U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 138 51463 Office: CALIFORNIA SERVICE CENTER Date: SEP 0 2 2004

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the employment-based 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 Territory of Guam in April 1992. It operates a tour service. It seeks to employ the beneficiary as its president and chief executive officer. 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: (1) a qualifying relationship with the beneficiary's foreign employer; or, (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's 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):
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> * * *
>
> (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 first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

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

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
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> (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.
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> *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.
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> *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.

The petitioner has submitted evidence that the beneficiary owns and controls a majority interest in both the petitioner and the foreign entity. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. The petitioner has established a qualifying relationship with the beneficiary's foreign employer. The director's decision on this issue will be withdrawn.

The second issue in this proceeding 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
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> 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.

In an attachment to the petition, the petitioner stated that the beneficiary would be employed in an executive capacity and will:

(a) Manage all aspects of the petitioner's business managing seven employees including the Sales and marketing Manager [sic].
(b) Supervise and control the work of other supervisory employees and manage the essential function of the petitioner.
(c) Have the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) for other employees he directly supervises; and
(d) Exercise discretion over the sales and marketing operations of the business.

The petitioner also provided the beneficiary's resume that described the beneficiary's duties[1] as:

1. Planned, developed, and established policies and objectives of tour business in accordance with board directives and corporation charter. Conferred with company officials to plan business objectives, develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. Reviewed activity reports and financial statements to determine progress and status in attaining objectives and revised objectives and plans in accordance with current conditions. Directed and coordinated formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. Planned and developed industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and the public. Evaluated performance of executives for compliance with established policies and objectives of the firm and contributions in attaining objectives.

2. Besides the general duties as President and Chief executive [sic] of the tour company, additional duties consisted of developing option tours such as honeymoon tour, marine sports, jungle tour, submarine tour, hiking course and other tour spots to attract more tourists from Korea. Provided counseling to tour related business organizations to [sic] coordinating required sales promotions for tourism on Guam. Recommended frequent sales promotion policy and counseling to Guam Government to expand the Korean market for tourists.

3. Attracted annually 13.000 tourists fro Korea and its numbers are expected to be increased in the future.

On July 2, 2002, the director requested: (1) the petitioner's wage reports for the previous four quarters; (2) the petitioner's organizational chart listing all employees by name and job title and including a brief description of their job duties; and (3) a more detailed description of the beneficiary's duties in the United States including the percentage of time the beneficiary spends in each of his duties.

In response, the petitioner provided a copy of its organizational chart showing: the beneficiary as president and chief executive officer; an executive secretary and "operator" reporting to the beneficiary; a general manager, tour manager, and vice-president/tour manager all reporting directly to the beneficiary; and five tour guide positions. Three of the tour guides also held positions identified as the general manager, tour manager, and vice-president/tour manager.

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[1] The description appears to relate to the beneficiary's duties for the petitioner but may relate to the beneficiary's duties for the foreign entity. The description is structured using the past tense but refers to the beneficiary's position as president and chief executive officer. The duties do not coincide with the beneficiary's dates of employment for either the petitioner or the foreign entity.

The petitioner also submitted its Guam Form SW-2, Employer Quarterly State Wage Report, for the quarter in which the petition was filed. The Guam Form SW-2 confirmed the employment of the beneficiary, one tour manager/tour guide, the part-time employment of the vice-president/tour manager/tour guide, and two tour guides. The Guam Form SW-2 listed one employee that was not identified on the organizational chart.

The director determined that: (1) the petitioner did not have a reasonable need for an executive as the petitioner's type of business did not possess the organizational complexity to warrant an executive position; (2) based on the petitioner's organizational structure and the petitioner's type of business, the beneficiary would be assisting in day-to-day non-supervisory duties; (3) the beneficiary would essentially be a first-line supervisor over not managerial and non-professional employees; and (4) the beneficiary would be performing routine operational duties rather than managing a function of the business. The director also referenced another petition (WAC 02 138 51547) the petitioner had filed on behalf of a different beneficiary that included a similar description of duties for a sales and marketing position. The director concluded that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner notes that the number of the petitioner's employees is not determinative of either managerial or executive capacity. Counsel cites an unpublished matter in support of his statement. Counsel asserts that the beneficiary serves in both an executive and managerial capacity because he is the most senior member of the corporate structure and is responsible for the complete operation of the company. Counsel references "exhibits" and contends that the documentary evidence establishes that the beneficiary "fits within the 'manager' definitions under 8 C.F.R. § 214.2(l)(ii)(B)."[2] Counsel concludes that the description of the beneficiary's duties demonstrates that the beneficiary's duties are oversight, policy-making, and overall supervision.

Counsel's assertions are not persuasive. 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In this matter, the petitioner initially claimed that the beneficiary would be employed in an executive capacity and then paraphrased the four elements contained in the definition of managerial capacity. The petitioner stated that the beneficiary would "[m]anage all aspects of the petitioner's business;" "supervise and control the work of other supervisory employees and manage the essential function of the petitioner;" "have the authority to hire and fire or recommend . . . personnel actions;" and "exercise discretion over the sales and

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[2] Counsel's reference is to the regulation defining executive capacity in the L-1A intracompany transferee context and not to the regulation defining managerial capacity for this immigrant visa petition.

marketing operations of the business." 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.).

The description of the beneficiary's duties on his resume, in addition to not clearly indicating whether the duties refer to the beneficiary's duties for the petitioner or for the foreign entity, is vague and nonspecific. For example, the petitioner states that the beneficiary "[p]lanned, developed, and established policies and objectives," and "[c]onferred with company officials to plan business objectives," and reviewed reports and financial statements to determine and revise objectives. The petitioner did not, however, define the petitioner's objectives, or clarify who actually performed the tasks to attain the objectives. The petitioner did not provide evidence that it employed "executives," thus the petitioner's claim that the beneficiary "[e]valuated performance of executives for compliance with established policies and objectives of the firm and contributions in attaining objectives" is not substantiated in the record. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103, *aff'd*, 905 F.2d at 41. Moreover,

The beneficiary's resume does indicate that it is the beneficiary who develops option tours, provides counseling to tour related businesses, and recommends sales promotion policies. However, 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). Furthermore, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive, despite the director's request for a percentage allocation. This failure of documentation is important because developing tours, promotion, and counseling other businesses, do not fall directly under traditional managerial or executive duties as defined in the statute. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel notes that the number of a petitioner's employees is not dispositive of a beneficiary's managerial or executive capacity. However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, although the director requested a brief description of the beneficiary's subordinates' duties, the petitioner did not provide the descriptions. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner has not provided any evidence that it employs sufficient personnel to carry out the day-to-day operational and administrative tasks of the petitioner.

Counsel's reference to "exhibits" on appeal is not helpful in identifying the beneficiary's daily tasks. A review of the totality of the record reveals no evidence of the beneficiary's actual duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The record does not support counsel's conclusion that the beneficiary's duties are oversight, policy-making, and supervision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). As determined above, the petitioner has provided a non-specific description of the beneficiary's duties, has failed to acknowledge the percentage of time the beneficiary spends on non-managerial and non-executive duties, and has failed to establish it has sufficient employees to carry out the day-to-day services of the business without the beneficiary's contribution to the day-to-day operational and administrative tasks. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

Counsel's citation to an unpublished decision is not probative. The unpublished, non-precedent decisions of the AAO are not binding authority. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees, in the administration of the Act, unpublished decisions are not similarly binding.

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.