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Office: NEBRASKA SERVICE CENTER

Date: AUG 29 2006

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

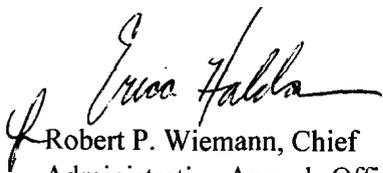
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 is a corporation organized under the laws of the State of Washington that is engaged in the sale of electrical heating units. The petitioner seeks to employ the beneficiary as its vice-president of sales and marketing.

The director denied the petition concluding that the beneficiary was not employed by the foreign or United States entities in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that the director failed to consider the evidence presented by the petitioner to establish that the beneficiary's qualifying employment in both the foreign and United States entities. Counsel claims that the beneficiary would be employed by the United States entity in a primarily executive capacity. Counsel further states that as the foreign entity's national sales and marketing manager, the beneficiary was employed in the foreign entity in a primarily managerial or executive capacity. Counsel submits a brief and evidence 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.

The first issue in this proceeding is whether 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 petitioner electronically filed the instant immigrant visa petition on June 28, 2005, noting the employment of two workers, including the beneficiary. In a separately submitted letter, dated June 23, 2005, the petitioner's president stated that the beneficiary would be employed as the company's vice-president of sales and marketing, and explained:

In this capacity[,] he is solely responsible for developing the US market for [the petitioner's] products. He oversees two regional sales managers[,] 20 dealers and distributors and the warehousing and distribution functions of the company. He implements and directs the marketing plan and liaisons with the dealer network. He reports directly to me and he works under my general supervision only.

The petitioner noted that in this position, the beneficiary would receive an annual salary of \$56,400 and benefits amounting to an additional \$33,600. Appended to the letter, the petitioner provided a list of its agents' names and contact information in the United States.

On August 10, 2005, the director issued a request for evidence asking that the petitioner provide a detailed description of the day-to-day job duties to be performed by the beneficiary, including the percentage of time the beneficiary would devote to each task. The director requested that the petitioner also submit an organizational chart identifying the beneficiary's proposed position with respect to the petitioner's specific departments and employees, a statement identifying each worker's title and job description, Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for the years 2003 and 2004, as well as the tax returns filed by the petitioner for the last two years.

Counsel for the petitioner responded in a letter dated October 27, 2005. In the attached documentation, counsel submitted the beneficiary's job description, noting that he would be responsible for developing the petitioner's sales in the United States, and more specifically, would organize a regional and local "selling organization," negotiate contracts, identify "business opportunities," and "development strategies." The beneficiary's job responsibilities were identified as follows:

- 15%: Budgeting, forecasting and reporting
- 30%: Hiring, firing, training and performance evaluation of sales agents
- 20%: Direct contact with [k]ey customers (executive level) to sign sales agreements and set up common development plans
- 20%: Defining sales & marketing strategies and implementing them (shows, advertising, promotions)
- 15%: Miscellaneous activities (travelling [sic], administration, communications, head office meeting, factory trips, technical meeting)

In an attached organizational chart the beneficiary was identified as supervising the petitioner's sales, marketing, and warehouse departments, as well as its administrative services functions. The petitioner noted the employment of one additional employee, a sales manager, and its use of sales agents employed by eight companies located throughout the United States, as well as a "home show staff." The sales companies utilized by the petitioner were comprised of both sales and support staffs. The petitioner also identified the warehousing company used by the petitioner to store its products and to process its orders, and submitted an agreement executed in the year 2000 between the petitioner and the warehouse facility, located in the state of Washington.

In a December 15, 2005 decision, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director addressed the petitioner's staffing levels, which were comprised of the beneficiary and a sales manager, and noted that the petitioner did not employ any other workers subordinate to the beneficiary. The director stated that it was unclear how the beneficiary would spend 30 percent of his time hiring, firing and evaluating sales agents, as claimed by the petitioner, "when there are no other employees." The director recognized the petitioner's use of outside sales agents, but concluded that the beneficiary would not supervise the outside salesforce. The director stated "[e]ven if the beneficiary did directly supervise sales people and warehouse workers, the employment would still not be qualifying because these positions are not professional, i.e. require college degrees." The director further noted that the petitioner had not submitted evidence of employing its purported "home show staff." The director also concluded that the beneficiary would perform non-managerial "sales-related" tasks of the petitioner's business. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on January 17, 2006. In an attached brief, counsel challenges the director's finding, stating that the beneficiary "is the sole executive officer in the United States and [] is responsible, not just for a major component of the business operations in the U.S. but all four components of operations in the U.S." Counsel contends that the director "arbitrarily ignores the evidence previously submitted on the record," and "misrepresents the facts" offered in connection with the petitioner's use of manufacturer's representatives. Counsel outlines the statutory definition of "executive capacity," and states that the beneficiary's responsibilities of selecting, contracting, and supervising the manufacturing representatives "constitute directing a major component or function of the [petitioning] organization," and are primarily executive in nature. Counsel explains:

[The beneficiary's] decision to use [m]anufacture[r]'s [r]epresentatives as the best way to sell [the petitioner's] products is an executive decision. He is not a first line supervisor of the sales force. He is an executive decision maker who may chose to terminate the contract of any representative using his sole discretion. Furthermore . . . most [m]anufacturer's [r]epresentative[s] are professionals holding college degrees or they are highly skilled in their field.

The same is true for choosing professionals to handle the [w]arehouse, [m]arketing and [a]dministrative service divisions of the company. The decision to use professional contractors itself is managerial. The continuing general supervision and management of independents contractors is no less managerial than the continuing general supervision and management of employees. The only difference is that employees are fired if they do not perform whereas the contracts of contractors are terminated when they do not perform. In their case the responsibility of management is the same: to ensure the successful and smooth operation of the organization.

Counsel further explains that consistent with the statutory definition of "executive capacity," the beneficiary establishes the goals and policies of the petitioning entity, which include developing markets in the United States to wholesale products and utilizing outside services to perform such functions as sales, warehousing, marketing, and administration. Counsel states that the beneficiary also exercises wide latitude in the petitioner's decision-making and receives general supervision from the petitioner's president.

Counsel contends that the director "placed undue emphasis" on the size of the petitioner's staffing levels, and failed to consider the reasonable needs of the petitioning entity with respect to its overall purpose. Counsel stresses that the petitioner is operating as a wholesaler that contracts for the performance of "its essential functions" – sales, marketing, warehousing, shipping and administrative services. Counsel claims that the director "failed to see that the beneficiary oversees all of these functions and he is ultimately responsible for all of them although he does not perform them himself." Counsel claims that the practice of contracting with outside companies "is standard in this industry," and references articles from the United States Department of Labor *Occupational Outlook Handbook* as evidence of the common use of sales representatives and manufacturing agents by wholesale and manufacturing companies. Counsel submits the referenced articles, which also discuss the role of a sales representative and the advantages incurred by a company in using agents.

Counsel also submits a January 12, 2006 statement from the president of the foreign and United States entities, in which the companies' president contends that the director misunderstood the industry in which the petitioner operates and misinterpreted the beneficiary's responsibilities. As the statement is already part of the record, it will not be entirely repeated herein. Of particular relevance, the petitioner's president addresses the four "components" of the United States company – sales, marketing, and warehouse departments, as well as administrative services – and states that it is the beneficiary's responsibility to manage and direct these functions. With respect to each department, the companies' president explains that the petitioner's sales are "headed by" the regional sales manager, who "is responsible for the development of a new market segment (the rural electrical cooperative market, deemed Special Project in the [o]rganizational [c]hart) [as well as] supervising the work of our independent sales staff . . . , identifying target customers, offering training sessions, and participating in trade events (shows, conferences, state meetings, etc.)." As noted by counsel in his appellate brief, the petitioner's president addresses the use of manufacturer's representatives as common in the petitioner's industry and identifies six United States sales agencies, as well as a company offering warehousing and processing services, purportedly utilized by the petitioner. With respect to the petitioner's marketing and administrative services functions, he explains that employees of the foreign entity perform any related tasks, including designing and producing promotional material and product displays, managing home shows and exhibitions, and coordinating contracts with advertisement agencies, as well as customer service, accounting, and payroll. The petitioner's president further states:

[The petitioner's] vital function [of selling electric heaters] is performed by independent sales representatives who are under the direct control of [the beneficiary] or his subordinate[,] [the petitioner's sales manager]. The other essential functions of the company, marketing, warehousing and administrative services are not performed by [the beneficiary] but they are contracted out to other firms who are under the direct control of [the beneficiary].

[The beneficiary] is the [s]enior executive officer in the United States. At the end of the day he is responsible for the management and director of [the petitioning entity]. He receives general supervision and directions from me – the Board of Directors and the President.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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). Despite the director's request for the

petitioner to "describe the actual day-to-day duties [performed by the beneficiary] in great detail," the petitioner submitted a limited outline of five responsibilities held by the beneficiary. The brief statements that the beneficiary would maintain the company's budget, hire, fire and train sales agents, contact "[k]ey customers," define and implement sales and marketing strategies, and perform "[m]iscellaneous activities" do not sufficiently identify the beneficiary's daily managerial or executive tasks. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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).

In addition, the supplementary evidence submitted in response to the director's request for evidence and on appeal does not clarify the beneficiary's eligibility for classification as a manager or executive. See 8 C.F.R. §§ 103.2(b)(8) and (12) (stating that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established as of the time the petition is filed). The initial job descriptions offered by the petitioner in both its June 23, 2005 letter and response to the director's request for evidence represent that the beneficiary would spend approximately 40 percent of his time personally performing sales and marketing functions of the company, including contacting key customers, defining and implementing sales and marketing strategies, attending shows, and performing advertising and promotions. However, the petitioner subsequently suggests on appeal that the company's sales and marketing functions would be performed exclusively by a sales manager, manufacturing representatives and the foreign entity's marketing department. Besides contradicting the petitioner's original statements, this claim is also inconsistent with the information contained on its organizational chart, which suggests that the sales manager is responsible for sales to "rural Co-op utilities," a specific consumer group, rather than to all of the United States wholesalers and dealers targeted by the petitioner. Additionally, the petitioner does not reconcile its initial claim that the beneficiary would develop and implement its sales and marketing strategies with its subsequent statement that the foreign company's marketing coordinator would perform "all marketing and public relations activities." On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On appeal, counsel stresses the petitioner's use of manufacturer's agents to sell its products, and claims that the director erroneously focused on the petitioner's staffing levels in determining that the beneficiary did not qualify for the classification sought. Counsel correctly observes that 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).

Based on the petitioner's representations, at the time of filing, the petitioner employed the beneficiary and a sales manager, and utilized approximately six to eight manufacturer's agencies. The AAO notes, in contrast, that the petitioner stated in its initial June 23, 2005 letter submitted with the Form I-140 that the beneficiary

would oversee two regional sales managers and twenty dealers and distributors. The AAO further notes that the petitioner initially identified eight sales agencies on its organizational chart, yet on appeal listed ten sales agencies, of which only six were the same as those previously identified by the petitioner. 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).

Regardless, the petitioner relies on its purported relationship with sales agencies, or manufacturer's agents, to establish that the beneficiary would be employed as an executive¹. In fact, counsel stresses on appeal that the primary "question" in the instant appeal would be whether the beneficiary's "selection, contracting and continuing general supervision of independent, professional sales organizations constitute directing a major component or function of the organization." Counsel also seems to suggest that Citizenship and Immigration Services (CIS) refuses, in general, to recognize the supervision of outside independent contractors as a managerial or executive responsibility. On the contrary, CIS acknowledges that in certain situations, a beneficiary, who is the sole employee of a company, may qualify as a manager or executive. It is the petitioner's obligation to establish, however, 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. The definitions of executive and managerial capacity require that the petitioner prove that the beneficiary *primarily* performs the high-level responsibilities specified in the statutory definitions 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).

In the instant matter, the petitioner has not submitted concrete documentary evidence of its purported contractual relationship with independent sales agencies, which is essential to establishing the beneficiary's employment as a manager or executive. The AAO recognizes that the petitioner offered on appeal copies of two agency agreements that were signed on October 14, 1999 and August 1, 2004. The AAO notes that the petitioner previously acknowledged on its organizational chart the agency contracted with in the October 14, 1999 agreement; however, the petitioner did not address its relationship with the second agency until the appeal. As neither document has a provision documenting the term of the agreement, and one was executed almost six years prior to the instant filing, they are not supportive of the petitioner's claim of utilizing independent agencies for its sales functions. Additionally, an "American agents list" submitted by the petitioner with its initial filing appears to have been generated in 2002², more than three years before the immigrant petition was filed, and therefore, does not appear to represent the agents purportedly used by the petitioner at the time of filing. The limited amount of evidence in the record pertaining to the petitioner's relationship with independent sales agencies undermines its claim that the beneficiary performs the "selection, contracting and continuing general supervision of independent, professional sales organizations," or that the beneficiary controls the work of independent sales representatives. Furthermore, the petitioner has not offered any documentary evidence relating to its use of independent sales representatives for its "home sales staff." Going on record without supporting documentary evidence is not sufficient for purposes of meeting

¹ Counsel states in his appellate brief that "[t]he statutory definition of "[m]anagerial capacity" has overlapping and similar provisions all of which apply to [the beneficiary's] duties for [the petitioning entity]." As a result, counsel states, "[i]n truth, [the beneficiary] is functioning at a high executive level in the organization and he performs many of the managerial duties as a consequence."

² The "American agents list" document contains a computer file name at the bottom of the page that reads "AgentsUS2002."

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)). Without evidence of its use of outside sales agencies, the current record does not support a finding that the petitioner's reasonable needs would be met through the employment of the beneficiary and a sales manager.

Furthermore, the petitioner has not offered documentary evidence that the foreign entity employs the purported marketing or administrative staff. This evidence is relevant to substantiating the petitioner's claim that someone other than the beneficiary would perform the petitioner's marketing, advertising, and administrative functions. Also, in what appears to be an attempt to conform to the statutory requirements of "managerial capacity," counsel claims that the employees in the warehouse, marketing and administrative services divisions are professionals, yet does not submit any evidence establishing that these employees possess or require an advanced degree, such that they could be classified as professionals. 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).

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next consider whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

In its June 23, 2005 letter submitted with the petition, the petitioner indicated that the beneficiary had been managing the foreign company's regional sales prior to his transfer to the United States.

In her August 10, 2005 request for evidence, the director requested that the petitioner provide a chronological outline of the positions held by the beneficiary in the foreign entity, as well as a "very detailed description of each position held by the beneficiary from 1994 to 1997." The director asked that the petitioner include an approximate percentage of the amount of time the beneficiary spent on each task, as well as organizational charts depicting the beneficiary's various positions, the company's employees, and the job duties performed by each.

In his October 27, 2005 response, counsel submitted the following job description for the beneficiary's former position as national sales and marketing manager of the foreign corporation³:

- Budgeting and planning of trade marketing activities (trade and consumer shows, trade promotion and publicity) with an annual budget of \$100 to \$200,000.
- Manage trade marketing activities:
 - Design, planning and construction of home show booths

³ The petitioner noted that the beneficiary's position as national sales and marketing manager included responsibilities from his prior position as marketing assistant manager. Therefore, the job responsibilities related to the former position are incorporated herein.

- Design and construction of product displays
- Selection and distribution of promotional articles
- Design, organization and follow up of promotional programs
- Organization of factory tours
- Preparation of trade, direct mail campaigns and measurement of results
- Creation of presentation material, training or sales personnel
- Organization of internal sales meetings

* * *

- Purchasing:
 - Display and show booth materials, promotional articles, trade and consumer show commitments.
- Special projects:
 - [L]ogistical organization of company relocation ([M]ay 1993)
 - Planning and supervision of grand opening ([M]ay 1994)
 - New project launches (1991, 1994, 1996)

* * *

- Management and control of all [s]ales activities, including:
 - Sales forecasting
 - Identification of business opportunities
 - Communication with [k]ey [c]ustomer [m]anagement
 - Hiring, [f]iring, [t]raining and coaching of sales representatives
- Direct management and control of:
 - 1 marketing assistant
 - 1 regional sales manager
 - 4 sales representatives
- Indirect supervision of:
 - 2 sales representatives
 - 3 sales agencies

The petitioner also provided the following outline of job responsibilities held by the beneficiary:

- Percentage of time dedicated to each duty:
 - 20%: Budgeting, planning, measurement
 - 10%: Supervision of [m]arketing [a]ssistant
 - 10%: Supervision of [r]egional [s]ales manager, including field visits

- 30%: Supervision of [s]ales [r]epresentatives, including field visits
- 5%: Analysis and [r]eporting
- 5%: Direct customer contact (executive level)
- 20%: Miscellaneous administrative tasks

The petitioner submitted an organizational chart of the foreign entity depicting the above-stated staffing levels.

In the December 15, 2005 decision, the director referenced the job description offered for the beneficiary's position in the foreign company, concluding that it did not demonstrate that the beneficiary had been employed abroad in a primarily managerial or executive capacity. The director noted that the petitioner had submitted limited documentary evidence pertaining to its staffing levels, and did not explain who sells the foreign entity's products. The director concluded that the beneficiary "was primarily engaged in sales-related duties and the first-line supervision of sales people." Consequently, the director denied the petition.

In his January 13, 2006 appellate brief, counsel for the petitioner contends that the director "inappropriately" concluded that the beneficiary was not employed by the foreign entity in a qualifying capacity. Counsel states that the director's reference to retail employees was illogical, as the foreign entity did not claim to operate retail stores. Counsel notes that the foreign entity's operations are "nearly identical" to the United States organization.

In the attached January 12, 2006 declaration from the foreign entity, the company's president provided the following description of the beneficiary's former position:

As [n]ational [s]ales and [m]arketing [m]anager for our parent company, [the beneficiary] reported directly to me and had executive responsibilities for our [s]ales and [m]arketing [d]epartment which represents the very core of our activities. His main duties were:

- Direct supervision of a Regional Sales Manager (Mr. [REDACTED] no relation – who had 10 years of sales and supervisory experience and a Bachelor's of Commerce), who, in turn, was supervising 2 sales employees . . . as well as 3 sales agencies
- Direct supervision of 4 sales employees . . . in our home territory of Quebec.
- Direct supervision of a marketing assistant . . . in charge of supplying Trade marketing support (Trade show management, display design, promotional programs, sales contracts, publicity, sales and training meetings).
- Coordination of all aspects of the sales process and administration (employee training, customer service, order entry, invoicing, shipping, salary and performance reviews, expense accounts) with the heads of the other departments.
- Definition of sales strategy, sales policies, pricing, product selection, and their implementation.
- Appointment of manufacturer's representatives.
- Direct customer contact at the executive level.

For two years prior to his nomination at [the petitioning entity], as [n]ational [s]ales and [m]arketing [m]anager, [the beneficiary] was responsible for an essential component of [the foreign entity's] activities and his position satisfied the definition of 'executive capacity'.

Upon review, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

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). The limited statements provided with respect to the beneficiary's role as national sales and marketing manager prevent a finding that the beneficiary occupied a primarily managerial or executive position. For example, the petitioner stated that the beneficiary spent a cumulative amount of fifty percent of his time supervising the marketing assistant, sales representatives, and regional sales manager. The petitioner's blanket claim that the beneficiary supervised employees, however, is not sufficient to establish that the beneficiary's employment satisfied the statutory definition of "executive capacity⁴." *See* §101(a)(44)(B) of the Act. The petitioner did not document what specific day-to-day job duties are associated with the beneficiary's supervision of the subordinate workers or identify the managerial or executive tasks performed by the beneficiary during his "field trips" with these employees. The specific executive or managerial tasks performed by the beneficiary during the remainder of his time are equally vague. The petitioner did not explain what the beneficiary purportedly "budgeted," "planned," "measured," "analyzed," or "reported," or what "[m]iscellaneous administrative tasks" consumed twenty percent of the beneficiary's time. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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).

The AAO notes the insufficiency in counsel's claims on appeal. Counsel challenges the logic of the director's findings, and claims only that the foreign entity's operations are identical to that of the United States company. The AAO recognizes that the director offered a limited explanation for the denial of the petition based on the beneficiary's foreign employment capacity, and notes when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). However, counsel's blanket claim on appeal that the director's statement "makes no sense" is not sufficient to overcome the director's findings. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO notes it is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possessed a managerial or executive title. Absent a comprehensive description of the specific managerial or executive job duties associated with the beneficiary's position as national sales and marketing manager, the AAO cannot conclude that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

⁴ The petitioner's president claims in his declaration submitted with the appeal that the beneficiary's position in the foreign entity "satisfied the definition of 'executive capacity'."

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.