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U.S. Department of Justice
Immigration and Naturalization Service

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prevent clearly unwarranted

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

[Redacted]

File: [Redacted] Office: NEBRASKA 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, Nebraska 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 Minnesota in 1990. It is engaged in the business of providing customized computer systems to the Russian banking and retail industry. 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 that the beneficiary would be primarily employed in an executive or managerial capacity. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage of \$60,000 per year.

On appeal, counsel for the petitioner submits additional documentation to support the petitioner's ability to pay the proffered wage and to demonstrate that the beneficiary's position is an international manager or executive position.

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.

The first 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 stated that the beneficiary was "an integral part of the day to day business of [the petitioner]." The petitioner further stated that "[i]n addition to managing our substantial Russian Branch, with over 100 employees involved in the development of software, [the beneficiary] has taken charge of the management of our U.S. operations and training programs. [The beneficiary] has responsibilities in our *U.S. Joint Venture* which requires him to provide both operational, marketing, and training expertise." The petitioner also provided an organizational chart depicting a president, and three vice-presidents reporting to the president. The three vice-presidents shown on the chart included a vice-president of computer operations, a vice-president of bank automation systems as the beneficiary's position, and a vice-president of real estate investment.

The director in a request for further evidence stated that the evidence submitted to demonstrate that the beneficiary qualified as a multinational executive or manager was not sufficient. The director requested that the petitioner provide further evidence to establish that the beneficiary qualified under each of the criteria for a manager or executive. The director requested that the petitioner provide evidence describing the beneficiary's intended employment in the United States.

In response, the petitioner provided a statement from its president stating that the beneficiary clearly met the requirements for executive capacity in that:

- (1) He directs the management of the entire organization;
- (2) He has developed from the ground up the organization, including establishing goals and policies, hiring and firing staff;
- (3) Day to day decisions are left completely to [the beneficiary]. Discussion and decision concerning extremely major topics are discussed at annual or special meetings of ILCA;
- (4) [The beneficiary] holds the highest, most authoritative position in this company and is unsupervised. The annual meeting of the Shareholders of ILCA is the only time when

discussion of his decisions and performance take place.

The petitioner also stated that the beneficiary was recognized by fellow [redacted] shareholders as an executive. The petitioner further stated that the beneficiary's "diverse and extensive responsibilities also easily satisfy 'managerial capacity' criteria." The petitioner also noted that the beneficiary's "presence in the U.S. for 50% of the year is extremely important at this time in order to revive the company." The petitioner concluded that the beneficiary was essential to the success of the petitioner and that the beneficiary "has complete control and authority in all aspects of the business which clearly distinguishes him as an Executive."

The petitioner also provided an organization chart for the [redacted]. The chart depicted the [redacted] holding company with the beneficiary as president of the group. The holding company had seven companies under its umbrella, with the beneficiary holding an interest in each company except for the petitioner. The chart depicted [redacted] as holding a 20 percent interest in the petitioner.

The director determined that the petitioner had not shown that the beneficiary would manage or direct the management of the organization. The director concluded that the beneficiary would be involved in the performance of routine operational activities of the corporation rather than in the management of a function of the business. The director further concluded that the evidence did not support a finding that the beneficiary would be primarily employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner submits additional evidence and requests that the additional evidence be used to find that the beneficiary qualifies as an international executive or manager. The petitioner states in a letter submitted on appeal that the beneficiary as vice-president serves directly under the supervision of the president. The petitioner also states that three professional support personnel, an operations manager, a production manager, and an executive assistant report directly to the beneficiary. The petitioner states that the operations manager has a bachelor's degree and conducts the day to day business of the petitioner and has sales staff reporting to him. The petitioner states that the production manager has a computer science degree and is involved in computer operations and supervises production staff. The petitioner states that the executive assistant has a bachelor degree. The petitioner provides a management chart delineating this reporting hierarchy. The chart notes that production and sales personnel report to the operation manager and the production manager but does not disclose the number of production and sales employees. The petitioner also states that the beneficiary is needed to continue with the negotiation and acquisition of ongoing contracts, planning of

future projects, and also to participate in the undertaking of international trade shows.

The additional information submitted on appeal is not persuasive. 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). The most that can be gleaned from the general description of the beneficiary's responsibilities provided with the initial petition is that the beneficiary will be in charge of the petitioner's operations and training programs and that the beneficiary will provide operational, marketing, and training expertise for the petitioner. The Service is unable to determine from this broad description whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner's claim that the beneficiary also manages its Russian branch is not supported by the record. 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 petitioner has not provided sufficient evidence that it has a Russian branch. The record contains an agreement with one of the company's apparently held by the [REDACTED] that is 70 percent owned by the beneficiary. However, the agreement appoints another individual to make executive decisions for this company. The beneficiary is noted in the agreement as holding the position of chairman of the board. The petitioner does not outline the duties of the beneficiary in this position and furthermore does not provide evidence of the claimed number of employees for the branch. Finally, the record does not contain information on how a company that is not similarly owned as the petitioner could be considered a "branch" of the petitioner.

The petitioner's description of the beneficiary's duties provided in response to the director's request for evidence does not further enlighten the Service regarding the beneficiary's daily activities for the petitioner. The description is vague and refers, in part, to duties such as "direct[ing] the management of the entire organization," and "establishing goals and policies, hiring and firing staff," and that "[d]ay to day decisions are left completely to [the beneficiary]." These duties merely paraphrase elements found in the statutory definition of "executive capacity" and "managerial capacity" without describing the actual duties of the beneficiary with respect to the daily operations. The petitioner also states that the beneficiary "holds the highest, most authoritative position in this company and is unsupervised." This statement directly contradicts the organizational chart provided with the petition and the

management chart and statement provided on appeal that indicates the beneficiary reports to and is supervised by the president. 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 petitioner has not provided a description of the beneficiary's duties that conveys an understanding of the beneficiary's actual daily duties.

The petitioner's statement on appeal that three professional support personnel report directly to the beneficiary does not contribute to a finding of eligibility under this visa classification. Although the individuals holding the positions may have bachelor degrees, the petitioner has not provided evidence to support a finding that the positions held by these individuals are professional positions. The record is deficient in this regard.

The petitioner's statement on appeal that the beneficiary is needed to negotiate contracts, plan future projects and participate in trade shows describes duties that appear to require the performance of basic services for the petitioner. As noted above, an individual who performs tasks for a petitioner is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, supra.

The petitioner's statement that the beneficiary is needed in the United States for 50 percent of the year calls into question whether the beneficiary will be primarily employed by the petitioner in an executive or managerial position.

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. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. 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, consistently 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 or will be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that it has the ability to pay the proffered wage of \$60,000 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.

On appeal, counsel states that request for evidence on the petitioner's ability to pay the proffered wage was misunderstood as the director had referenced the petition as being in conjunction with a labor certification. Counsel submits information on this issue on appeal and asserts that the information provided is sufficient to establish the petitioner's ability to pay the proffered wage. The documentation submitted includes a letter from the petitioner's president stating that the petitioner has been in business since 1990 and has never missed a payroll, and a statement from an accountant that the petitioner has the ability to pay the \$60,000 being offered. The petitioner also includes a statement from its bank indicating that it has a balance of \$99,605.62 in its checking and savings accounts.

The statements provided on appeal are not sufficient to support a finding that the petitioner has the ability to pay the proffered wage. 8 C.F.R. 204.5(g)(2) clearly sets out the type of evidence the Service will consider when determining the petitioner's ability to pay the wage. This evidence was clearly requested by the director and even though the petitioner may have misunderstood the necessity of fulfilling this requirement when it responded to the director's request, the petitioner has now had full opportunity to provide independent evidence of its ability to pay the proffered wage and has failed to do so. In sum, the petitioner has not submitted sufficient independent evidence that it has the ability to pay the beneficiary the proffered wage.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and a foreign entity. 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. 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 submitted its Articles of Incorporation, its By-laws, and three share certificates with the petition to demonstrate its ownership and control. The petitioner's share certificates are issued to three companies in the following proportions:



- 650 shares
- 150 shares
- 200 shares

The director requested further information to demonstrate that a qualifying relationship existed between the overseas employer of the beneficiary and the petitioner. The petitioner in response submitted a statement that the beneficiary had developed a company known as [REDACTED] a joint venture and subsequently had developed several other companies including the petitioner. The petitioner stated that the beneficiary owned 26 percent of [REDACTED] a joint venture. The petitioner also submitted a chart, briefly referred to above, that depicted an [REDACTED] holding company with the beneficiary as president at the top of the organizational hierarchy. The petitioner is also shown in the chart with a 20 percent ownership by [REDACTED]. The chart also contains an organization described as [REDACTED] - 1989," which shows the beneficiary holding a 23 percent interest and also being the general manager. The supporting statement indicates that the beneficiary is the general director of the holding group and has total responsibility for all the companies.

It is not possible to determine from the inconsistent information contained in the record, what organization employed the beneficiary prior to the beneficiary entering the United States as a non-immigrant. Moreover, from the limited information provided



the Service is unable to discern an affiliate or subsidiary relationship between any of the possible foreign employers and the United States entity. [REDACTED] does not appear to own any portion of the petitioner and [REDACTED] a joint venture owns only 20 percent 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 is deficient in establishing that the petitioner has a qualifying relationship with a foreign entity.

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.