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

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536



File: WAC 00 261 53289 Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2003

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)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that 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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company organized as a limited partnership in the State of California. The partnership was organized in September 1998. It is engaged in the sale of plastic cards and identification systems, related products, and other services. It seeks to employ the beneficiary as its president and general manager. 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 between itself and a foreign entity. The director also determined that the petitioner had not established that the beneficiary's duties had been or would be executive or managerial.

On appeal, counsel for the petitioner asserts that the director relied on an erroneous understanding of the evidence in concluding that a qualifying affiliate relationship had not been established. Counsel also contends that the director did not consider the beneficiary's management of an essential function and a subordinate professional and managerial staff.

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 a qualifying relationship with the claimed foreign entity.

The regulation at 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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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 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 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). 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, supra* at 595.

The petitioner has provided documentation showing that a California company owns a one percent interest in the petitioner but has exclusive control of the petitioner's business. The petitioner's documentation also shows that the beneficiary's foreign employer is owned and controlled by five individuals. These same five individuals own the remaining 99 percent of the petitioner but do not control the petitioner. The petitioner's documentation also shows that the same five individuals own and control the California company that controls the petitioner. Counsel asserts, thus, that these five individuals ultimately control the petitioner. According to counsel's reasoning, the petitioner and the overseas entity thereby qualify as affiliates.

Counsel's assertion is not persuasive. It is well established that a corporation is a separate legal entity from its stockholders. *Matter of Tessel*, 17 I&N Dec. 631 (Comm. 1981). The California company that controls the petitioner does so on its own behalf. It is the California company that ultimately is subject to liability for its actions. The AAO declines to "pierce the corporate veil" for immigration purposes when a separate legal entity stands between the group of individuals who own approximately the same share or proportion of the petitioner and the foreign entity. In this matter, it is clear that the five individuals who own and control the California company and the foreign entity do not control the petitioner. Accordingly, the petitioner has not established that a qualifying relationship exists between the overseas entity and the petitioner. The director's decision will be affirmed on this issue.

The second issue in this proceeding is whether the petitioner has established that the beneficiary had been and would 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 would "continue to primarily direct the management of the U.S. company." The petitioner also stated that the beneficiary would "eventually supervise and control the work of other managerial, professional, and managerial employees," including authority to hire and fire subordinate staff. The petitioner also noted that the beneficiary had "been delegated broad latitude in the exercise of his discretion over all of the day-to-day operations of [the petitioner]." The petitioner stated further that the beneficiary would "manage an essential function within the organization." The petitioner outlined the beneficiary's additional duties as follows:

[The beneficiary] will continue to develop corporate policies and organizational objectives and continue to direct management in the implementation of these policies and goals. His authority will necessarily extend over the technical liaison with Cards & More affiliates, sales, marketing, technical support, etc.

[The beneficiary] will continue to develop and maintain key business relationships vital to the company's envisioned goal to expand to other states and countries. He will review agreements with major clients, sign major contractual agreements, hold authority to bind the corporation financially without limitation and generally represent [the petitioner] to the U.S. at large. He will be the highest level manager at [the petitioner's] organizational hierarchy.

The petitioner also provided its organizational chart depicting the beneficiary as chief executive officer and president and an individual identified as the technical sales manager. The chart listed several other positions as unfilled and an unidentified temporary employee as secretary.

The director requested information that would demonstrate that the beneficiary would be performing the duties of a manager. The director specifically requested information regarding proposed employees and information regarding who was doing the sales and secretarial work.

In response, the petitioner indicated that the beneficiary had recently hired a technical sales manager and an office manager. The petitioner indicated that the technical sales manager's duties involved technical and sales activities and marketing efforts, including full participation in technical presentations. The petitioner noted that the technical sales manager would provide direction and support to sales representatives. The petitioner described the office manager as being responsible for administrative duties at the company, and one who would oversee the work of secretarial and other support staff that would be hired. The petitioner also reiterated the beneficiary's duties as noted above and provided a percentage breakdown of the beneficiary's duties as follows:

50% - Manage the organization's marketing, administration and operations.

5 % - Ultimate authority to hire, fire, promote and other personal actions.

25% - Direct development of key business relationship with major clients, and other business professionals.

5% - Commit corporation [sic] to contractual obligations without limit.

10% - Formulate business plans, set organizational goals, direct policy.

5% - Develop new products and services.

The petitioner also stated that the beneficiary devoted 100% of his time to primarily directing all aspects of the business operations.

The director determined that the beneficiary would be a first-line supervisor and would be performing the functions of the business himself. The director concluded that the record demonstrated that the beneficiary would be performing all aspects of the day-to-day operations of the business.

On appeal, counsel for the petitioner clarifies that the petitioner is requesting consideration of the beneficiary's position in a managerial capacity not an executive one. Counsel asserts that the director ignored the evidence in the record demonstrating the essential function managed by the beneficiary. Counsel also asserts that the beneficiary manages subordinate managerial personnel. Counsel submits letters from the petitioner's customers stating that the beneficiary is a managerial employee of the petitioner. Counsel also submits an organizational chart of the "Cards & More employees."

Counsel's clarification that the petitioner expects the beneficiary to work only in a managerial capacity is helpful. Although the petitioner's job descriptions for the beneficiary's position includes paraphrases of elements of the definition of executive capacity as defined in 101(a)(44)(B) of the Act, the AAO will consider the position description pursuant to the definition of managerial capacity as requested by the petitioner through its counsel.

Counsel's assertions and evidence are not persuasive. When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner has submitted a broad position description that paraphrases certain elements found in the definition of executive and managerial capacity without describing the actual duties of the beneficiary with respect to daily operations. The petitioner states, for example, that the beneficiary will "continue to primarily direct the management of the U.S. company" and "develop corporate policies and organizational objectives and continue to direct management in the implementation of these policies and goals;" See section 101(a)(44)(B)(i) and (ii) of the Act. The petitioner also states that the beneficiary would "eventually supervise and control the work of other managerial, professional, and managerial employees," including authority to hire and fire subordinate staff and that the beneficiary had "been delegated broad latitude in the exercise of his discretion over all of the day-to-day operations of [the petitioner]." See section 101(a)(44)(A)(ii) and (iii) and (iv) of the Act. The petitioner states further that the beneficiary would "manage an essential function within the organization." See section 101(a)(44)(A)(i) of the Act. These statements are conclusory in that the statements paraphrase the definitions and do not convey an understanding of what the beneficiary does on a daily basis.

The petitioner has provided some insight into the beneficiary's activities by stating that the beneficiary would continue to develop and maintain key business relationships, review agreements, sign contractual agreements, bind the "corporation," and represent the petitioner. Although this description provides some detail regarding the beneficiary's activities it does not describe functions that are necessarily managerial. Counsel contends that the beneficiary is managing an essential function of the petitioner but does not explicitly define the essential function. If counsel is contending that developing and maintaining key business relationships, reviewing and signing contracts, and representing and binding the petitioner to agreements are essential functions of the petitioner, it appears the beneficiary is performing these essential functions rather than managing them. 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 record also confirms that the beneficiary is primarily performing the necessary operations of the petitioner. The petitioner represented in the petition that it only employed a technical sales manager in addition to the beneficiary when the petition was filed. The technical sales manager's duties were described as involving the technical aspect of the sales and marketing efforts. The beneficiary on the other hand generally developed and made the key contacts and represented the company spending at least 25 percent of his time performing this function. The petitioner indicated that the beneficiary spent 50 percent of his time managing the organization's marketing, administration, and operations but failed to provide evidence of other employees who actually performed this function. The AAO concludes, based on the record, that it is the beneficiary who primarily performs these services.

The petitioner's indication that it planned to hire sales and administrative staff in the future, and that it did eventually hire an office manager is not relevant to this proceeding. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45,49 (Comm. 1971).

Counsel's assertion on appeal that the beneficiary manages a subordinate managerial staff is not persuasive. 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). The petitioner has not provided evidence that it employed any individual at the time of filing that could be considered a manager. Counsel's reliance on the technical sales manager's L-1A status to establish the employee's managerial

capacity is unpersuasive. For if the sales technical manager's status was approved based on a similar unsupported record, the approval would constitute clear and gross error on the part of CIS.

Counsel's reference to the beneficiary's management of staff employed in Germany is also unpersuasive. The petitioner has not provided evidence that the petitioner directly employs these individuals and the fact that the individuals are employed in Germany negates the necessity for the beneficiary's continued employment in a managerial capacity by the United States petitioner. In addition, the record does not contain sufficient documentary evidence of the actual employment of overseas staff supervised by the beneficiary. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, the allocation of the beneficiary's time to various tasks does not include information regarding the supervision of overseas employees.

Counsel's inclusion of letters by business people attesting to the beneficiary's managerial status while informative does not add substantively to the record. The adjudication of a beneficiary's managerial capacity is governed by the Act and pertinent regulations.

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 descriptions of the beneficiary's job duties fail to sufficiently describe the actual day-to-day duties of the beneficiary. In addition, the position description paraphrases elements found in the statutory definition 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 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. CIS is not compelled to deem the beneficiary 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.

Beyond the decision of the director, the petitioner has not provided documentation that it was engaged in regular, continuous,

and systematic business for one year prior to filing the petition.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

i. Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

(D) The prospective United States employer has been doing business for at least one year.

The petition was filed on September 1, 2000. The petitioner was registered as a limited partnership in September of 1998 and entered into a lease agreement for office premises in March of 1999 and had a bank account in April of 1999. However, the earliest transactions provided in the record begin in January 2000 nine months prior to filing the petition. The AAO notes that the petitioner generated approximately \$308,000 in gross income for the year 1999, but the record does not indicate how the income was generated and specifically when the income was generated in 1999. As the appeal will be dismissed for the reason 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.