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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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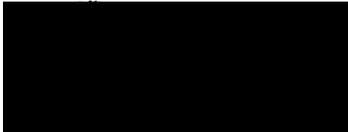
File: [Redacted] Office: TEXAS SERVICE CENTER

Date: NOV - 6 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of Texas and is engaged in the production and sale of handcrafted saddles. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship between itself and a foreign entity. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner submits a letter on behalf of the beneficiary. The petitioner requests reconsideration in accepting the petition on behalf of the beneficiary.

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 first issue to be examined is whether the petitioner has established a qualifying relationship with the foreign entity in this case.

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 initially submitted a letter through its counsel stating that it was a subsidiary of its parent TC Saddlery Trading GmbH and that the beneficiary owned both corporations. In the same letter, the petitioner through its counsel indicated that the beneficiary "was employed by [REDACTED] a subsidiary of [REDACTED]. The petitioner also submitted its certificate of incorporation showing that it was incorporated in June 1996. The petitioner further submitted a copy of the "Unanimous Consent of the Board of Directors in Lieu of Organizational Meeting" dated June 7, 1996. This document revealed that the petitioner was authorized to offer and issue a maximum of 100,000 shares of common stock. The document also revealed that 10,000 shares were issued to the beneficiary. The petitioner also submitted a copy of share certificate number 1 issuing 10,000 shares of its stock to the beneficiary on June 7, 1996. The petitioner also submitted a copy of an agreement with translation regarding the foreign entity TC Saddlery-Trading GmbH. This document reflected the foreign entity ownership as of September 1, 1999 as follows:

[REDACTED] - 71,750
[REDACTED] - 71,750
[REDACTED] - 61,500

The director requested additional documentary evidence to establish a qualifying relationship between the United States company and the beneficiary's foreign employer. In response, the petitioner provided a copy of its stock certificate number 2 issuing 10,000 shares to [REDACTED] on October 30, 1998.

The director determined that the petitioner had not submitted sufficient information of a qualifying relationship and thus the beneficiary had not been employed outside the United States for at least one year by the same employer or a subsidiary or affiliate

of the prospective United States employer.

On appeal, the petitioner does not specify how the director's reasoning on this issue is flawed. The petitioner merely states that its gross revenue for the year 2000 was over \$850,000.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

Case law confirms that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of a immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988); see also Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant proceedings); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings). In context of this visa 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 of Scientology International, at 595.

The petitioner has submitted inconsistent documentation regarding its ownership and control. It states that it is a subsidiary of a foreign entity (or the foreign entity is its subsidiary) but submits documentation that reflects the beneficiary is its sole shareholder. When the director requested clarification of its ownership the petitioner, without explanation, submitted an additional share certificate that, if reliable, results in a different percentage of ownership. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). Moreover, the petitioner has not submitted minutes of relevant annual shareholder meetings, agreements relating to the voting of shares, the distribution of profit, the management and direction of either the petitioner or the foreign entity. With the apparent indiscriminate use of stock certificates with no other independent supporting documentation the Service is unable to determine the elements of ownership and control in the present petition. Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed German company.

The next issue to be examined is the nature of the beneficiary's employment with the United States entity. In denying the

petition, the director found that the beneficiary was not an executive or a manager because it appeared that the majority of the beneficiary's tasks involved performing day-to-day functions of the company.

The petitioner initially submitted a position description stating that the beneficiary was responsible for "the day-to-day activities of the business including but not limited to hiring, supervision and termination of employees, overall management and scheduling of work and product development, development and implementation of policies and procedures." This statement merely paraphrases portions of the statutory definition of "managerial capacity" without comprehensively describing the actual duties of the beneficiary with respect to the daily operations of the company.

The petitioner's description of the beneficiary's job duties provided in response to the director's request for evidence, although more descriptive, is more indicative of an individual performing services for the petitioner rather than performing executive or managerial tasks for the petitioner. For example, the petitioner indicates that the beneficiary designs new products and product lines, researches new and better raw material sources, analyzes bills of materials, graphic design and layout of advertising, makes presentations at trade shows, handles inventory control and negotiates with endorsers. 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).

On appeal, the petitioner emphasizes the need for the beneficiary as its president and director of international development. The petitioner states that the beneficiary functions as the new products creator and has a group of 14 managers and employees directly reporting to him. The petitioner continues to stress that the beneficiary is the creator and developer of its products. The information provided on appeal regarding the beneficiary's duties and responsibilities provides little clarification of the beneficiary's actual day-to-day duties. The petitioner's emphasis that the beneficiary is the creator and developer of its products is too general in nature for the Service to determine that the beneficiary is performing managerial or executive duties with respect to these duties rather than actually performing the duties. In addition, the petitioner has not provided adequate independent documentation of its claimed 14 employees. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or

executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary in the proposed position does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties.

The third issue to be examined is whether the beneficiary was employed by the claimed foreign entity in a managerial or executive capacity.

The director determined that the petitioner had provided a job description for the beneficiary's work with the claimed foreign entity that indicated the majority of the beneficiary's time was spent performing the day-to-day duties of the company. On appeal, the petitioner again provides a general job description for the beneficiary's overseas work only providing specifics that emphasize the beneficiary's performance of basic operations of the company. The petitioner does not provide sufficient documentation to overcome the director's determination on this issue. Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$50,000 per year. The record is deficient in independently establishing the financial viability of the petitioner. The petitioner has failed to provide copies of its Internal Revenue Service (IRS) Form 1120, U.S. Corporate Income Tax Return or audited financial statements. As the petition is dismissed on the grounds stated above, this issue is not examined further.

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.