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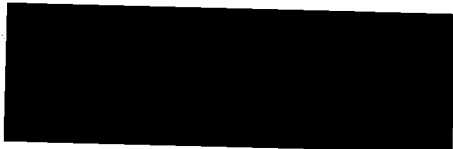
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **APR 01 2005**

IN RE: Petitioner:   
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:



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 this immigrant petition seeking 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 California corporation that is operating a Japanese restaurant. The petitioner seeks to employ the beneficiary as its president and chief executive officer.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been or would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that the director failed to consider "the essential managerial and executive nature of the duties to be performed by [the beneficiary]." Counsel contends that the beneficiary would be employed by the petitioner as a manager of "all essential functions of the company," and claims that the beneficiary therefore satisfies the definition of "managerial capacity." Counsel submits a brief in support of the 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and would be employed by the United States 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.

The petitioner filed the immigrant petition on January 23, 2001, noting that it employed seventeen workers, including the beneficiary. In a letter submitted with the petition, dated January 18, 2001, the petitioner stated that as the president and chief executive officer the beneficiary would be the highest-ranking officer of the company and would be responsible for the financial and business performance of the organization. The petitioner provided the following outline of the beneficiary's job duties as president:

- Negotiation with banks and other financial institutions to provide for cash flow and other financing requirement of [the petitioning entity] in order to develop its restaurant business and ensure its smooth operation in the United States;

- Ultimate authority to review and make final decisions regarding the employment, promotion and termination of all employees in the United States;
- Final and ultimate decision making authority over all financial and accounting practices of [the petitioning entity]. She will make all final budget and economic decisions including oversee[ing] the construction of new restaurant locations and the implementation of a comprehensive marketing plan. In addition, she will communicate directly with the senior management of the parent corporation in Japan, Katsushin, to ensure that all company policies and procedures comply with those of the parent corporation; and
- Supervision of the development and implementation of marketing and business expansion strategy to target potential areas of business growth, opportunities for new restaurants and to follow the development of new growth areas for future restaurant sites.

[The beneficiary] will also manage the expansion of [the petitioning entity's] restaurant business, and she will evaluate the feasibility of opening more restaurants in the United States. She will alter or initiate procedures to improve services and reduce costs of the restaurant and improve the efficient operation of the restaurant.

The petitioner submitted an organizational chart of the company, reflecting the employment of fifteen workers: the beneficiary as president, a general manager, a manager, an assistant manager, a chef, four kitchen personnel and six service personnel.

In a request for evidence issued on April 11, 2001, the director asked that the petitioner provide the following documentary evidence of the beneficiary's employment in a qualifying capacity in the United States entity: (1) an organizational chart for the United States company describing its managerial hierarchy and staffing levels and identifying the names and job titles of all employees under the beneficiary's supervision; (2) a detailed description of the job duties performed by the beneficiary, including the percentage of time spent by the beneficiary on each task and a description of her education and qualifications for the position; (3) a brief description of the job duties, educational level, and annual salary of all employees supervised by the beneficiary; and (4) an explanation as to why the petitioner requires the employment of an additional manager and how the beneficiary's job duties will differ from those performed by the current managers.

Counsel responded in a letter dated June 28, 2001, providing a letter from the petitioner, dated June 29, 2001, wherein the petitioner offered the following description of the beneficiary's employment in the United States:

[The beneficiary] will continue her present duties as the president and chief executive officer of [the petitioning entity]. She will be the highest ranking officer of the company in the United States and will report directly to the undersigned.

[The beneficiary] is authorized to make all personnel, financial and business decisions for the company. She has the authority to establish company policies, hire and terminate employees, borrow money, and make all other day-to-day business decisions for the company.

The company is not intending to assign any additional beneficiaries to the United States. . . . [The beneficiary] has a background in finance and has been assigned the oversight and supervision of restaurants in Tokyo where our company has required the services of a person skilled in financial management, fiscal oversight, personnel restructuring and reorganization. She supervised a total of three (3) restaurants and her services proved exceptionally valuable in restoring the operations to profitability.

[The foreign entity] was faced with a similar, if not more difficult, situation at our restaurant in California. [The beneficiary] is the only local employee with a financial and business organization background. She has the trust and confidence of the senior management in Tokyo and has been able to reverse the negative financial situation of the restaurant[.]

In an attached organizational chart, the petitioner identified the following ten workers: the beneficiary, a general manager, an executive chef, a chef, a kitchen assistant, a service manager, and four individuals employed under the supervision of the service manager whose positions are unspecified.

In his October 15, 2001 decision, the director determined that the petitioner had not demonstrated that the beneficiary has been or would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that "[a]lthough the description [of the beneficiary's job duties] seeks to make it appear that the beneficiary has been and will be functioning as a multinational executive or manager," the petitioner's type of business and organizational structure must support the employment of a manager or executive. The director noted that the petitioning entity, which is involved in the food service industry, does not require or involve the employment of professional employees. The director concluded that the beneficiary, therefore, has not been and would not be employed as a multinational manager or executive. Consequently, the director denied the petition.

In an appeal filed on November 19, 2001, counsel contends that the beneficiary is the manager of an essential function, as her employment satisfies the definition of managerial capacity. Counsel states that the beneficiary functions at a senior level within the organization's hierarchy, is authorized to make decisions, establish policies, and borrow money for the company, reports directly to the foreign company's board of directors, and exercises discretion over the daily financial operations of the corporation. Counsel notes that the director did not contest the authenticity of the beneficiary's job duties, and claims that "[t]he duties of the beneficiary were clearly and unequivocally identified as managerial in nature." Counsel claims that because the beneficiary is in charge of all the essential functions of the company and is "empowered to make managerial decisions concerning the company's personnel, business expansion budget and financial affairs," she qualifies as the manager of an essential function of the corporation.

Upon review, the petitioner has not demonstrated that the beneficiary has been or would be employed by the United States entity 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). Here, the petitioner does not outline the specific job duties to be performed in association with the beneficiary's responsibilities as president and chief executive officer. The petitioner's broad claims that the beneficiary would have decision-making authority over the company's financial and accounting practices, the final budget, and the implementation of the

corporation's marketing plan, and would supervise the development of the petitioner's marketing and business expansion strategies do not address what managerial or executive tasks that would be involved with each responsibility. Additionally, the petitioner does not identify what matters the beneficiary would manage when exercising her authority to "make all other day-to-day business decisions for the company." On appeal, counsel merely recites the beneficiary's vague job responsibilities and makes a blanket assertion that the beneficiary satisfies the definition of managerial capacity. Reciting the beneficiary's vague and broadly cast job responsibilities are not sufficient; the regulations require a detailed description of the beneficiary's job duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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).

In addition to being vague, the petitioner's description of the beneficiary's position in the United States entity is primarily a recitation of the definitions of "managerial capacity" and "executive capacity." See §§ 101(a)(44)(A) and (B) of the Act. The petitioner's statements in its January 18, 2001 and June 29, 2001 letters that the beneficiary would have the ultimate authority to make final decisions with regard to the staff's employment, would hire and terminate employees, would make all financial and business decisions, would establish company policies, and would report directly to the senior management of the parent corporation paraphrase the criteria outlined in each capacity. It is not enough to simply restate the statutory requirement of managerial or executive capacity. Again, the regulations require the petitioner to submit a statement clearly describing the job duties to be performed by the beneficiary. See 8 C.F.R. § 204.5(j)(5). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Moreover, the petitioner's personnel structure does not substantiate the petitioner's claim that the beneficiary would be performing primarily managerial or executive job duties. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time the petition was filed, the petitioning entity had been operating as a Japanese restaurant for approximately seven and a half years.<sup>1</sup> The petitioner's exact number of employees is unclear as the record contains claims ranging from seventeen to ten workers. Of the employees identified, the majority, twelve, are employed as kitchen and service personnel for the restaurant. According to the organizational chart submitted with the petition, the petitioner also employed a general manager and manager. The AAO notes that on the organizational chart submitted in response to the director's request for evidence, the petitioner eliminated the position of "Manager" and noted only one direct subordinate of the beneficiary, the general manager. The number of personnel was also reduced to ten. Notwithstanding the discrepancy in the actual size of the petitioner's staff, the petitioner's summary of its personnel supports a finding that the reasonable needs of the

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<sup>1</sup> While the petitioner's articles of incorporation reflect an incorporation date of June 1997, it appears from the lease submitted by the petitioner that it has been operating in a different corporate form since September 1993.

organization are not met by its current employees. It is implausible that the beneficiary would be responsible for the "supervision of the development and implementation of marketing and business expansion strategy," and would have final decision-making authority over the company's finances, considering the petitioner has not identified any workers who would themselves perform the financial, marketing, and strategic planning for the corporation. Although specifically requested by the director, the petitioner did not provide a description of the job duties performed by the employees supervised by the beneficiary. 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).

Instead, it appears that the beneficiary would in fact be performing the day-to-day non-managerial and non-executive functions associated with these responsibilities. The beneficiary's direct performance of the financial operations of the company is further confirmed by the petitioner's claim that the beneficiary would personally negotiate with banks for cash flow and financing. 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).

Counsel's claim on appeal that the beneficiary is employed as the manager of the company's essential functions is not supported by the record. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

Here, counsel merely claims that the beneficiary is "in charge of not just one but all essential functions of the company." Counsel cannot simply claim that the beneficiary is employed as a functional manager without providing a clear and detailed description of the job duties to be performed by the beneficiary as the manager of the essential function. It is even more unreasonable to expect the AAO to conclude that the beneficiary manages "all" essential functions of the petitioning organization, without the petitioner specifically explaining the functions to be managed by the beneficiary. Counsel's blanket statement that "[n]one of the beneficiary's specified duties were non-managerial," is not sufficient to demonstrate the beneficiary's employment as a function manager. 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. at 534; *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, as previously discussed, the record indicates that the beneficiary is in fact performing the job duties related to the daily functions of the business rather than managing the function.

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

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed overseas in the three years preceding her entry as a nonimmigrant in a managerial or executive capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(C). The petitioner explained in its January 18, 2001 letter that the beneficiary was employed by the foreign entity as a manager in its accounting department, during which she oversaw the financial operations of three restaurants. While the petitioner identified the beneficiary as supervising three workers, a payroll and taxes manager, and two employees in charge of accounts payable and fiscal management, the petitioner noted several non-managerial job duties performed by the beneficiary including preparing annual restaurant budgets, determining the restaurants' sales goals, tracking the goals with the planned budgets, and preparing regular financial reports for senior management. Based on the current record, the AAO is unable to determine whether the beneficiary primarily performs non-managerial operational tasks of the accounting department, or whether the majority of the beneficiary's time is devoted to performing managerial responsibilities. Although specifically requested by the director, the petitioner did not provide a more detailed description of the beneficiary's job duties identifying what proportion of the beneficiary's job duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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). 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). For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.