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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

LIN 06 244 52584

Office: NEBRASKA SERVICE CENTER

Date: OCT 31 2008

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, Chief
Administrative Appeals Office

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

The petitioner, a Texas limited liability company, claims to be in the jewelry business and to be an affiliate of a Mexican business entity. 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 denied the petition concluding that the petitioner failed to establish (1) that it is the same as the beneficiary's foreign employer, or an affiliate or subsidiary thereof; or (2) that it will employ the beneficiary in a primarily managerial or executive capacity.

On appeal, the petitioner claims that the foreign entity currently in existence, Artesanias Finas del Pacifico S.A. de C.V., is a successor-in-interest to the beneficiary's original foreign employer, Taxco Exporto S.A. de C.V., which ceased to do business in 1999, and thus there is a requisite qualifying relationship between the petitioner and the foreign employer. The petitioner also claims that the beneficiary will be employed in an executive capacity. The petitioner submits additional evidence in support of its 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 and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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.

Title 8 C.F.R. § 204.5(j)(3) explains that a petition filed for a multinational executive or manager under section 203(b)(1)(C) must be accompanied by a statement from an authorized official of the "petitioning United States employer" which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The first issue in this proceeding is whether the petitioner has established that it is same employer as, or a subsidiary or affiliate of, the Mexican entity by which the beneficiary was employed abroad, Taxco Exporta S.A. de C.V.

A "subsidiary" is defined at 8 C.F.R. § 204.5(j)(2) as:

[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.

Likewise, an "affiliate" is defined in pertinent part at 8 C.F.R. § 204.5(j)(2) as:

- (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[.]

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). In the context of this petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N at 595.

In this matter, the petitioner claims to be 100% owned by the beneficiary. In support, the petitioner submitted organizational documents, a membership certificate, and tax returns. These documents also indicate that the petitioner was incorporated in 2001. In attachments to the Form I-140, the petitioner further asserts that the "foreign company" in Mexico is Artesanias Finas del Pacifico, S.A. de C.V. (hereafter "Artesanias"). The petitioner submitted translated organizational documents for Artesanias which indicate that the beneficiary owns a majority stake in this business entity. These organizational documents also indicate that Artesanias was formed in 2004.

On June 20, 2007, the director requested additional evidence. In his Request for Evidence, the director noted that Citizenship and Immigration Services (CIS) records indicate that the beneficiary was first admitted to the United States in L-1 nonimmigrant status on or about July 16, 1998, approximately six years prior to the incorporation of the claimed foreign employer, Artesanias. Accordingly, the director requested evidence establishing that the petitioner currently has a qualifying relationship with the beneficiary's original foreign employer, i.e., the entity which employed the beneficiary prior to his admission to the United States in L-1 status in 1998.

In response, the petitioner submitted evidence which collectively indicates that the beneficiary was last employed abroad by a company called Taxco Exporta S.A. de C.V. (hereafter "Taxco"), which ceased doing business in 1999. The chief operating officer of Artesanias described the sequence of events in a translated letter dated September 7, 2007 as follows:

The company Taxco Exporta, SA de CV, [the beneficiary] acted as President and at the same time was the major stockholder of the company, which had to stop it's [sic] operations in September of 1999 due to financial engineering and reorganization reason and the a [sic] new company was created, Jewels Of The Pacific Factory, SA de CV, in which [the beneficiary] was the major stockholder and International Corporate Director for the same company, this company left its operations in May of 2005 due Reconstruction to give way to a more financially solid base that would support new investments in the United States, the actual company created was [Artesanias], where [the beneficiary] is the International Corporate Director and major stockholder.

The petitioner also submitted organizational documents for all three Mexican business entities which indicate that the beneficiary owned controlling stakes in each.

It is noted that the record is devoid of evidence that the beneficiary was actually employed abroad by Jewels Of The Pacific Factory, S.A. de C.V. (hereafter "Jewels") or Artesanias even though he was assigned the title "International Corporate Director." To the contrary, CIS records indicate that since 1998 the beneficiary has spent the majority of his time in the United States in L-1 status.

The petitioner also claims that, even though Taxco ceased doing business in 1999, Jewels became its successor-in-interest and, after Jewels ceased doing business in 2005, Artesanias became a successor-in-interest to Jewels. In support, the petitioner submitted a translation of a 1999 document titled "Amendment of Corporate Purpose" pertaining to the formation of Jewels and which describes the relationship between Jewels and Taxco as follows:

In connection with the second point of the agenda, [the secretary] stated that [Taxco] has been operating since 1993, but its organization has been deteriorating over the time and has come to a point where taxes are damaging its financial structure and preventing the optimization of its financial resources. Therefore, as a financial engineering and reorganization tool, he proposed to create a new company, with new partners, to be called [Jewels], where [the beneficiary] would be the Director General and would have full powers and authority to enlarge the field of operations of the new company, and to open new branches in any foreign countries. Such new branches would be managed by employees relocated from Mexico, and [the beneficiary] is hereby nominated as Director General for those branches to be opened abroad, specifically in the United States of America.

[The secretary] added that [Taxco] shall pay all of its current liabilities, and [the beneficiary] stated that [Jewels] shall purchase all assets of [Taxco], so that [Jewels] may commence to do business with a sound financial position.

Furthermore, the petitioner submitted a letter dated April 10, 2006 from Artesanias in which the comptroller describes the relationship between Artesanias and Jewels as follows:

I am writing to inform you that due to some financial restructuring [Jewels] is not longer in operation as of 2005, however a new company [Artesanias] has replaced the former company. [Artesanias] has taken all the rights and obligations that [Jewels] had.

However, it is noted that the record is devoid of evidence corroborating the claim that Artesanias has "replaced" Jewels or that it has absorbed the rights and obligations of Jewels. To the contrary, it appears that Artesanias, similar to Jewels, is a new Mexican company unattached to, or unencumbered by, the prior operations of Taxco or Jewels.

On October 27, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that it is the same as the beneficiary's foreign employer, Taxco, or an affiliate or subsidiary thereof. While the director "conceded" that Jewels appears to be a successor-in-interest to Taxco, the director determined that the record does not establish that Artesanias is a successor-in-interest to Jewels. Accordingly, the petitioner has failed to establish that the beneficiary's prospective employer in the United States is the

same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas, because that employer, Taxco, is no longer in existence. Taxco ceased to exist in 1999.

On appeal, the petitioner claims that Artesanias is a successor-in-interest to Taxco. In support, the petitioner submits a letter dated December 6, 2007 from Artesanias which claims generally that Jewels was "replaced" by Artesanias and that 2005 operating licenses held by Jewels were assigned to Artesanias.

Upon review, the petitioner's assertions are not persuasive.

As noted above, in order establish eligibility for the benefit sought under this immigrant visa classification, the petitioner must establish that it "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C). It is emphasized that this criterion requires the existence of a *present* qualifying relationship with the foreign employer. The criterion will not be met by the existence of a past relationship, which may have been qualifying, but was extinguished because the foreign employer ceased to exist prior to the filing of an immigrant petition.

In this matter, the beneficiary's original foreign employer, Taxco, ceased operating in 1999. Although the record contains evidence indicating that two other entities owned and controlled by the beneficiary, Jewels and Artesanias, were organized in Mexico after the demise of Taxco, the record is devoid of evidence that either of these entities employed the beneficiary or may be considered to be "the firm or corporation or other legal entity by which the alien was employed overseas." The record does not establish that Taxco ceased to exist because of a merger, acquisition, division, or change in corporate form or name, which resulted in Taxco becoming a part of a new entity, such as Jewels or Artesanias, having a current and ongoing qualifying relationship with the petitioner. To the contrary, it appears that Jewels was formed as a new business entity and that it simply acquired Taxco's assets after its formation. Jewels did not acquire Taxco's stock or, importantly, corporately absorb Taxco or its liabilities, and Taxco was apparently abandoned to its creditors in 1999. Furthermore, as correctly noted by the director, the record is also devoid of evidence establishing that Artesanias, also formed as a new corporation, absorbed Jewels after its demise in 2005. 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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Overall, the record is not persuasive in establishing that the petitioner "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. § 204.5(j)(3)(C). The mere fact that another entity buys the assets of the beneficiary's original foreign employer after its demise does not establish that this buyer has assumed the corporate identity of this original foreign employer even if the buyer shares ownership and control with the petitioner and the original foreign employer. Rather, it must be established that the original foreign employer is still in existence at the time the

immigrant petition is filed, either in an identical corporate form or in some other form by way of merger, acquisition, division, or change of name or form.¹

Accordingly, the petitioner has failed to establish that it is same employer as, or a subsidiary or affiliate of, the Mexican entity by which the beneficiary was employed abroad, Taxco, and the petition may not be approved for that reason.

The second issue in this proceeding is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary 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) 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--

¹It is noted that the director "conceded" in his decision that Jewels became a successor-in-interest to Taxco by way of its acquisition of Taxco's assets. However, for the reasons explained *supra*, the AAO disagrees with this conclusion, and the director's finding on that matter will be withdrawn.

- (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 Form I-140, the petitioner claims to employ two workers in the United States and describes the beneficiary as "head of all departments of the business." The petitioner also describes the beneficiary's proposed duties in an attachment to the Form I-140 as follows:

His duties at [the petitioner] are to conduct, management [sic], planning, develop and implement the market strategy, identify the supply chain for its parent company and [the petitioner] and develop rapport with the community leaders. [The petitioner] directs, plans, and implements policies and objectives for [the petitioner] in accordance with what he feels needs to be done to make the company more profitable. Furthermore, he directs the activities of the company in order to plan procedures, establish responsibilities, and coordinate functions for the company. He also analy[z]es the operations of the company to evaluate the performance of [the petitioner] and its staff. During his analysis of the operations of the company he tries to determine areas of cost reduction and program improvement. [The beneficiary] also reviews financial statements, made by his accountant, and sales reports from the company in order to ensure that [the petitioner's] objectives are achieved. He has assigned and delegated the responsibility of managing the daily activity of the company to [REDACTED]. [The beneficiary] establishes internal control procedures that make the day to day function of the company go smoothly. He does not receive supervision from anyone other than the board of directors of [Artesanias]. His directive from the Board of Directors of [Artesanias] is to exercise leadership and goodwill toward the community in order to be a value added person to San Antonio.

The petitioner also describes the duties of the beneficiary's single subordinate worker, [REDACTED], who has been assigned the title "administrator." As this job description is in the record, it will not be repeated here verbatim. Generally, the "administrator" is described in broad terms as being responsible for financial matters, daily operations, and administration and as establishing relationships with vendors and other third parties. The petitioner also claims that a bachelor's degree in accounting, business, or a related field is necessary to perform the administrator's duties. Finally, the petitioner submits a copy of [REDACTED] bachelor's degree in business administration.

On June 20, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's proposed job duties, an organizational chart "that represents the

employees that the beneficiary manages or supervises," and descriptions of the job duties of any subordinate workers.

In response, the petitioner submitted a letter dated September 8, 2007 in which the beneficiary's "executive" job duties are further described and broken down as follows:

1. 50% in planning, strategy development[,] financial review, evaluating market conditions and potential new opportunities;
2. 20% making discretionary decisions coupled with maintaining contact with cruise ships where it's a niche market for jewelry made from precious stones and silver;
3. 30% of his time is spent developing policies and developing relationship[s] with potential suppliers of jewelry made of gold, titanium, precious stones and other styles of silver jewelry as well as the [sic] combined with gold.

The petitioner also claims that the beneficiary supervises both the administrator and three other workers who are employed by other "subsidiaries" in the United States. Finally, the petitioner claims that all of these workers, including [REDACTED], are "professionals."

The petitioner did not submit an organizational chart, even though this evidence was specifically requested by the director.

On October 27, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred, claims that the beneficiary will be employed in an executive capacity, and submits a brief and additional evidence, including an organizational chart.

Upon review, the petitioner's assertions are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity.

As a threshold issue, it is noted that the petitioner's attempt on appeal to submit, for the first time, an organizational chart for the United States operation was inappropriate and will not be considered by the AAO. The director specifically requested a copy of an organizational chart for the United States operation in the Request for Evidence, and the petitioner chose to ignore this request. As the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the petitioner may not supplement the record on appeal with this requested evidence. The AAO will not consider this evidence for any purpose, and the appeal will be adjudicated based on the record of proceeding before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). 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).

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary establishes marketing strategy, develops rapport with "community leaders," implements policies and objectives, "directs the activities," "establishes responsibilities," "coordinate[s] functions," "analy[z]es the operations," and reviews financial data. However, the petitioner fails to specifically describe these strategies, policies, objectives, activities, responsibilities, functions, or operations, or explain what, exactly, the beneficiary will do to develop rapport with "community leaders." The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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. *Id.* 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.

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his operation of the enterprise. To the contrary, it appears more likely than not that the beneficiary will primarily perform first-line supervisory, administrative, and operational tasks. As the beneficiary's single subordinate worker, the "administrator," has not been established to be a professional (*see infra*), it has not been established that first-line supervisory tasks associated with the beneficiary's supervision of the "administrator" will be qualifying duties. Furthermore, the record is not persuasive in establishing that the other duties ascribed to the beneficiary will be truly managerial or executive in nature. For example, the petitioner claims that the beneficiary will devote approximately 50% of his time marketing to cruise ship clients and developing relationships with potential suppliers. As the record does not establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to these duties, it cannot be concluded that the beneficiary will "primarily" perform qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.²

²Although the petitioner claims that a variety of workers are employed by other business entities which purportedly share common ownership and control with the petitioner, e.g., [REDACTED], the record does not establish how these workers are supervised and controlled by the beneficiary or how they serve to relieve the beneficiary of performing the non-qualifying first-line supervisory, marketing, administrative, or operational tasks inherent to his operation of the petitioner, a wholesale jewelry business. Once again, 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.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise an "administrator." However, as he is the petitioner's sole subordinate worker, the "administrator" does not appear to have any supervisory or managerial responsibilities over other employees. Furthermore, as the petitioner failed to submit an organizational chart in response to the director's Request for Evidence, it has not been established that the "administrator" has supervisory responsibilities over other workers. 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). Accordingly, it appears that the beneficiary will be the first-line supervisor of the "administrator." A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. § 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the record is not persuasive in establishing that the administrator is a professional. In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. 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 as that term is defined above.

In this matter, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties of the "administrator." Similar to the beneficiary, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the "administrator" will do on a day-to-day basis. Although it appears that the "administrator" will be generally responsible for daily operations and financial matters, it has not been established that a bachelor's degree in business administration is necessary to perform these vaguely described duties. Once again, 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. 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).

Accordingly, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

³While the petitioner has not argued that the beneficiary will primarily manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The beneficiary's job description is so vague that it cannot be discerned what, exactly, the beneficiary will do on a day-to-day basis. Also, as explained above, it appears more likely than not that the beneficiary will primarily perform administrative or operational tasks and work as a first-line supervisor of a non-professional worker. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for 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,

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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary will manage an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. See 8 C.F.R. §§ 204.5(j)(2) and (5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will more likely than not primarily perform non-qualifying tasks and be a first-line supervisor of a non-professional worker. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.