

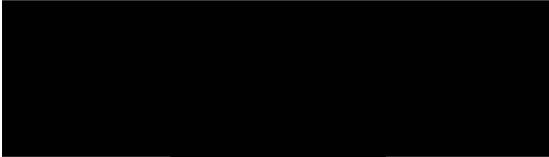
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U.S. Citizenship
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Services

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File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 16 2006
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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)

IN 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner was incorporated in the State of New York on December 3, 2003, and claims to be engaged in international trading. It seeks to employ the beneficiary as its president 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 petitioner claims that it is the subsidiary of Hebei Gem-Tech Electronics Co., Ltd., located in the People's Republic of China.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel contends that the petitioner has sufficient staff at the U.S. office to support the beneficiary in a qualifying managerial or executive position.

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 matter is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

On Form I-140, filed on March 19, 2007, the petitioner indicated that the beneficiary would be employed as its president. In a letter of support dated March 8, 2007, the petitioner provided the following overview of the beneficiary's duties:

[The beneficiary] fills the position of President in our company. The position is the key managerial/executive position within the Petitioner. She has overall control of operation and management, hiring and firing of department heads, setting company policies, goals, and expansion strategies, exercising wide latitude in discretionary decision making, and evaluating the needs of the Parent Company. In short, she manages the whole organization, supervises and controls the work of the manager of the subsidiary, has the authority to hire and fire managers and other professional employees, exercises discretion over the day-to-day operations of the subsidiary, receives only general supervision from higher level executives, which is the parent company's superior.

A detailed description of the Beneficiary's duties is as [follows]:

- [P]erforming essential executive functions of president of the company in all aspects of business decision-making, policy making and personnel management particularly;
- [E]stablishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.;
- [F]ormulating immediate goals for expansion and long term business policies in accordance with the parent company's direction;
- [E]nsuring our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company;
- [D]irecting the preparation of financial plans and annual budget reports for the parent company's review;
- [G]uiding the company through the web of American, Chinese and other international laws and regulations concerning the import and export of goods;
- [R]esearching and familiarizing [herself] with the American and Chinese markets as well as the relationship between the two markets;

- [A]mending and/or modifying company's directions in response to the changing markets;
- [M]eeting and/or discussing with parent company to form [a] cooperative effort in response to the changing market;
- [E]xercising personnel management authority concerning hiring, recruiting and discharging of subordinates;
- [E]xercising wide latitude in discretionary decision-making power and receiving only general direction from parent company;
- [T]o recruit and supervise one vice president, some sales representatives;
- [T]o set up all management systems, including the business, budget, accounting, clientele, suppliers, compliance, banking, and texts;
- [T]o set up sales, marketing, advertisement and commission systems in order to develop a wider customer's base in the U.S.;
- [T]o set up better customers communication channels through direct contact, internet website, products catalogs, video images, trade show exhibitions;
- [T]o recruit proper public relationship firm or marketing firms as consultant to increase the image and expose of Parent Company's products.

In addition, the petitioner submitted two organizational charts pertaining to the petitioning entity. The first chart indicated that the beneficiary oversaw the vice president, who in turn managed two departments: the office and the market and sales department. The second chart again indicated that the beneficiary directly oversaw the vice president, who in turn oversaw himself as manager of the market and sales department, and [REDACTED] office secretary. Under the market and sales department are ten positions identified as "sales representative," although only one appeared to be filled. The AAO notes that the only salesperson identified by name on the chart is [REDACTED], office secretary. The organizational chart, therefore, appeared to depict a total of nine open positions.

The petitioner also submitted copies of its Form 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2006. Both documents indicated that the petitioner employed 12 persons during each quarter and paid a total of \$66,900 in wages for each quarter. The petitioner did not attach a supplemental sheet listing the names of the twelve employees.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.¹ Consequently, a

¹ The director also found that the initial evidence was insufficient to establish the beneficiary's managerial and/or executive capacity abroad and the issue of whether a qualifying relationship

request for evidence was issued on August 6, 2007. In the request, the director required the petitioner to submit evidence establishing that the beneficiary satisfied the four criteria set forth in the regulatory definitions of either managerial or executive capacity, or both. The director indicated that in support of the beneficiary's eligibility, the petitioner should include copies of position descriptions, performance evaluations, or other corporate records which set forth the beneficiary's duties, priorities, or relationships.

In a response received on September 5, 2007, the petitioner addressed the director's requests. Regarding the beneficiary's duties, the petitioner provided an affidavit from [REDACTED] the petitioner's vice president, which stated as follows:

First, in this position [the beneficiary] has the duty to overall direct and control the management and operation of whole company. She performs the essential executive functions of president of the company in all aspects of business decision-making, policy making and personnel management particularly;

She always works hard to promote the skill and level of management of our company. She directs me and other managers about how to manage our company. She stresses the point that excellent management of an organization should abide the law, and has a good management of supervising staff, scientific method and well advanced [sic]. She established the company management structures, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.A. Under her direction our company's management is good and develops smoothly.

Second, as a president, [the beneficiary] collects the [advice] and personal opinions on the company's goal and policies. Then according to the company's situation and requirement of development she formulates the immediate goals for expansion and long term business policies in accordance with the parent company's direction to ensure our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company. She also directs the preparation of financial plans and annual budget reports for the parent company's review.

Third, as a president, and Board Chairman of the company, [the beneficiary] exercises wide latitude in discretionary decision-making power. She amends and/or modifies company's directions in response to the changing markets, and meets and/or

existed between the U.S. and foreign companies. These issues were satisfied as a result of the petitioner's response and need not be discussed further.

discuss[es] with parent company to form a cooperative effort in response to the changing market.

Fourth, as board chairman and president of the company, she receives only general direction from general manager and board of directors of [o]ur parent company

Fifth, as a president, [the beneficiary] manages our organization. She sets up all management systems including the business budget, accounting, clientele, suppliers, compliance, banking, and tax. She guides the company through the web of American, Chinese and other international laws and regulations concerning the import and export of goods, and research[es] and familiarizes herself with the American and Chinese markets as well as the relationship between the two markets.

Sixth, as the president, she supervises and controls the work of managers and supervises. In our company she supervises and controls the work of a vice president, one manager of Market & Sales department, and other professionals.

Seventh, she has the authority to hire and fire the person whom she supervises. In our company she exercises personnel management authority concerning hiring, recruiting and discharging of subordinates, and to recruit and supervise one vice president, some sales representatives. She in not only to hire and fire any staffs and also to have the right to promote the person who works hard and obtains the achievements.

Eighth, she exercises discretion over the operation of the company. She directs sale department to set up sales, marketing, advertisement and commission systems in order to develop a wider customer's base in the U.S.A., and to set up better customer communication channels through direct contact, internet website, products catalogs, video images, trade show exhibitions. She does hard work to recruit proper public relationship firm or marketing firms as consultant to increase the image and expose of Parent Company's products.

The petitioner's vice president concluded by stating that the beneficiary clearly satisfies all eight criteria of managerial and executive capacity.

On February 11, 2008, the director denied the petition. The director cited four main deficiencies in the petitioner's evidence. First, the director noted that the description of duties provided by the petitioner was too vague and failed to establish that the beneficiary met the criteria for both managerial and executive capacity. Second, the director noted that while it did appear that the beneficiary performs some high-level responsibilities, the record was unclear with regard to the positions and duties of the beneficiary's subordinates and, as a result, it could not be determined that

the beneficiary would primarily engage in high-level duties. Third, the director noted that the petitioner's organizational chart, which identified only five employees by name, contradicted the petitioner's quarterly tax returns which indicated that it employed twelve persons. Finally, the director noted that based on the overview of the petitioning entity and the basic information provided on the organizational chart, it did not appear that the petitioner employed sufficient staff to perform the everyday operational duties of the company, such as shipping and receiving, accounting, training, or marketing.

On appeal, counsel for the petitioner submits a two-page letter which focuses primarily on the petitioner's organizational chart and the discrepancies noted between the tax records and the chart regarding the number of employees. Counsel alleges that the chart clearly shows twelve positions and that it is not common practice to list employee names on company organizational charts. Counsel does not address the director's finding that the description of the beneficiary's duties was insufficient, and merely concludes that the evidence demonstrates that the petitioner has adequate staff to relieve the beneficiary from non-qualifying duties.

Upon review, the AAO concurs with the director's findings. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In response to the request for evidence, the petitioner claimed that the beneficiary satisfied the regulatory criteria for both managerial *and* executive capacity as set forth under section 101(a)(44)(A) and (B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Therefore, the AAO is required to evaluate the beneficiary's compliance with the provisions of both regulatory definitions. At a minimum, the petitioner must establish that the beneficiary's responsibilities will meet the requirements of one or the other statutory definitions.

The definitions of executive and managerial capacity each 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). In the denial, the director noted that based on the overview of duties, it appeared that the beneficiary may in fact be engaging in some high-level responsibilities as contemplated by the definitions, but noted that the petitioner had failed to demonstrate that these duties constituted a majority of the beneficiary's tasks.

Although the petitioner provided a lengthy overview of the beneficiary's duties in both the initial letter of support and in response to the request for evidence, the statements provided are nondescript

and merely paraphrase the regulatory definitions. Based upon the evidence submitted, it cannot be determined that the beneficiary would be primarily engaged in qualifying managerial and executive duties. Specifically, in both the initial letter of support and in response to the request for evidence, the description of duties provided simply adopts many of the key phrases used in the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act. These general statements do little to clarify the exact nature of the beneficiary's duties. 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.). 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. For example, in response to the request for evidence, the petitioner's vice president provided a statement listing eight main duties of the beneficiary, which directly corresponded to the four criterion in the definition of managerial capacity, and the four criterion in the definition of executive capacity. 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. at 1108.

On appeal, counsel for the petitioner does not address this issue, and simply concludes in his letter that based on the fact that the petitioner employs twelve persons, it is clear that the beneficiary will be "freed" from performing day-to-day operations of the company. However, counsel provides no objective evidence to support this contention. 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).

The brief and vague overview of the beneficiary's role in the company, coupled with the unresolved issues surrounding the beneficiary's subordinate staff, precludes a determination that the beneficiary is relieved from responsibility for many of the day-to-day functions essential to the petitioner's business. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In this matter, the AAO would normally look to the organizational structure of the petitioner to examine the duties of subordinate staff members in relation to the beneficiary. In this matter,

however, the organizational hierarchy is somewhat confusing in that it provides no detail or insight into the positions and duties of the other employees. Moreover, as noted by the director in the denial, the organizational chart lists ten sales person positions, but appears to indicate that only one such position was filled. Therefore, the director correctly noted on appeal that the tax records, indicating twelve employees, directly contradicted the organizational chart and thus cast doubt on the validity of the petitioner's claims.

On appeal, the petitioner contends that it is not common practice to list the names of all employees on a corporate organizational chart, specifically in instances where a corporation employs a large number of persons. However, United States Citizenship and Immigration Services (USCIS) finds organizational charts particularly helpful for establishing the employment hierarchy of a petitioner and routinely verifies the staffing levels of a company by comparing such charts with a petitioner's quarterly tax returns or payroll records. In this situation, it does appear that the petitioner employed twelve persons as claimed on its quarterly returns. However, the fact remains that no details regarding the additional nine employees and their role in the company has been provided.

As a result of the petitioner's failure to provide additional information regarding the duties of the vice president/market and sales manager, office secretary/sales person, and the other nine unidentified salespersons, the petitioner has consequently failed to establish that the beneficiary is relieved from performing non-qualifying duties. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. The record indicates that the petitioner employs a vice president who is also the market and sales manager, and an office secretary who is also a salesperson. Including him, there are a total of ten salespersons allegedly on the petitioner's staff. There is no mention in the record, however, of any accounting personnel, nor does the petitioner identify any person responsible for purchasing, shipping and receiving, training, or general administrative functions. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager and/or executive.

Despite the director's specific objections in the denial, the petitioner and counsel failed to address or acknowledge on appeal the deficiencies cited as the bases for the denial. Instead, counsel concluded that a staff of eleven subordinates automatically relieved the beneficiary from performing non-qualifying duties, and thus clearly established the beneficiary's eligibility. As previously stated, 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. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. 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.