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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 248 53731 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 August 2001. It imports, distributes, and wholesales gas cylinders, gas regulators, cutting devices, meters, and gauges. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner contends that the director erred when finding the beneficiary would not be employed in the United States as a manager or executive.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the 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;
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> 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
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a July 25, 2002 letter appended to the petition, the petitioner described the beneficiary's position:

> As the president and director [the beneficiary] is responsible for directing the entire operation of the U.S. subsidiary. Specifically he coordinates and collaborates with Brass Eagle Company in the production and marketing of gas cylinders in the United States. He also is in charge of directing the activities of the subsidiary, including overseeing the contracts relating to the importing of gas cylinders and regulators, cutting devices, meters and gauges and exporting gas cylinders to Japan, Asia, Oceania and Europe.
>
> [The beneficiary] is responsible for the development of new markets in the United States and for expansion of the business operations. He is involved in a [sic] wide latitude of decisions including the hiring and firing of employees, supervision of [the] treasurer of the corporation and [the] Manager of the Purchasing and Shipping Departments. He reports directly to [the petitioner's chairman], who is also the president of the [parent company]. The beneficiary directs the business and financial activities of the company and supervises those in charge of such matters. [The beneficiary] is authorized to enter into business arrangements and financial transactions on behalf of [the petitioner] and is the sole authority for doing so. [The beneficiary] also indirectly supervises the Export Manager at the parent company to ensure that all U.S. orders are processed in accordance with directions. [The beneficiary] reviews the financial reports as well as the purchasing and shipping reports and gives directions as appropriate. [The beneficiary] oversaw $1.8 million dollars of sales last year and in a short 5 month span, has lead [sic] the company to a sales figure in excess of $895,000. [The beneficiary] also is responsible for negotiations with vendors and assists them when needed.

On July 23, 2003, the director requested: (1) a more detailed description of the beneficiary's duties in the United States; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, August 2, 2002. The director requested that the chart include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6, Quarterly Wage Reports, for the third quarter of 2002 and the first quarter of 2003.

In response to the director's request for further evidence in support of the petition, the petitioner provided its organizational chart and a description of the beneficiary's duties. The petitioner's organizational chart depicted the beneficiary in the position of president and in a position in the sales department. The chart also showed the company's treasurer in the accounting department, and one individual in the purchasing and shipping department. The petitioner's payroll records confirmed only the employment of the beneficiary and the individual described as an executive assistant and as the purchasing and shipping manager.

The petitioner indicated that the beneficiary spent a couple of hours each morning reviewing electronic mail and facsimiles and preparing responses and viewing information on the websites of competitors and customers. The petitioner also indicated that it owned a 45 percent interest in a distribution company and that the beneficiary worked closely in designing and marketing a variety of uses of the petitioner's gas cylinders.

The petitioner further indicated that the beneficiary hosted group meetings for executives of the parent company and its holding company and traveled to Tokyo several times a year to attend board meetings and to take part in developing new products.

The director determined that: (1) the description of the beneficiary's job duties did not establish that the beneficiary met the criteria outlined in the definition of executive or managerial capacity; (2) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the day-to-day non-supervisory duties; (3) the beneficiary would be essentially a first-line manager who would not supervise managerial or professional employees; and, (4) that the beneficiary did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function.

On appeal, counsel for the petitioner restates the beneficiary's duties as described in the response to the director's request for evidence. Counsel cites several unpublished matters to support her contention that the beneficiary in this matter "operates at a senior level with complete discretion of controlling a major amount of funds and contracts" and that a president acting through subcontractors and negotiating deals as a key function can satisfy the statutory definition. Counsel asserts that the size of the petitioner's office should not be an "overall factor in determining whether or not, [the] beneficiary is engaged in executive type duties."

Counsel asserts that the beneficiary is an executive as he: (1) directs the management of the petitioner and does not ship the petitioner's product, and that his executive assistant performs the day-to-day functions; (2) sets the petitioner's policies and goals and is responsible for all financial arrangements and obligations and for authorizing and negotiating all contracts and functions at a senor level; (3) has the sole authority to make decisions regarding the petitioner, including hiring and firing vendors and suppliers; and (4) receives only general direction from Japan when marketing the product and represents the parent company's interest in the United States.

Counsel also contends that the beneficiary's duties satisfy the criteria of managerial capacity as he: (1) manages both the petitioner and Leland Limited USA, Inc., a company in which the petitioner owns a 45 percent interest; (2) manages the work of his executive assistant who performs an essential function for the petitioner; (3) functions at a senior level within the organizational hierarchy as indicated by the petitioner's organizational chart; and (4) has sole authority over the petitioner, is responsible for overseeing that the exports and products manufactured overseas meet the specifications for the United States market, and is responsible for representing the parent company's products in the United States.

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). Counsel claims on appeal that the beneficiary will be primarily engaged in both managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, a petitioner may not claim that a beneficiary is 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.

The petitioner's initial description is general. The petitioner states that the beneficiary is "responsible for directing the entire operation of the U.S. subsidiary," and is "involved in a [sic] wide latitude of decisions including the hiring and firing of employees," and "directs the business and financial activities of the company and supervises those in charge of such matters." These phrases do not sufficiently define the beneficiary's actual duties but rather paraphrase elements contained in the statutory definition of executive capacity. *See* section 101(a)(44)(B)(i) and (ii) of the Act. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner states that the beneficiary "collaborates with Brass Eagle Company in the production and marketing of gas cylinders in the United States," and is "in charge of directing the activities of the subsidiary, including overseeing the contracts," and is "authorized to enter into business arrangements and financial transactions on behalf of [the petitioner] and is the sole authority for doing so." These general statements do not establish whether the beneficiary's duties are primarily managerial or executive duties or are duties associated with the petitioner's daily operations. 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). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, the petitioner indicates that the beneficiary is responsible for "the development of new markets in the United States and for expansion of the business operations," and "is responsible for negotiations with vendors and assists them when needed," as well as supervising the treasurer and reviewing the financial reports and supervising the purchasing and shipping manager and reviewing the purchasing and shipping reports. These duties are more indicative of an individual performing operational or supervisory services for the company. 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). 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)(A)(iv) of the Act.

The petitioner's response to the request for further evidence did not elaborate on the executive or managerial aspect of the beneficiary's duties. The petitioner indicated that the beneficiary reviewed mail, researched competitors and customers, worked with others in designing and marketing the petitioner's products, hosted meetings in the United States, and traveled to Japan to attend board meetings and develop new products. The petitioner does not explain or further clarify how performing the company's market research, developing new products, and hosting or attending meetings are primarily executive or managerial duties. Moreover, the petitioner's organizational chart depicts the beneficiary as the only individual in its sales department. 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.

Counsel's contention that the beneficiary is an executive because he is not directly involved in shipping the petitioner's product but instead is responsible for authorizing and negotiating contracts is not persuasive. The petitioner has not provided evidence of employees other than the beneficiary who perform the petitioner's sales function. Likewise, the petitioner has not provided evidence of employees, other than the beneficiary, who are responsible for marketing the petitioner's product, and for market research.

Counsel's claim that the beneficiary's duties also satisfy the criteria of a manager is also not persuasive. Again, the petitioner has not provided evidence to support this claim. The petitioner does not describe the beneficiary as performing primarily supervisory duties of managerial, supervisory, or professional employees. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner's payroll records confirm that the petitioner employs one individual in addition to the beneficiary. The petitioner describes this individual's duties as including general office duties, warehouse and inventory maintenance, invoicing for shipments, maintaining accounts payable and receivable and records of correspondence, processing purchase orders, maintaining business records, and compiling documents for end of the year tax returns. These duties are administrative and operational and do not suggest that the position is supervisory, professional, or managerial. The record does not support counsel's contention on appeal that the beneficiary's subordinate manages an essential function. 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).

The petitioner also does not provide documentary evidence that the beneficiary actually manages a separate entity or the employees of that separate entity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As observed above, the record does not contain evidence that the beneficiary's subordinate manages an essential function. To establish that the beneficiary or the beneficiary's subordinate manage an essential function, the petitioner's description of the daily duties for the positions must demonstrate that the function is managed and that the position does not require the performance of the duties related 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N at 604.

Moreover, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, although the petitioner places the beneficiary at a senior level on the organizational chart, the record does not substantiate that the beneficiary primarily performs duties associated with the high level responsibilities identified in the statutory definitions rather than spending the majority of his time carrying out the daily operational tasks of selling, developing, and marketing the petitioner's product.

Counsel correctly observes 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). 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

When considering the reasonable needs of the petitioner, the petitioner must establish that the reasonable needs of the organization justify the beneficiary's job duties. The petitioner must specifically articulate why the petitioner's needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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.

Counsel's citation to unpublished cases carries little probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished matters. The matters cited apply to nonimmigrant petitions.[1] The assertions of counsel will not satisfy the petitioner's burden of proof. As observed above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter Of Laureano*, 19 I&N at 1; *Matter of Ramirez-Sanchez*, 17 I&N at 506. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties.

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.

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[1] The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.