation of such strategies;
- Research and develop plans to establish and expand regional sales, including company promotional and marketing schemes;
- Function as liaison between the U.S. entity and the parent company abroad;
- Direct, oversee and be solely responsible for the operations, investment activities and the expansion and development of the company;
- Evaluate, assess and revise current financial operations, budget, procedures, policies, accounts and other aspects of the enterprise

Counsel provided a list of eight employees, including their job titles and a brief description of job duties. These employees included a general manager, sales manager, a purchasing officer, four cashiers, and one stock person. The petitioner stated that the general manager worked 9:00 to 5:00 on Monday through Friday, while the other employees worked variable schedules and could be assigned to work at any one of the three shops as needed. The petitioner also submitted the requested evidence of wages paid to employees as of the second and third quarters of 2003.

On the basis of this limited information, the director approved the petition.

The director issued the NOIR on January 19, 2010. The director observed that a review of the petition revealed that the petitioner employed only the beneficiary and a limited staff of part-time employees at the time the petition was filed, and the record did not establish that he would be relieved from performing non-managerial duties associated with the operation of company's multiple gift shops. The director also noted that the only statement of job duties in the record was that provided in counsel's letter dated October 20, 2003, and the record was therefore lacking "a statement from an authorized official of the petitioning U.S. employer" demonstrating that the beneficiary would be employed in a qualifying managerial or executive capacity. Further, the director emphasized that job description provided by former counsel failed to provide any detail with respect to the beneficiary's day-to-day duties and, for this additional reason, was insufficient to establish that the beneficiary would be employed in a qualifying capacity.

In response to the NOIR, the petitioner submitted a letter dated February 13, 2010 and supporting documentation. At that time, the petitioner stated that it was operating two retail gift stores which are open

for business daily. With respect to the beneficiary's job duties, the petitioner re-submitted the October 20, 2003 letter from its former attorney and states that "it was intended to be and should be considered as offered by an 'official' of the petitioning organization." The petitioner further stated that former counsel's letter specifically addressed the exact nature of the beneficiary's day-to-day duties and described the subordinate staff "which were handling the day-to-day assignments."

Upon review of the petitioner's response to the NOIR, the director concluded that the petitioner had not established that it will employ the beneficiary in a managerial or executive capacity.

In reviewing the beneficiary's employment capacity, USCIS gives primary consideration to the petitioner's description of the beneficiary's proposed position, as a detailed description of the beneficiary's actual daily tasks tends to 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). USCIS also gives ample consideration to the job duties of the beneficiary's subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in a business.

Upon review of the totality of the evidence, the petitioner failed to explain what specific tasks the beneficiary would perform on a day-to-day basis at the time the petition was filed and in his current capacity with the petitioner. Furthermore, given the limited staff reflected on the Form I-140 and in subsequent tax records, it appears that the beneficiary would perform non-qualifying tasks while overseeing the day-to-day business. The evidence of record supports the director's conclusion that the petitioner did not employ staff to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying duties.

In the NOIR, the director reviewed the October 20, 2003 letter and observed "counsel's description of the beneficiary's assignment omits detail with respect to the beneficiary's precise day-to-day duties." In response to the NOIR, rather than using the opportunity to submit a more detailed description of the beneficiary's actual job duties at the time of filing, the petitioner resubmitted the same October 20, 2003 letter and submitted no additional evidence to establish the nature of the beneficiary's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As noted by the director, the letter contains a vague and non-specific job description that fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner claims that the beneficiary will "establish policies and procedures," "direct the hiring, supervision and placement of employees," and "develop, implement and revise...policies, procedures and business plans." Additionally, the beneficiary will oversee and evaluate, formulate strategies, develop new enterprises, research and develop, liaison, direct and oversee operations and evaluate, assess and revise financial operations. However, the petitioner does not specifically define any of these corporate policies, plans or procedures or explain what, exactly, he will do in each area of responsibility. The petitioner failed to provide insight into the specific tasks

that the beneficiary would perform to accomplish these responsibilities on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner's limited staff at the time the Form I-140 was filed further supports the director's conclusion that the petitioner was unable to relieve the beneficiary from having to allocate the primary portion of his time to the performance of non-qualifying job duties. Specifically, the petitioner's Form I-140 indicated that it had five employees including the beneficiary, and the supporting evidence indicated that the petitioner was operating three gift shop locations. In the October 20, 2003 letter, counsel indicated that the petitioner had increased its staff to nine employees, provided brief descriptions of their duties, and indicated that the petitioner continued to operate the same three retail stores. However, the petitioner did not provide a description of the staffing of the company at the time of filing, which, according to the information provided in the petitioner's Employer's Quarterly Report, included the beneficiary, one full-time employee and three part-time employees. Specifically, the petitioner failed to provide an organizational chart, job titles, or job duties for the employees who were working for the company at the time of filing.

Further, as observed by the director, the wages paid in 2002 are minimal. Specifically, during the second quarter of 2002, three other employees each earned less than \$1500 for the three-month period and were likely part-time employees. The petitioner indicated that it was operating three gift shops that were each open for 48 hours per week. The petitioner did not explain how the petitioner operated three shops with two full-time and three part-time employees. The totality of the record does not support a conclusion that any of the other employees at the time of filing were supervisors, managers, or professionals, or would have relieved the beneficiary from engaging in primarily non-qualifying duties. Instead, the record indicates that the beneficiary and his claimed subordinates, as of the date of filing, were more likely than not required to perform the actual day-to-day non-managerial tasks of operating the gift shops. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On appeal, the petitioner asserts that it currently operates two gift shop locations and employs two full-time and three part-time employees. The petitioner explains that the beneficiary operates the business in a managerial capacity but notes that the beneficiary "does not manage any supervisory, professional or managerial employees but . . . manages all the essential functions." Counsel further asserts that the petitioner has sufficient staff to operate the business and to relieve the beneficiary from performing non-qualifying

duties. 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).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Counsel's unsupported assertion that the beneficiary currently "manages all the essential functions" does not overcome the deficiencies noted with respect to the overly vague description of the beneficiary's duties and the lack of staff to perform the non-qualifying duties associated with operating two to three gift shops. 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).

Counsel urges USCIS to consider that the petitioner, as a business operating "two small gift shops" does not require a large number of employees. 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

Regardless, many of counsel's assertions on appeal reference the current staffing and operations of the petitioning company. 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'r 1971). Ultimately, the petitioner failed to adequately explain its staffing at the time of filing or describe the beneficiary's duties. The petitioner has not explained how a staff comprised of one full-time and three part-time employees would relieve the beneficiary from involvement in the day-to-day operations of the three gift shops the petitioner operated as of June 2002. Therefore, the

petitioner has not established that the beneficiary's proposed position, as of the date of filing, was in a qualifying managerial or executive capacity.

Further, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Accordingly, the petitioner has failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity, and the approval of the petition will remain revoked.

B. Foreign Employment

Turning now to the beneficiary's employment abroad, the petitioner's initial evidence included no information regarding the beneficiary's job title, job duties or the staffing of the foreign entity. In response to the RFE issued prior to the initial approval of the petition, the petitioner provided a vague description of the beneficiary's role as managing partner indicating that he was responsible for making hiring decisions; establishing and implementing business goals, strategies and protocols; formulating company policies; and analyzing and reviewing all aspects of the organization. The descriptions pertaining to the foreign employment lack detailed information about the beneficiary's specific tasks and the time allocated to each task. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, while USCIS will consider the beneficiary's stated job duties in light of the company's staffing and organizational hierarchy, the petitioner has failed to provide any evidence of the organizational structure or staffing levels of the foreign entity during the three years preceding the beneficiary's admission to the United States in 1999. The director explained in the NOIR that the record did not contain a detailed description of the beneficiary's duties while employed by the foreign entity or any supplemental evidence that would support a finding that the beneficiary was employed in a qualifying managerial or executive capacity for at least one year in the three years preceding his admission to the United States as a nonimmigrant. In response, counsel referred the director to review the position description that accompanied the petitioner's RFE response submitted in October 2003 and offered nothing further. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal counsel directs attention to an unsigned letter dated May 9, 2000 describing the beneficiary's duties with the foreign entity. The letter appears to have been prepared in response to a request for evidence issued

in regard to a prior nonimmigrant petition (Form I-129) filed on the beneficiary's behalf. Further, the position description appears to be the same description included in the petitioner's response to the director's RFE in October 2003. The letter indicates that the foreign entity had 10 employees and includes a table listing job titles, departments, qualifications, and duties for some of the foreign entity's employees, specifically the positions of managing partner, financial controller, personnel manager, sales manager, and administration manager. The table contains no hierarchical structure however, and fails to identify any employee by name or indicate when or whether the position is filled or not filled. Thus, this document does not resolve the deficiencies noted with respect to the lack of a detailed description of the duties the beneficiary performed as managing partner of the foreign entity or the staffing and organizational structure of the foreign entity during the relevant time period of June 1996 through June 1999.

Based on a comprehensive review of the record, the petitioner failed to provide sufficient evidence establishing that the beneficiary was employed abroad in a qualifying managerial or executive capacity or that he would be employed by the petitioning U.S. entity in a managerial or executive capacity.

Accordingly, the AAO finds that the petitioner did not establish eligibility at the time of filing and the petition was therefore properly revoked.

III. Qualifying Relationship

The remaining issue to be addressed in this proceeding is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or that the two entities are related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

On appeal the petitioner states [REDACTED] ceased operations in 2004." The petitioner further asserts that the fact that the foreign entity has gone out of business does not constitute "good and sufficient" grounds to revoke the petition.

The director found, and the AAO agrees, that the "multinational" requirement for this petition, by definition, requires the petitioner to establish by a preponderance of evidence that it conducts business in the United States and in at least one foreign country, through a foreign parent, subsidiary, or affiliate.

A multinational executive or manager is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas. 8 C.F.R. § 204.5(j)(3)(i)(C). 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. Notwithstanding the USCIS 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).

In this case, the petitioner states that as of 2004 the foreign entity is no longer in business and the claimed affiliate relationship between the petitioner and the foreign entity was severed. It would be factually impossible for the petitioner to establish an ongoing qualifying relationship with a foreign entity that no longer exists. Therefore the petitioner no longer meets the definition of "multinational" as it no longer conducts business in the United States and in at least one other country. For this additional reason, the revocation of the approval will be affirmed.

III. Conclusion

The approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving

eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361
The petitioner has not sustained that burden.

ORDER: The director's decision dated March 12, 2010 is affirmed. The approval of the
immigrant petition is revoked.