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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **NOV 19 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:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

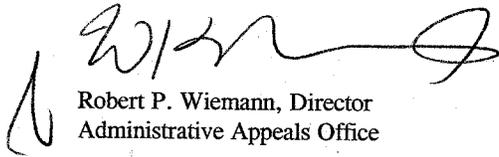
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of California in 1985. It is engaged in manufacturing, selling, importing, and exporting merchandise, parts, and materials. It seeks to employ the beneficiary as its vice-president. Accordingly, it 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 with a foreign entity. The director also determined that the petitioner had not established that the beneficiary's duties would be executive or managerial in nature. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage of \$156,000 per year.

On appeal, counsel for the petitioner asserts that the director reviewed a petition unrelated to this petitioner and beneficiary when reaching his decision. Counsel notes that the decision refers to an unrelated company in paragraph 2 of the director's decision and that the director referred to a notice of action dated January 25, 2001, although the notice of action addressed to this petitioner was dated February 23, 2001. Counsel does not address the substantive portion of the decision that refers to this petitioner and its claimed parent company, the verbatim description of the beneficiary's duties as submitted by the petitioner, and this petitioner's ability to pay the beneficiary the proffered wage of \$156,000.

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

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

* * *

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

is managerial or executive.

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

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

Counsel's assertion that the director reviewed an unrelated petition in reaching his decision is not persuasive. Upon review of the complete decision, it is clear that the director reviewed this petition and the evidence supporting the petition. Other than the second paragraph that refers to another company and the incorrect date noted for the request for further evidence, the body of the decision cites the evidence provided in support of this petition. The director's error in referring to another petition is noted, however as the substantive portion of the decision clearly concerns the petition at hand the substantive portion of the decision will be reviewed.

The first issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the claimed parent company.

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.

Initially, the petitioner submitted a statement indicating that the petitioner's claimed parent company "decided to invest US\$150,000 into [the petitioner] and converted it into [the claimed parent company's] U.S. subsidiary." The petitioner also provided its share certificate number 6 issuing 5,100 shares to the claimed parent company. The share certificate is dated January 2000. The petitioner also provided its Internal Revenue Service (IRS) Form 1120 for 1999. The Form 1120 revealed that an individual owned 60 percent of the common shares of the petitioner and that the value of the outstanding stock was \$40,000.

The director requested additional information on this issue. The director specifically requested proof of the stock purchase and

additionally asked for the petitioner's signed and certified copies of its latest IRS tax forms including its IRS Form 1120.

In response, the petitioner provided copies of a certificate for outward remittance for \$150,000 dated January 12, 1989 (counsel claims the date is according to the Taiwanese calendar), a company bank statement showing a withdrawal from the claimed parent's company bank, and the petitioner's bank statement showing an incoming wire transfer in January of 2000 in the amount of \$150,000.

The director determined that the petitioner had not adequately explained its ownership noting that the petitioner had not provided share certificates 1 through 5 to indicate how many shares were issued by these share certificates. The director also noted that the general manager of the company apparently owned 60 percent of the petitioner.

On appeal, counsel for the petitioner does not address these discrepancies.

However, for thoroughness the Associate Commissioner will review the issue. Upon review, the petitioner has not adequately established the ownership and control of the petitioner. Regulation and case law confirm 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 this 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); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (in non-immigrant proceedings). The record does not contain evidence that stock was transferred from shareholders to the claimed foreign entity. Thus, it appears that a number of shares in addition to those issued to the claimed foreign entity are still outstanding. The record does not reveal the percentage of ownership by the petitioner's various shareholders. The petitioner's latest tax return provided is for the 1999 tax year. The petitioner chose not to submit its IRS Form 1120 for the year 2000 in response to the director's request for evidence or an explanation of why the tax return was unavailable. As such, it remains unclear whether the general manager continues to hold 60 percent of the petitioner's common shares or whether the alleged transfer of shares to the claimed foreign entity modified this holding.

The record is deficient in establishing that the petitioner has a qualifying relationship with a foreign entity.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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-

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 initially did not provide a description of the beneficiary's proposed duties for the United States entity. The

petitioner merely stated that the beneficiary had been appointed to the position of vice-president of the subsidiary. The petitioner also stated that the beneficiary would be "in charge of all of operation and business in the American branch."

The director requested a more detailed description of the beneficiary's duties in the United States.

In response, counsel for the petitioner provided the following description of the beneficiary's responsibilities and duties:

To apply his familiarization of the company policies, operational systems, company markets and products to assist the president to oversee the smooth running of the U.S. subsidiary.

The beneficiary is regularly to hold meetings with the president and the general manager: To review and to discuss methods to improve the company business, to review and to discuss if promotional methods are necessary to boost the sales volume, to review and to discuss if there is a need to increase additional employee, [sic] to review and discuss if there is potential areas to expand markets for the company products, to review and discuss if employees [sic] wages and benefits are comparable to the market trends, to review and to discuss year end budgets, to review and to discuss if the sales volume meets the company expectations and methods to further improve business, to review and to discuss if employees' carry on their duties, to review and to discuss if employees need disciplinary actions or rewards, etc.

Also the beneficiary occasionally accompanies the president and the general manager to make solicitation visits to potential customers and business associates.

The beneficiary is also responsible to assist the president to prepare and submit reports of the progress of the U.S. subsidiary [sic] to the parent company at regular intervals.

The petitioner also provided its organizational chart depicting a general manager, a secretary, a sales person, a warehouse person and a shipping person. The petitioner also provided California Form DE-6, Quarterly Wage Reports for the year 2000. The DE-6 Forms revealed the petitioner employed three individuals in the first quarter and the first two months of the second quarter and four individuals for the last month of the second quarter. The DE-6 Forms further revealed that the petitioner employed three individuals for the first month of the third quarter and four employees for the last two months of the third quarter and for all of the fourth quarter.

The director recited the description of the beneficiary's job duties provided by counsel for the petitioner in response to the request for evidence and concluded that the description was broad and general in nature. The director noted discrepancies between the petitioner's organizational chart and the beneficiary's proposed duties. The director noted specifically that the organizational chart reflected five employees but did not show a president even though the description of the beneficiary's duties included the beneficiary spending a majority of his time with the president and general manager. The director concluded that based on the record the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel for the petitioner ignores the fact that the director based his decision, in part, on the description of the beneficiary's duties submitted in response to the request for evidence. Counsel does not address the deficiencies of the record on this issue.

However, for thoroughness the Associate Commissioner will review the issue. The petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). As noted by the director, the petitioner submitted a broad and general description that does not convey an understanding of the beneficiary's actual daily duties. The beneficiary it appears will spend the vast majority of his time in meetings. The petitioner does not bother to explain the beneficiary's contributions to these meetings. The beneficiary will also occasionally accompany others to solicit business and will also apparently prepare reports. As noted by the director, the petitioner presents confusing information by submitting an organizational chart that does not comport with the description of the beneficiary's proposed duties. 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).

The record contains insufficient evidence to demonstrate that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not sufficiently 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 or will manage a subordinate

staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The third issue in this proceeding is whether the petitioner has established that it has the ability to pay the proffered wage of \$156,000 per year.

8 C.F.R 204.5(g) (2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has not submitted any current independent evidence that it has the ability to pay the beneficiary the proffered wage. Again counsel does not address this issue on appeal. Although the director requested the petitioner's latest IRS Form 1120 in his request for additional evidence, the petitioner chose not to provide its 2000 IRS Form 1120. In determining the petitioner's ability to pay the proffered wage, the Service will rely on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Reliance on federal income tax returns to determine a petitioner's ability to pay is well-established by judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); see also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The record is completely deficient in demonstrating that the petitioner could comply with this salary commitment at the time the petition was filed. Moreover, there is a large difference in the salaries paid to the petitioner's other employees and the salary proposed to be paid to the beneficiary. Such a difference calls into question the underlying validity of the petitioner's offer to employ the beneficiary as a multinational manager or executive.

Beyond the decision of the director, the petitioner did not submit evidence to establish that the beneficiary had been employed by

the claimed parent company abroad in a managerial or executive capacity for at least one year in the three years preceding entry as a non-immigrant, as required by 8 C.F.R. 204.5(j)(3)(i)(B). The petitioner did not provide a comprehensive description of the beneficiary's duties for the claimed parent company. 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). As the appeal will be dismissed for the reasons stated above, this issue is not examined further.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.