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Citizenship and Immigration Services

BAH

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

[REDACTED]

OCT 09 2003

File: [REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

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:

[REDACTED]

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

Robert P. Wiemann, Director
Administrative Appeals Office

OCT0903-03B4203

DISCUSSION: The employment-based visa petition was approved by the Director, California Service Center. Upon subsequent review, including an investigative report, the director issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company organized in December 1992 in the State of California. It is engaged in the import and export of electronic products and Asian foods. It seeks to employ the beneficiary as its general manager. 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 initially approved the petition filed in June 1996. The approval is dated September 1996. A field investigation of the petitioner's place of business was conducted on March 15, 2001. The director issued a notice of intent to revoke the approval on June 18, 2002. The director, in the notice of intent to revoke, indicated that based on the investigation and the lack of initial evidence submitted with the petition, the petition had been approved in error.

The director determined that the petitioner had not provided evidence that its claimed parent company had actually purchased the common stock designated on its stock certificate number 1. The director based this determination on the lack of documentary evidence showing the monetary transfer of funds from the claimed parent company to the petitioner for the purchase of stock. The director also noted that the Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Returns provided inconsistent information regarding the petitioner's ownership. The IRS Forms 1120 indicated that no foreign person owned the petitioner directly or indirectly, but also indicated that the beneficiary owned 100 percent of the petitioner. The director noted further that the field investigation revealed that the petitioner was engaged in packaging foods rather than in the electronic portion of its claimed business. The director does not clearly state his reasoning regarding the negative impact of the field investigation on the petitioner's qualifying relationship with the beneficiary's overseas employer. The director, however, concluded that the petitioner had not substantiated its qualifying relationship with the beneficiary's overseas employer.

In response to the notice of intent to revoke, the petitioner through its attorney indicated that in 1992 and 1993 it was difficult for Chinese companies wishing to invest in the United States to transfer funds out of China. Counsel states that the petitioner was capitalized with \$19,500 from the beneficiary's personal Hong Kong bank account in April 1993. Counsel also indicates that the petitioner received partial funding of \$8,180

from a third party company that owed this amount to the claimed parent company. Counsel provided a copy of a remittance advice showing the beneficiary had transferred \$19,500 from his Hong Kong account to an account in his name in the United States. Counsel also provided a copy of a notice of incoming money transfer stating that \$8,180 had been deposited to the beneficiary's account from a third party company. Counsel also noted that the petitioner's IRS Form 1120 for the year 2000 reflected the claimed parent company's ownership of the petitioner. Counsel also asserts that the field investigation was flawed as the petitioner had provided documentation that it conducts transactions in both food-stuffs and electronic and scientific goods and has provided its lease that covers an area of 1,536 square feet.¹

The director determined that the record did not contain evidence to support the petitioner's claim that the foreign entity supplied the initial funds for the capitalization of the petitioner. The director found that the evidence in the record did not substantiate a qualifying relationship between the petitioner and the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the beneficiary's foreign employer owns 100 percent of the petitioner. Counsel asserts that the beneficiary owns 99 percent of his foreign employer. Counsel asserts that the beneficiary on behalf of his employer wired funds from his personal bank account to the United States to capitalize the petitioner. Counsel asserts that the petitioner has adequately demonstrated a valid parent/subsidiary relationship between itself and the foreign entity.

Counsel's assertions are not persuasive. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

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 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

¹ The lease is signed by the beneficiary as an individual not in any capacity for the petitioner.

Dec. 362 (BIA 1986) (in non-immigrant proceedings; *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in non-immigrant proceedings).

The petitioner has not provided evidence that the foreign entity capitalized the petitioner. This visa classification is not intended for self-employed persons to enter the United States or remain in the United States to continue their self-employment. The petitioner has not submitted sufficient evidence to establish that the foreign entity capitalized the petitioner. The monies to capitalize the petitioner were supplied by the beneficiary.

Although the petitioner was incorporated, it appears to operate only as a vehicle to continue the beneficiary's self-employment. In sum, the petitioner has not provided sufficient documentation to establish the qualifying relationship between itself and the foreign entity.

The petitioner has indicated that the beneficiary is the 99 percent owner of the foreign entity. However, even if the record consistently showed that the beneficiary owned 100 percent of the petitioner, counsel has not documented an affiliate relationship. 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.

The petitioner has not provided substantiating documentation regarding the actual ownership and control of the foreign entity. 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).

Moreover, the petitioner's tax returns present inconsistencies. The petitioner indicates on Schedule L, Line 22(b) that the petitioner's capital for common stock is \$30,000. The monies allegedly paid to capitalize the petitioner equal \$25,680. The petitioner does not explain this inconsistency. As the director notes, 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 second issue in these proceedings is whether the petitioner established that the beneficiary's primary assignment would be in a managerial or executive capacity. The director stated in the notice of intent to revoke that the petitioner had not included a detailed description of the beneficiary's duties for the petitioner. The director noted further that the field investigation revealed the petitioner's business was conducted in an eight-foot by twelve-foot storage area and was staffed by two employees, the beneficiary and one other individual. The director concluded that based on the evidence in the record and the investigative report, the beneficiary had not and would not qualify as a manager or executive for immigration purposes.

In response to the notice of intent to revoke, counsel contends that the beneficiary performs executive duties. Counsel states that the beneficiary is responsible for negotiating letters of credit, that he identifies wholesaling companies to process products, and negotiates with other companies at the executive level. Counsel asserts that the letters of credit the beneficiary negotiates and the heavy regulation of the food industry require the beneficiary to perform in an executive capacity. Counsel asserts that subordinate staff performs the mundane day-to-day tasks, thus, allowing the beneficiary to conduct only executive duties.

The petitioner also submitted its organizational chart depicting the beneficiary as president and as being responsible for the import department and his wife as being responsible for the finance section and export department. The chart also identified a position of administrative manager also described as a secretary, a salesman, a food packaging processor, a food manufacturing processor, and a delivery person.²

The director, relying on the field investigator's report that an investigator had visited the petitioner's business premises several times and had only found one person working at the location, determined that the petitioner's evidence in the record did not overcome the evidence in the field investigator's report. The director also determined that counsel's job description of the beneficiary's duties did not establish that the position was primarily a managerial or executive position. The director further determined that the record did not demonstrate that the beneficiary

² The petitioner's organizational chart and an employee list show that the petitioner employs two individuals with similar names, the beneficiary's wife, [REDACTED] and another individual named [REDACTED]. [REDACTED] is not reflected on any of the various California Forms DE-6, Quarterly Wage Reports. It is not clear if [REDACTED] is a separate person or is a misspelling of the name of the beneficiary's wife.

would be supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary supervises an administrative manager, [REDACTED], and that CIS has approved her Form I-140, Immigrant Petition for Alien Worker, as a multinational manager/executive. Counsel asserts that the beneficiary's supervision of this individual indicates that the beneficiary himself is a manager/executive.

Counsel's assertions are not persuasive. The record does not contain independent documentation substantiating that the petitioner employed [REDACTED]. As stated previously, 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, supra; Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra.* Although counsel does not submit other evidence on appeal regarding the beneficiary's alleged executive and managerial duties, the AAO affirms that the record is deficient in establishing that the beneficiary's primary assignment for the petitioner is in an executive or managerial 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 record shows an individual primarily performing the operational and many of the administrative tasks of the petitioner. 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 few California Forms DE-6 provided, do not show other full-time employees who relieve the beneficiary from performing non-qualifying duties. The beneficiary is the individual signing the shipping documents, bills of lading, and custom documents. Negotiating and signing letters of credit, identifying companies to do business with, and meeting other executives are not tasks that are necessarily executive or managerial tasks. The petitioner has not provided a sufficiently comprehensive description of the beneficiary's purported duties to conclude that the beneficiary is or will be primarily involved in managerial or executive tasks.

Also of note, the petitioner has not established that the beneficiary's duties for the claimed foreign entity were in a managerial or executive capacity or that the foreign entity continues to do business. The petitioner has not provided sufficient documentation to establish this element of this classification. The AAO notes that the record shows a request for an overseas investigation and that this request is still pending.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.



ORDER: The appeal is dismissed.