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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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[redacted]

MAR 0 2 2004

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center denied the employment-based visa 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 Florida in May 1994. It supplies its claimed foreign affiliate with computer supplies. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director did not consider all the evidence in the record when making the decision.

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 issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a 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.

The petitioner stated on the Form I-140, Immigrant Petition for Alien Worker, that the beneficiary would direct and manage the company at an executive level. The petitioner submitted a letter in support of the petitioner but did not provide a description of the beneficiary's proposed duties for the petitioner. The petitioner indicated that the beneficiary had been president of the foreign company for nine years, had transferred to the petitioner in an L-1A, intracompany transferee status, and was now needed permanently as

the petitioner's chief executive. The record does not contain further information regarding the beneficiary's daily duties. The petitioner did provide its 1999 and 2000 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return. The 1999 IRS Form 1120 showed the petitioner had paid $29,652 in salaries. The 2000 IRS Form 1120 showed the petitioner had paid $26,274 in salaries. The petitioner also provided its Florida Division of Unemployment Compensation Employer's Quarterly Report Forms UCT-6. The Florida Forms UCT-6 showed that the petitioner had paid four employees in the last two quarters of 2001. The beneficiary was paid $6,000 for each quarter and the three other employees were each paid $1,236 for each quarter.

The director determined that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve him from performing the services of the business.

On appeal, counsel for the petitioner asserts that financial documents for the year 2001 had also been provided with the petition. Counsel claims that the 2001 financial documents showed that the petitioner had paid $36,360 in salaries for that year. Counsel contends that the beneficiary directs the management of the company through supervisory personnel and various subcontractors as shown by the evidence provided with the initial petition. Counsel re-states the definition of executive capacity and asserts that the beneficiary performs these duties. Counsel also submits the petitioner's Florida Form UCT-6 for the quarter ending December 31, 2001 and the petitioner's 2001 IRS Form 1120.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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) (Emphasis in original).

The petitioner, however, did not provide a comprehensive description of the beneficiary's duties as required by 8 C.F.R. § 204.5(j)(5). Contrary to counsel's assertion, the record does not contain evidence that the beneficiary directs the management of the company through supervisory personnel and subcontractors. The record does not set out the beneficiary's duties, does not provide the duties or position titles of the beneficiary's subordinate personnel, and does not demonstrate the utilization of subcontractors. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, 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.).

Also contrary to counsel's assertion, the record before the director did not include the petitioner's 2001 financial documents. However, even if such documents had been before the director, the payment of $36,360 in salaries to four individuals does not support the petitioner's claim that the beneficiary's assignment was in a primarily executive or managerial capacity. As observed above, the record does not contain descriptions of the beneficiary's duties or his subordinates' duties. Thus, it is not possible to discern from the record that the beneficiary's assignment would primarily involve executive or managerial duties rather than involve the performance of the daily operational tasks of the organization. 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).

In sum, the petitioner has provided insufficient documentary evidence that the beneficiary directs the management of the organization rather than performs the essential operational and administrative tasks. The petitioner has not provided evidence that the beneficiary supervises and controls other supervisory, professional, or managerial employees. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

Beyond the decision of the director, the petitioner has provided insufficient documentation to establish that the beneficiary's assignment for the foreign entity, involved primarily managerial or executive duties for one year prior to entering the United States as a nonimmigrant. The record does not contain an employee list or flowchart indicating the number of employees or the nature of their work.

Further, beyond the decision of the director, the petitioner has not adequately documented the affiliate relationship between itself and the beneficiary's foreign employer. The petitioner claims that the beneficiary owns 100 percent of the foreign entity and 90 percent of the petitioner. The petitioner references individuals, other than the beneficiary, that have held or currently hold stock in the foreign entity and in the petitioner. However, the record does not contain evidence of stock ownership, stock ledgers, stock transfers, payments for the purchase of stock, or other evidence establishing the affiliation between the petitioner and the foreign entity.

For these additional reasons the petition will not be approved.

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.