U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

B4

MAY 06 2005

FILE: WAC 03 027 52479 Office: CALIFORNIA 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, 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 State of California in January 1997. It exports plastic supplies, equipment, and advanced composites and fiberglass technology from the U.S. to Korea. It also facilitates the introduction of U.S. technology to Korea, sells U.S. manufacturing equipment and goods to Korea, and provides ongoing technical support to the Korean companies. 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) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; or, (2) a qualifying relationship with the beneficiary's foreign employer.

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):
>
> * * *
>
> (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 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.

In an October 7, 2002 letter appended to the petition, the petitioner stated the beneficiary's responsibilities as:

> [The beneficiary] is responsible for the entire U.S. operation, and will continue to carry out the duties he has successfully performed since his transfer. He will continue to utilize his executive and management skills, as well as his experience and knowledge to serve existing customers by providing faster service by having an office in the U.S. He will continue the management of the corporation, develop business strategies, establish goals and policies, and will exercise discretionary decision-making and direct the entire business operation of the company. He will continue to have the authority to hire and dismiss any and all employees within the U.S. company, and decision-making authority in regard to all matters concerning the U.S. operation.

In response to the director's request for a more detailed description of the beneficiary's duties, counsel for the petitioner indicated that the beneficiary is employed as its president and explained that the company actively imports and exports goods and products, primarily for military and government projects. Counsel stated that in the present matter, "the beneficiary is employed solely in an executive capacity" and that:

> As President, the beneficiary is responsible for the overall guidance of the U.S. (and Korean) company. He negotiates contracts and assists the company's clients in the design and development of projects, often acting as a middleman between the U.S. manufacturers and the Korean purchaser. He meets directly with executives of the company's clients, and cultivates agreements and contracts over many months. As the company's clients are located throughout the U.S. he travels routinely to meet and negotiate contract terms. He finalizes and signs contracts on behalf of the U.S. company. He communicates with the office in Korea on a daily basis to ensure coordination with suppliers and shippers.

The petitioner added that only an executive level employee would have the authority and ability to negotiate these agreements and see them through to their completion. The petitioner also observed that the beneficiary worked through a staff of employees and contract workers, delegating day-to-day operational tasks to his employees. The petitioner noted that the beneficiary's employees' carried out the bookkeeping, billing, accounting, accounts receivable, purchasing and shipping arrangements, and that actual shipping was carried out by an outside contractor. The petitioner also provided evidence of its five full-time employees, including the beneficiary, and employment agreements with several independent contractors and payment to two of them.

The director determined that the beneficiary's job description did not establish that the beneficiary's primary tasks would be executive. The director also referenced the petitioner's organizational chart and noted that the petitioner's California Form DE-6 confirmed the employment of four individuals and the beneficiary. The director did not discuss the petitioner's employment agreements with the independent contractors. The director concluded that the beneficiary would assist with the petitioner's day-to-day non-supervisory duties

and thus could not be considered an executive. The director also concluded that the beneficiary would be involved in performing routine operational tasks rather than managing functions of the business.

On appeal, counsel asserts that the beneficiary is an executive, a manager of personnel, and a functional manager. Counsel references the petitioner's organizational charts, California Form DE-6, Employer's Quarterly Report, for the quarter in which the petition was filed, and three employment contracts entered into with independent contractors and service providers. Counsel contends that the evidence in the record substantiates that all of the petitioner's services and non-managerial tasks required to keep the company operational are performed by the petitioner's employees or contracted workers.

Counsel's assertions are not persuasive. 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). 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 initial description of the beneficiary's duties is broad and paraphrases portions of the statutory definitions of executive and managerial capacity. However, 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.).

In the response to the director's request for evidence, counsel for the petitioner clarified that the beneficiary would be performing solely in an executive capacity. However, the description of the beneficiary's duties focused on the beneficiary's specific duties, such as "negotiate[ing] contracts and assist[ing] the company's clients in the design and development of projects, often acting as a middleman between the U.S. manufacturers and the Korean purchaser," and " travel[ing] routinely to meet and negotiate contract terms," and "finaliz[ing] and sign[ing] contracts on behalf of the U.S. company." These duties are indicative of an individual performing the petitioner's services of bringing international companies together. 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).

The AAO acknowledges that the petitioner employs individuals who carry out bookkeeping, billing, accounting, purchasing, and shipping arrangements when necessary. The AAO observes that the petitioner had entered into agreements with a consulting company in March 1999 and with a second company in September 2001 and had contracted with a company for secretarial services in January 2002. The petitioner has provided a copy of a check paid to one consulting firm in February 2000. The petitioner has not provided evidence of payment to other companies. However, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily carry out the petitioner's services.

Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has also submitted an agreement with an individual identified as the petitioner's vice-president or marketing manager who signed an employment agreement with the petitioner in December 2003, more than a year after the petition was filed.[1] The petitioner has submitted other 2003 agreements between unrelated parties wherein the petitioner has signed as an "agent" or is not even a designated party. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that it was using contracted employees continuously and regularly when the petition was filed. Moreover, as the petitioner's primary business appears to relate to the beneficiary's acts of agency on behalf of U.S. companies or Korean companies, his consulting or agency skills in this regard are not executive tasks.

On appeal, counsel adds for the first time, that the beneficiary is also a personnel manager and a functional manager. Counsel notes that the beneficiary's subordinates have bachelor degrees. However, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity. Rather, the duties of each position must be analyzed to determine if the position requires knowledge or learning, not merely skill, of an advanced type in a given field. The petitioner has not provided evidence that the beneficiary's subordinates actually perform duties that comprise professional 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 petitioner has not established that the beneficiary's duties are supervisory duties of professional employees.

Counsel's argument that the beneficiary is also a functional manager is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Again, 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 at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

---

[1] This same individual is also identified as the vice-president of a separate U.S. company that entered into a December 2003 agreement with an unrelated Korean company. The record also contains a photocopy of a check to this individual dated January 1999; however, it is not clear what service the individual performed to obtain this payment.

Counsel's reference to an unpublished decision is not relevant to the matter at hand. First, counsel has not provided evidence to establish that the facts of the instant petition are analogous to those in the unpublished matter. Here, the beneficiary clearly performs the petitioner's agency services. Second, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include primarily executive or managerial duties. For this reason, the appeal will be dismissed.

The next 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:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The director acknowledged that the record contained *prima facie* evidence that the beneficiary owned 100 percent of both the petitioner and the foreign entity. However, the director requested further evidence to establish that the beneficiary had paid for his purported interest in the petitioner. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In response to the director's request for evidence, the petitioner provided evidence that five individuals[2] wired transferred monies to the foreign entity. The petitioner claims that these individuals were employed by the foreign entity and that the monies wired to the petitioner were specifically on behalf of the beneficiary. However, the record shows that only two individuals were employed by the foreign entity, in the positions of secretary and sales manager, when the money was transferred to the petitioner. The record does not include evidence that the three other individuals worked for the foreign entity or the beneficiary. 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 at 190.

The record does not contain sufficient clarifying evidence of the role played by the individuals transferring monies to the petitioner when the petitioner was first established. The fact that individuals other than the beneficiary capitalized the petitioner taints the petitioner's claim that the beneficiary is its sole owner. The petitioner has not provided evidence to overcome the director's decision on this issue.

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.

---

[2] The foreign entity's name, rather than an individual's name does appeal on a wire transfer dated March 9, 1998.