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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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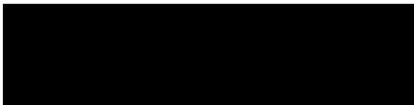
File: WAC 01 244 60176 Office: CALIFORNIA SERVICE CENTER Date:

APR 18 2003

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)

ON BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

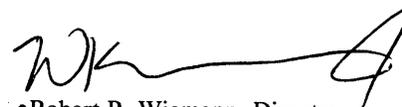
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner was incorporated in March 2000 in the State of California. The corporation is an international trader of garments and equipment, and claims to be a wholly-owned subsidiary of [REDACTED]. The petitioner seeks to employ the beneficiary as its president at a salary of \$24,000 a year. 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 based on the following four conclusions: (1) the petitioner had failed to establish a qualifying relationship with a foreign entity; (2) it had failed to determine that it has been engaged in the regular, systematic and continuous provision of goods and/or services; (3) the petitioner had not established that the beneficiary has been and would be employed in a capacity that is primarily managerial or executive; and (4) the petitioner had failed to establish its ability to compensate the beneficiary his proffered wage.

On appeal, counsel refutes the director's adverse findings and provides a statement and additional evidence in support of the petitioner's claims.

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 in this proceeding is whether the petitioner has established that a qualifying relationship exists between the United States and foreign entity.

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.

In support of the initial filing, the petitioner submitted two stock certificates and a stock transfer ledger, both indicating that a total of 20,000 shares of the petitioning entity's stock were purchased by the foreign parent company. The petitioner also submitted evidence of two fund transfers. Although the first fund transfer resulted in a monetary transfer to the petitioner's bank account, the transfer originated from the beneficiary at a Cambodian banking institution, not from the foreign parent company. The second fund transfer originated from the Golden Dragon, located in China, and was delivered to the account of Shen Mao International Trade, located in California. Thus, the second fund transfer neither originated from the foreign parent, nor was deposited in the petitioner's account.

In response to the director's request for additional evidence, the petitioner submitted the evidence of the first wire transfer (from the beneficiary to the petitioner's bank account), one stock certificate indicating the foreign company's ownership of 10,000 shares of the petitioner's stock, and a stock transfer ledger documenting the foreign company's purchase of 10,000 shares of the petitioner's stock. No other stock transfers were documented on that ledger.

In the denial, the director noted that the wire transfers and other documents provided by the petitioner to establish the foreign company's purchase of the petitioner's stock do not indicate that the funds originated from the foreign company. The director also noted the discrepancy between the stock transfer ledger submitted with the initial filing and the one submitted in response to the request for additional evidence.

On appeal, counsel submits a brief explaining that China's foreign currency control policy does not allow fund transfers out of China in an amount greater than \$10,000. Counsel explains further that, because of China's policy, the fund transfers could not originate from China and were therefore completed by third parties located in other countries. However, the petitioner failed to submit any documentary evidence to support its explanation of China's foreign currency policy. Simply 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).

Counsel also explains that the Minutes of Action of Directors, which took place in March 2000, mistakenly indicated an intent to transfer 10,000 shares of the petitioner's stock to the beneficiary. Although counsel indicates that this mistake was "a pure slip of pen," he provides no documentation, such as an amendment correcting the mistake, to support his explanation. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although counsel also provides an explanation for the inconsistency between the two different stock transfer ledgers, once again, he fails to provide documentary proof to support his claim. 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 regulation 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 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 visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings).

As general evidence in an immigrant petition for a multinational executive or manager, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of an corporate entity. A certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. *Black's Law Dictionary* 1430 (7th ed. 1999). The regulation at 8 C.F.R. § 204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases. As ownership is a critical element of this visa classification, the Bureau may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock

ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. In the instant case, none of the wire fund transfers submitted by the petitioner confirm that the foreign entity purchased any of the petitioner's stock. The petitioner's claim as a subsidiary is based upon the purchase of the assets of the corporation for a fixed amount of remuneration. There is no direct evidence in the record to support the petitioner's claim that the foreign entity supplied the capital to purchase the corporation. Therefore, the petitioner has failed to establish a qualifying relationship between it and a foreign entity.

The second issue in this proceeding is whether the petitioner has established that it has been doing business according to 8 C.F.R. § 204.5(j)(2).

In the denial, the director concluded that the petitioner failed to establish that it has been doing business and noted that "[a]ll invoices, customs and shipping documents submitted for service consideration are ultimately with the foreign parent company." The director also noted that none of the business exchanges are taking place in the United States. The record contains a number of the petitioner's invoices which show Shanghai as the city from which the shipments originated; moreover, the foreign entity is not named as either the shipping or receiving party. Rather, the petitioner is named as the buyer of merchandise that has been ordered from Shanghai. The record also contains a number of invoices which indicate that the petitioner has dealt with companies located in Hong Kong, Cambodia, and the United States. The petitioner is named as a party to each of the invoices in the record. On review, the director's observations are not accurate. They do not determine that the petitioner's business is mainly with the foreign entity. The petitioner clearly does business with a variety of companies which do not necessarily include the foreign entity. Based on the number of invoices in the record, it is also apparent that the petitioner engages in the continuous, systematic and regular course of business. Therefore, the petitioner has overcome the director's objection in regard to this issue.

The third issue in this proceeding is whether the beneficiary will be employed in a 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.

In the initial filing, the petitioner described the beneficiary's duties in the United States as follows:

1. Planning, developing and establishing policies and objectives of the company's business in international trade activities and distribution
2. Designing long-term and short-term business plans, reviewing activity reports and being responsible for budget planning

3. Directing market research and keeping liaisons with prospective clients to establish business connections with U.S. companies and to further develop garment processing business
4. Setting up quality standards for products and product samples, reviewing and approving the design of the products in the U.S. market
5. Directing Seale [sic] Department on import/export issues, locating sellers and buyers, pricing, etc.
6. Overseeing business transactions of all accounts and financial statements to determine progress and status in attaining objectives
7. Holding major business negotiations and sign contracts with other companies and distributors;
8. Hiring employees, designers and sales representatives, and evaluating their performance for compliance with established policies and objectives of the company
9. Maintaining a close working relationship with the overseas parent company in China and reporting progress/development at regular intervals

On December 5, 2001 the Bureau requested that the petitioner submit additional evidence establishing the beneficiary's duties in the United States. The petitioner was instructed to provide, in part, its Form DE-6, Quarterly Wage Reports showing the names of all of its employees and the number of weeks they have worked. The petitioner was also instructed to submit its organizational chart, including a list of employees who work under the beneficiary, their job descriptions and educational levels.

The petitioner responded by submitting an organizational chart which lists four employees, including the beneficiary. The petitioner indicates that the beneficiary's immediate subordinate is a sales manager who assists the beneficiary in policy making and budget planning, and reviews client orders, checks the status of orders, and supervises the petitioner's sales people. It is noted that one of the petitioner's sales people is a salaried employee while the other is commission-based. The petitioner's quarterly wage and tax statements for the four quarters in 2001 indicate that the salaries of three employees were reported, while in 2000 only the beneficiary's salary was reported.

The director denied the petition, noting several discrepancies between the organizational chart submitted with the initial filing and the one submitted in response to the petitioner's request for

additional evidence. Namely, the director noted that in the original organizational chart, the position of general manager was filled by ██████████ who in the most recent chart is claimed to be a commission-based sales person. The director further commented that the original chart indicated that ██████████ would be a sales person, not a manager. In the most recent organization chart, however, ██████████ was shown as occupying the position of sales manager.

On appeal, counsel offers an explanation for this discrepancy, stating that Mr. ██████████ was "found unqualified for business management" and that as a result he was placed in the position of a commission-based employee. Counsel does not, however, explain why an employee who was previously considered hired as a sales person was suddenly moved to a managerial position. 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, supra*. In the instant case, the petitioner has provided only the explanations of counsel to account for the inconsistencies on record. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra*. In addition, as the petitioner has provided no evidence that Mr. ██████████ has received any commissions for work done, there is no indication that Mr. ██████████ is working for the petitioner, leaving the petitioner with three employees, including the beneficiary.

The director also determined that based on the size and nature of the petitioning organization, there is no need for an executive or managerial position and that the beneficiary would, therefore, not be primarily performing executive or managerial duties.

On appeal, counsel urges the Bureau to consider that the petitioning business was commenced during an economically challenging time and that such adverse conditions have kept the petitioner from further development. The petitioner must note, however, that eligibility as a multinational manager or executive must be established at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). There is no provision in the law that allows the Bureau to take into account a petitioner's hardships in determining its eligibility. Furthermore, the Bureau does not compel any petitioner to apply for this preference visa. The petitioner in the instant case was clearly aware of the adverse economic conditions which were preventing it from "expanding fast." That being the case, the petitioner could have chosen to submit its petition at a later date, when it reached a stage of development

which would require the services of a full-time manager or executive.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act.

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. In fact, the description of duties provided by the petitioner are too vague and general to determine what namely the beneficiary has been and will be doing on a daily basis. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. 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). Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity.

The remaining issue in this proceeding is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage of \$24,000 per year.

8 C.F.R. §204.5(g)(2) states the following, in pertinent part:

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."

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

In the director's request for additional evidence, the petitioner was informed that the ability to pay must be established by submitting annual reports, federal tax returns or audited financial statements.

The petitioner responded by submitting its quarterly federal tax returns for the third and fourth quarters of the year 2000, and for all four quarters of 2001. The petitioner also submitted its year 2000 tax return and an unaudited balance sheet and financial statements for the nine-month period ending December 31, 2001.

Based on the documentation listed above, the director determined that the petitioner lacked the ability to pay the beneficiary's proffered wage. Specifically, the director focused on a monetary inconsistency of nearly \$8,000 between the petitioner's quarterly wage statements for the nine-month period ending December 31, 2001, which indicated wages paid in the amount of \$42,300, and the petitioner's income statement and historical general ledger for the same time period which indicated that a total of \$34,740.41 was paid in wages and that of that amount the beneficiary was only paid \$12,458 instead of the \$16,000 indicated on the petitioner's quarterly tax return.

On appeal, counsel explains this discrepancy by stating that "due to a number of personal and business reasons" the beneficiary was not paid for five months of service in the year 2001. No further explanation is provided as to what was meant by "personal and business reasons," nor did the petitioner document or mention why it failed to pay the beneficiary for five months of work. The director concluded in the appeal that the petitioner did not have the ability to pay the beneficiary's proffered wage. Counsel's admission on the petitioner's behalf that there were business

reasons for not having paid the beneficiary for five months of work goes further to justify the director's conclusion regarding the petitioner's inability to pay. As previously stated, the petitioner is obligated 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, supra*. The petitioner's failure to provide credible documentary evidence to clear up the numerical inconsistency between its own internally generated financial statements and the claims made on its quarterly tax returns lead the Bureau to conclude that the petitioner has failed to establish its ability to pay the beneficiary's proffered wage. For this and the remaining issues discussed above, it is determined that this petition cannot be approved.

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.