

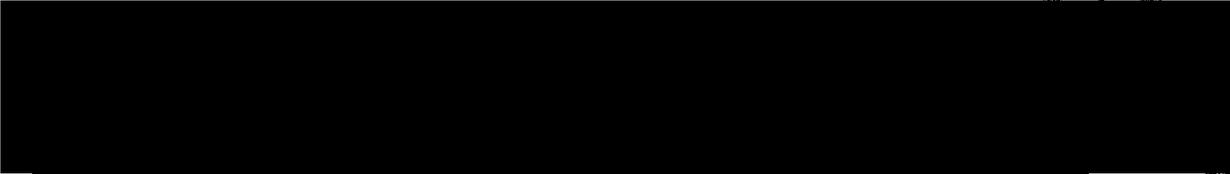
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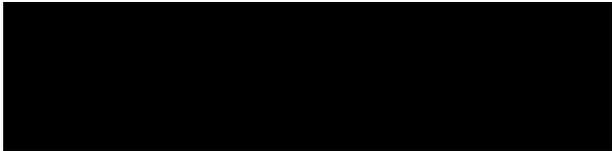


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005
WAC 04 036 50885

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

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

ON BEHALF OF PETITIONER:



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 AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is providing management and promotional services for artists in the music industry. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities and that the petitioner had not demonstrated that the beneficiary was employed by the foreign entity or would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel for the petitioner claims that Citizenship and Immigration Services (CIS) erroneously reviewed the evidence demonstrating an affiliate relationship between the foreign and United States companies. Counsel also contends that the job descriptions contained in the three letters submitted by the petitioner and counsel demonstrate the beneficiary's employment overseas as a manager. Counsel submits a brief in support of the claims on appeal.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

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

The first issue in the instant matter is whether a qualifying relationship exists between the foreign and United States entities.

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;

* * *

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 filed the instant petition on November 19, 2003. In its September 28, 2003 letter submitted in support of the immigrant petition, the petitioner noted an affiliate relationship between the United States entity and two foreign companies located in Turkey and the United Kingdom. The petitioner identified its stockholders as the beneficiary, who purportedly owns 49 percent of the issued stock, and [REDACTED] who was represented as owning the petitioner's remaining shares. The petitioner attached two stock certificates, a stock transfer ledger, and a "written consent" of the petitioner's board of directors, all of which reflected the above-outlined stock ownership.

In a notice dated October 25, 2004, the director asked that the petitioner submit the following documentary evidence of a qualifying relationship between the foreign and United States companies: (1) original wire transfer receipts, cancelled checks and deposit receipts identifying monies transferred by the purported shareholders in exchange for stock ownership in the petitioning entity; (2) an explanation of from where or from whom the transferred funds originated; (3) the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f) reflecting initial offering amounts; (4) the foreign company's annual report identifying subsidiary or affiliated companies; and (5) the foreign companies' articles of incorporation, bank statements for the last twelve months, and business licenses.

Counsel's response included a January 12, 2005 letter from the petitioner, in which the petitioner outlined documentary evidence submitted in support of a qualifying relationship. The petitioner provided bank statements identifying funds transfers from the Turkish company to two separate accounts titled in the name of the beneficiary and [REDACTED]. The petitioner also included a "declaration" from [REDACTED] identifying her interest as an investor, founder and co-partner in the Turkish entity, and confirming the transfer of funds from the company in Turkey to her personal bank account in the United States for the purpose of investing in the petitioning entity. The written consent of the petitioner's board of directors, also

submitted by the petitioner, identified [REDACTED] and the beneficiary as owners of 51 percent and 49 percent of the petitioner's stock, respectively. The petitioner also submitted documents that the petitioner identified in its letter as business licenses, but which also included a certificate of incorporation for a separate foreign company [REDACTED] located in the United Kingdom. The certificate of incorporation identified the beneficiary as the owner of 49 percent of the corporation's 99 shares of stock and [REDACTED] as the owner of the remaining shares. The additional business documentation referenced the foreign company in Turkey.

In a decision dated May 27, 2005, the director concluded that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities. The director addressed the ownership interests of the United States and United Kingdom companies, noting that the beneficiary and [REDACTED] were shareholders of the company in the United Kingdom.¹ The director stated that the evidence submitted did not establish the purported affiliate relationship. The director further noted the absence of voting proxies or agreements relinquishing the control held by one stockholder to another. The director stated "[a]lthough some commonality of ownership may exist, common control must exist to have a qualifying relationship." Consequently, the director denied the petition.

In an appeal filed on June 28, 2005, counsel maintains the existence of an affiliate relationship, stating that at the time of filing, the same person owned a majority of the stock in both the petitioning entity and the foreign corporation. Counsel addresses a mistake in the stock ownership outlined by the director in his decision, stating that the director incorrectly considered the shareholders of [REDACTED] a separate organization located in the United Kingdom that the petitioner "never requested . . . be considered for the application." Counsel also notes that the shareholders of the Turkish company were erroneously considered to be the stockholders of what the director viewed as a second United States organization. Counsel provides the following ownership interests for the three relevant companies:

Petitioning Entity:

[REDACTED]	51,000 shares	51% ownership
Beneficiary	49,000 shares	49% ownership

Turkish Entity:

[REDACTED]	4,750,000,000 shares	95% ownership
[REDACTED]	250,000,000 shares	5% ownership

London Entity (Fabrika International Agency (U.K.), Ltd.):

[REDACTED]	50% of ownership
Beneficiary	50% of ownership

¹ As addressed by counsel on appeal, the director incorrectly identified [REDACTED] as a shareholder of [REDACTED] the beneficiary's foreign employer. However, according to the certificate of incorporation [REDACTED] is a stockholder of [REDACTED], "a separate company also located in the United Kingdom.

Counsel references an attached certification from the Registrar of Companies for England and Wales, which documents the beneficiary and [REDACTED] as the shareholders of the London company, yet does not identify each stockholder's exact ownership interest. As clarification, counsel states in his appellate brief that according to United Kingdom regulations, equal ownership is assumed between two stockholders "when a specific percentage statement is not mentioned."

Counsel also provides the current ownership interests of each of the three companies, noting that the beneficiary is presently the majority shareholder of the United States and Turkish entities. This evidence, however, will not be considered because the stock interests were transferred after the filing of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Upon review, the petitioner has not established the existence of a qualifying relationship between the foreign and United States companies.

Although the petitioner identified the ownership interests in the petitioning entity at the time of filing the petition, the record does not substantiate the claim that [REDACTED] is the majority shareholder of either the London or Turkish companies. With regard to the London company's ownership, counsel relies on regulations of the United Kingdom which purportedly assume equal ownership between two shareholders if the ownership interests are not otherwise identified. Counsel, however, has not provided documentary evidence confirming the referenced law of the United Kingdom. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Counsel has not satisfied this evidentiary burden. Absent documentary evidence, the AAO cannot assume that [REDACTED] possesses an equal or majority ownership interest in the London company. Consequently, the petitioner has failed to establish that an affiliate relationship exists between the United States and London companies. 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).

Additionally, the record does not contain evidence substantiating counsel's claim that the United States and Turkish companies are affiliates. Counsel identifies [REDACTED] the owner of 95 percent of the stock issued by the Turkish corporation, yet again fails to provide documentary evidence confirming the purported ownership. The record contains a June 18, 2004 [REDACTED] which describes a transfer of stock interest from [REDACTED] to the beneficiary on February 23, 2004. However, the record does not include evidence of the percentage of stock owned by [REDACTED] on November 19, 2003, the date on which the immigrant petition was filed. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Without documentary evidence, the AAO cannot conclude that an affiliate relationship exists between the Turkish and United States companies.

Based on the foregoing discussion, the petitioner has failed to demonstrate the existence of a qualifying relationship between the foreign and United States entities. Accordingly, the appeal will be dismissed.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the September 28, 2003 letter appended to the immigrant petition, the petitioner explained that the beneficiary has ten years of international management experience in the entertainment industry throughout Europe, Turkey and the United States. The petitioner provided an outline of the positions held by the beneficiary during this time period, however, in accordance with the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) the AAO will concentrate on the beneficiary's employment during the three years prior to his entrance into the United States in February 2002. The petitioner stated:

In 1998, [the beneficiary] was asked to join [REDACTED] as a Consultant/Manager. [REDACTED] is the first international artist booking agency and management company in Turkey. In one year's time, [the beneficiary] signed fifty (50) new artists and productions to be represented exclusively in Turkey by [REDACTED]. His efforts helped establish [REDACTED] as a prominent talent agency within the entertainment industry in Turkey and abroad.

In January 2000, [the beneficiary] with [REDACTED] (majority shareholder of [REDACTED] and [REDACTED] founded [REDACTED]. [The beneficiary] became the Manager and Vice President of [REDACTED]. As Manager and Vice President, [the beneficiary] was instrumental in establishing [REDACTED] in London, UK and also in building a solid reputation for [REDACTED] throughout Europe. Through his efforts, he secured a number of famous international artists, DJ's and grand scale productions, both exclusive[ly] and non exclusively, and has succeeded in establishing [REDACTED] as a young credible and dynamic agency. [The beneficiary] has also expanded [REDACTED] activities, which traditionally included only managing and promoting talent. [REDACTED] and [REDACTED] now have become main distributors of B-52 Sound Systems in the U.K. and Turkey respectively.

In the beneficiary's attached resume, his position as vice-president of the London office was described as including the following job duties:

Establish company; direct development and direction of the company; solicit artistic talent; research European and U.K. entertainment markets; make connections with artists, producers[,] record companies, club managers and other venues; financial management; investment management; marketing talent, acts, and events through various media outlets, including over the Web; personnel management functions; and contract negotiations.

The beneficiary's position as "consultant/agent" was described as encompassing the following tasks:

Advise, consult and research Turkey's musical entertainment industry, including: trends in music, consumer tastes, fresh new talent, styles of performance, club scenes, productions and promotion of club acts, concerts, special events, etc., sound and lighting equipment, persons of note in the music entertainment industry; and soliciting and tracking new talent.

In a request for evidence, dated October 25, 2004, the director asked that the petitioner submit the following evidence pertaining to the positions held by the beneficiary overseas: (1) a detailed description of the job duties performed by the beneficiary, including an explanation of what the beneficiary did "in the day-to-day execution of his position" and the percentage of time spent on each task; (2) the dates of the beneficiary's employment with the foreign companies; (3) the job title of the employees supervised by the beneficiary, as well as a description of their positions; (4) an organizational chart describing the foreign company's managerial hierarchy and staffing levels; and (5) the beneficiary's payroll records for the year prior to the filing of the petition.

In his January 13, 2005 response, counsel included a letter from the petitioner, dated January 12, 2005, addressing the issues raised by the director in his request for evidence. In addition to providing the job descriptions already outlined in its September 28, 2003 letter, the petitioner stated:

At [redacted] and [redacted] [the beneficiary] was in charge of managing company's artist promotion, management and booking component (35 [%] of job duties). He supervised and controlled the work of other professional employees, such as company agents, marketing manager, PR manager, directors, attorneys, accountants and finance coordinator of the company (20% of job duties). As our manager, [the beneficiary] has full authority to hire and fire or recommend personnel actions (15 [%] of job duties) of [sic] and exercised a wide latitude in discretionary decision making authority over day to day business operations (30% of job duties).

Specifically, [the beneficiary] was responsible for developing and implementing a company vision and policies relating to such tasks as directing and coordinating company's business activities. Also, [the beneficiary] was to [d]evelop and direct activities regarding personal management functions or "Creative and Business Management" functions of [redacted] artists, including but not limited to the following: artists' recordings; the distribution of artists' works; publishing of artists' material; securing bookings; media relations and/or celebrity appearances; negotiating and determining pricing, payment conditions and commissions for artists' services and/or work; exclusive liaison with third parties concerning artists and any of the above activities[.]

Duties also included forming, developing management and marketing strategies for management clients, U.S. Artists, monitoring their business in terms of Public relations, media appearances, productions, and world wide bookings. Negotiating and executing contracts typically involved in the music entertainment industry, including but not limited to, licensing agreements, booking contracts, exclusive and nonexclusive agency contracts, artist management contracts, business management contracts, etc.); Planning, developing and establishing [redacted] policies and objectives in accordance with current and anticipated future developments; Evaluating market research regarding international and American trends on consumer tastes, particularly within the music industry, as well as compiling, analyzing and maintaining market research on general economic trends and business conditions in the U.S., Turkey, the United Kingdom and other European countries; Forming and developing business contacts in the industry.

An attached description of the beneficiary's "professional experience" noted that as the founder of the overseas organizations, the beneficiary "booked and promoted [over 200] shows," and "signed leading music talents to [the] company roster."

An appended organizational chart identified the beneficiary as the "president" and "head of international operations." The chart reflected a staff of four in the United Kingdom office, including a director, and three agents, and six workers, including the director, finance coordinator, marketing manager, public relations manager, attorney and accountant, in the Turkey office.

In a decision dated May 27, 2005, the director concluded that the petitioner had not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director noted a discrepancy in the position identified as the beneficiary's on the foreign entity's organizational chart and in an April 14, 2003 letter from the company's general manager, in which the beneficiary was named as an independent contractor and producer of the Turkish company. In his review of the beneficiary's job duties, the director stated that the petitioner "borrowed liberally" from the statutory definitions of "managerial capacity" and "executive capacity." The director further noted that the beneficiary performed such non-qualifying functions as "negotiating and signing contracts with artists or their agents." The director stated that the petitioner had not demonstrated "that the beneficiary has been managing the organization, or managing a department, subdivision, function, or component of the company," or "that the beneficiary functioned at a senior level within an organizational hierarchy." The director also concluded that the beneficiary was not employed as a functional manager. Consequently, the director denied the immigrant petition.

On appeal, counsel challenges the director's denial of the petition, stating that the beneficiary's job duties "conform to the [regulatory] guidelines." Counsel denies the existence of the April 14, 2003 letter referenced by the director in his decision, and contends that three letters submitted by both counsel and the petitioner address the beneficiary's employment overseas as a manager and not as an independent contractor. Counsel claims that the beneficiary's position as president and sole shareholder of the United States entity should be sufficient to establish his "executive status in the company." Counsel also references the company's organizational chart as demonstrating the beneficiary's supervision of "professional employees such as attorneys, accountants, and directors." Counsel contends that CIS' decision demonstrates its failure to properly review the record.

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

Based on the petitioner's representations, during the three years prior to the beneficiary's transfer to the United States, the beneficiary worked for both the Turkish and United Kingdom offices. However, as noted by the director, the record indicates that the beneficiary was an independent contractor for the company in Turkey. In an April 14, 2003 letter, the company's general manager stated "[the beneficiary] was an international agent and producer working for our company hired as an independent contractor between the years 1998 – 2000." The beneficiary's resume also identifies his role with the Turkish company as that of a "Consultant/Agent" from 1998 to 2000, and indicates that he concurrently worked as a sales consultant for another company during this time. Despite counsel's denial of the existence of the letter, he has not offered any evidence such as payroll records or paystubs, disputing the information contained in the letter and confirming that the beneficiary was an employee of the Turkish company. The regulations require that the beneficiary "was employed by the entity abroad." 8 C.F.R. § 204.5(j)(3)(i)(B). The existence of an employer-employee relationship is established through "the right of the employer to order and control the performance of his or her work." 9 FAM 41.54 N9 (stating that an "employer-employee relationship" requires proof of the employer's "right of control"). As the petitioner has not demonstrated the beneficiary was "employed" by the Turkish company, the AAO need not address the capacity in which the beneficiary worked. The AAO will consider whether the beneficiary's employment in the London office was in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The job descriptions offered by the petitioner demonstrate that the beneficiary personally provided the management and representation services offered by the foreign company. The beneficiary's resume indicates that the beneficiary solicited artists, researched entertainment markets, "[made] connections with artists, producers[,] record companies, [and] club managers," marketed the artists and events, negotiated contracts, and performed the functions related to personnel management. Additionally, according to the petitioner's January 12, 2005 response, the beneficiary compiled and analyzed market research, developed management and marketing strategies, and monitored the "[p]ublic relations, media appearances, productions and world wide bookings" of artists. In light of the above-named job duties, it does not appear that the beneficiary spent 35% of his time "managing" the promotions and bookings of the artists, as represented by the petitioner in its January 12, 2005 letter, but rather is personally performing the tasks himself. Moreover, ancillary evidence, including letters addressed and mailed directly to the beneficiary, demonstrate that the beneficiary was engaged in such administrative tasks as communicating with artists' agents, reserving flights and accommodations, and receiving invoices for payment to artists. 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 record does not demonstrate that the beneficiary was relieved of these non-qualifying duties by the company's agents. Despite the director's request, the petitioner did not offer a description of the job duties performed by the agents. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This information is relevant as the petitioner has not demonstrated that the beneficiary "managed" the company's artists through its agents, as claimed by the petitioner, rather than personally providing the representation services to the artists. The petitioner has not demonstrated that the beneficiary was relieved from performing these services. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, as the company did not employ workers who would perform market research, negotiate the artists' contracts, market the appearances, or perform other functions related to the business, such as maintaining personnel and financial records, making flight and hotel arrangements, and corresponding with agents, it is evident the beneficiary was responsible for performing these non-managerial and non-executive tasks.

The remaining job duties outlined by the petitioner in its January 12, 2005 letter are merely restatements of "managerial capacity" and "executive capacity." *See* §§ 101(a)(44)(A) and (B) of the Act. Specifically, the petitioner stated that the beneficiary "ha[d] full authority to hire and fire or recommend personnel actions," and "exercised a wide latitude in discretionary decision making authority over day to day business operations." 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).

Counsel references the petitioner's September 28, 2003 letter and stresses on appeal that the beneficiary's employment conformed to the regulatory definitions of "managerial capacity" and "executive capacity." In fact, the petitioner's brief statement merely identified the beneficiary's positions as manager and vice-president and did not specifically identify any managerial or executive job duties performed by the

beneficiary during his employment overseas. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner's letter, however, confirms the beneficiary's performance of the company's artist management services, noting that "[the beneficiary] secured a number of famous international artists, DJ's and grand scale productions."

Moreover, counsel's blanket claim on appeal that the beneficiary qualifies as an executive as a result of his position as president and sole shareholder of the United States company is insufficient. The beneficiary's proposed position within the United States company is a separate and distinct issue from his employment capacity overseas. See 8 C.F.R. § 204.5(j)(3). Counsel is required to outline the specific managerial or executive job duties performed by the beneficiary. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Additionally, the title assigned to a beneficiary, by itself, does not establish employment in a qualifying capacity.

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

The third issue is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner noted on Form I-140 that the beneficiary would be employed as its general manager. In its appended letter, dated September 28, 2003, the petitioner provided the following outline of the beneficiary's proposed job as "manager of operations":

1. Exercising a wide altitude [sic] in discretionary decision-making authority over day-to-day business operations, including the company's finance, accounting and personal management functions, such as hiring and firing of employees;
2. Developing and implementing a company vision and policies relating to such tasks as marketing; directing and coordinating [the petitioner's] business activities with [redacted] clients; and directing and coordinating [redacted] business activities and [the petitioner's] U.S. artists;
3. Develop and direct activities regarding personnel management functions or "Creative and Business Management" functions of [the petitioner's] artists, including but not limited to the following: artists' recordings; the distribution of artists' works; publishing of artists' material; securing bookings; media relations and/or celebrity appearances; negotiating and determining pricing; payment conditions and commissions for artists' services and/or work; exclusive liaison with third parties concerning artists and any of the above activities;
4. Determining whether to retain an artist on [the petitioner's] roster when personal management contract expires;

5. Developing short- and long-range corporate goals and objectives for the enhancement of business and for a more efficient and effective operation;
6. Developing [the petitioner's] marketing strategy with regard to promoting U.S. artists abroad;
7. Forming, developing management and marketing strategies for management clients, U.S. Artists, monitoring their business in terms with Public relations, media appearances, productions and world wide bookings.
8. Negotiating and executing contracts typically involved in the music entertainment industry, including but not limited to, licensing agreements, booking contracts, exclusive and nonexclusive agency contracts, artist management contracts, business management contracts etc.;
9. Planning, developing and establishing [the petitioner's] policies and objectives in accordance with current and anticipated future developments;
10. Directing investment funds;
11. Evaluating market research regarding international and American trends on consumer tastes, particularly within the music industry, as well as compiling, analyzing and maintaining market research on general economic trends and business conditions in the U.S., Turkey, the United Kingdom and other European countries;
12. Monitoring and evaluating the company's progress and performance by reviewing activity reports and financial statements;
13. Managing the company's budget, as well as revising company objectives in accordance with current and anticipated future business activities; and
14. Forming and developing business contacts in the industry.

In his request for evidence, the director asked that the petitioner provide the following documentary evidence pertaining to the beneficiary's proposed position: (1) a detailed description of the job duties to be performed by the beneficiary, including an explanation of what the beneficiary "will do in the day-to-day execution of his position" and the percentage of time that the beneficiary would spend on each task; (2) an organizational chart describing the company's managerial hierarchy and staffing levels; (3) the job title of the employees that would be supervised by the beneficiary, as well as a description of their positions; (4) the petitioner's payroll summary and Internal Revenue Service (IRS) Forms W-2 and W-3; (5) the petitioner's federal income tax returns for years 2003 and 2004; and (6) copies of state quarterly wage reports filed during the last eight quarters.

In response, counsel submitted a January 12, 2005 letter from the petitioner, in which the petitioner explained that in his "executive position" of general manager, the beneficiary manages the "personal/creative management functions and projects" for the company. The petitioner again explained the beneficiary's

responsibility of directing activities related to personnel management or "Creative and Business Management" functions, and provided a similar description of the functions to be performed by the beneficiary as that outlined above.

In an attached organizational chart, the beneficiary was identified as the company's "head of international operations" supervising the company's booking agent, accounting clerk, attorney and head of creative operations. The petitioner also provided an outline of the beneficiary's professional experience, stating that in his role with the United States entity, the beneficiary would lead U.S. talent agencies in their representation of music artists, and would "collect and sign the optimal performance offers from territories/promoters, which [cannot] be reached by these US agencies."

In his May 27, 2005 decision, the director concluded that the beneficiary would not be employed by the petitioning entity in a primarily managerial or executive capacity. The director noted a similarity in the beneficiary's job duties in the United States and abroad, and further noted ambiguity in "establish[ing] the beneficiary's position [in the United States]." The director also identified a discrepancy in the title of the beneficiary's position as reflected on the petitioner's organizational chart. The director concluded that the petitioner had failed to demonstrate that the beneficiary's proposed role in the petitioning organization would satisfy the statutory criteria of "managerial capacity" or "executive capacity." Consequently, the director denied the petition.

On appeal, counsel challenges the director's finding, stressing the beneficiary's executive role as president and as the sole shareholder of the United States corporation. Counsel references the managerial and executive job duties outlined by the petitioner in its January 12, 2005 letter, and notes the beneficiary's "broad discretionary and executive powers to determine actions and policies of the company." Counsel emphasizes the need to employ the beneficiary in the United States "to perform the functional part of [the] U.S. Company with respect to recruiting talent, executing deals, and establishing policies for the company."

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

The petitioner has not clarified the position to be held by the beneficiary in the United States. On Form I-140 and in its January 12, 2005 letter, the petitioner identified the beneficiary's proposed position as general manager. Yet, in its September 28, 2003 letter, the beneficiary was identified as the company's "manager of operations." Subsequently, on its organizational chart, the petitioner referenced the beneficiary's position as "president – head of international operations." The petitioner failed to identify the beneficiary's specific position within the organization. Clarification of the beneficiary's job title is an essential preliminary step in establishing the beneficiary's employment as either a manager or executive, and is particularly important, as each position's respective job duties are likely different. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

When examining the executive or managerial capacity of the beneficiary, the AAO will also look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO notes that the job description provided by the petitioner in response to the director's request for evidence is essentially the same as that initially provided in its September 28, 2003 letter, and did not clarify or provide more specificity to the original duties of the position. The purpose of the request for evidence is to elicit further information that

clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Regardless, the job descriptions offered demonstrate that the beneficiary would be performing non-managerial and non-executive job duties of the petitioning entity. Specifically, the beneficiary would be responsible for compiling and analyzing market research, developing the company's marketing strategy, monitoring clients' business with regard to public relations, media appearances, productions, and bookings, negotiating contracts, directing corporate investments, maintaining the company's budget, and developing business contacts. While the petitioner did not provide an allocation of the amount of time the beneficiary would spend on each non-qualifying task, it is reasonable to assume that as the sole employee of the corporation,² the beneficiary would be responsible for all functions of the company, including those that are not managerial or executive in nature. This conclusion is confirmed by travel itineraries and schedules, which indicate that the beneficiary would travel and attend performances with the petitioner's clients, as well identification of the beneficiary on the company's website as "agent."³ 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. at 604. The record does not demonstrate that the beneficiary would be primarily employed by the United States entity as a manager or executive. Accordingly, the appeal will be dismissed.

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

ORDER: The appeal is dismissed.

² The petitioner's Quarterly Wage and Withholding Report for the period ending December 31, 2003 identifies the beneficiary as the only worker employed by the petitioner.

³ The petitioner submitted copies of its "online schedule and booking system for agents and managers," which identified the beneficiary as an agent.