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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, DC 20536



OCT 16 2003

File: WAC 02 078 50924 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

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 in June 1997 in the State of California. It is engaged in the wholesale and distribution of computer parts. It seeks to employ the beneficiary as its vice-president. 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 determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel contends that the beneficiary's overseas employer owns the petitioner and that the beneficiary serves the petitioner in an executive capacity.

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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

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.

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 foreign entity.

The petitioner was incorporated in June 1997 and was authorized to issue 300,000 shares. The petitioner's 1998 Internal Revenue Service (IRS) Form 1120, U. S. Corporation Income Tax Return, shows one individual owning 60 percent of the organization and a second individual owning an unspecified interest in the organization. The petitioner's IRS Form 1120 on Schedule L, Line 22(b) shows common stock issued at a value of \$20,000 and at Line 23 additional paid-in capital of \$77,048 at the beginning of the year and \$146,500 at the end of the year. The president of the beneficiary's overseas employer states that the foreign entity

authorized its branch office in Texas to wire approximately \$30,000 to the petitioner for the petitioner's initial funding. The petitioner also provides a credit memo from the beneficiary's overseas employer to its Texas office with the notation that the overseas employer would reimburse the Texas office \$30,000 for the start up of the petitioner's office. The credit memo is dated December 31, 1997. The petitioner further provides its bank statement ending June 30, 1997 showing a deposit of approximately \$30,000 to its account.

The petitioner also submits "Minutes of Organizational Meeting" that took place on January 1, 1999. The minutes indicate that a written offer had been received to transfer the petitioner's business and assets. The minutes directed and authorized issuance of 200,000 shares of the petitioner's stock to the beneficiary's overseas employer. The petitioner also submits stock certificate numbers one through three that bear the notation "void" and stock certificate number four issued to the beneficiary's overseas employer. Stock certificate number four is dated January 1, 1999 and is for 200,000 shares. The petitioner's stock ledger shows stock certificate number four as evidencing the transfer of stock to the beneficiary's foreign employer.

The petitioner's IRS Forms 1120 for the 1999, 2000, and 2001 years show on Schedule L, Line 22(b) stock issued with a value of \$20,000 and at Line 23 additional paid-in capital of \$146,500.

The director determined that the record contained inconsistencies regarding the funding and claimed ownership and control of the petitioner. The director determined that the petitioner had not submitted independent, objective evidence to substantiate the claimed parent/subsidiary relationship.

On appeal, counsel for the petitioner submits a revised stock ledger showing that stock certificate number four issued to the beneficiary's overseas employer is the original issue. The stock ledger indicates that the issue is for 200,000 shares for \$30,000. Counsel asserts that the initial \$30,000 was paid to the petitioner for \$20,000 worth of stock and \$10,000 for operation capital for daily expenses. Counsel asserts that the evidence provided shows that the beneficiary's foreign employer owns 100 percent of the petitioner.

Counsel's assertions are not persuasive. The petitioner has not adequately explained the inconsistencies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The record shows that two individuals originally owned the petitioner. In January 1999, it appears the beneficiary's

foreign employer may have attempted to purchase the business and assets of the petitioner. However, the petitioner provides a wire transfer, a bank statement and credit memo dated in 1997 as evidence of the transfer of funds from the beneficiary's overseas employer to the petitioner. On appeal, counsel submits a revised stock ledger to attempt to show that stock of the company incorporated in 1997 was originally issued in January 1999. The petitioner has not provided explanations consistent with the documentary evidence submitted. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. The petitioner has not offered sufficient evidence to overcome the director's decision on this issue. Therefore, the petitioner has failed to establish a qualifying relationship between the United States and foreign entities.

The second issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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's duties included "assisting the president for the day-to-day operations of the U.S. company; directing hire, train and evaluation of personnel, enforcing company policies and procedures, conducting all of market research, report to President bi-monthly and quarterly report to the Board of Directors in Taiwan."

The petitioner also provided its organizational chart showing a president, the beneficiary's position as vice-president, an office manager, a sales representative, a marketing analyst, accountant, and an office assistant.

The director requested additional evidence to establish that the beneficiary's primary assignment would be in an executive or managerial capacity. The director specifically requested the petitioner's California Forms DE-6, Quarterly Wage Reports and descriptions of the job duties for all employees under the beneficiary's supervision.

In response, the petitioner submitted a revised organizational chart showing an officer manager reporting directly to the beneficiary and three employees reporting directly to the office manager. The petitioner's California Form DE-6 for the quarter in which the petition was filed showed four employees in the positions identified as vice-president (the beneficiary's position), office manager, research and development, and sales. The California Form DE-6 also indicated, however, that the petitioner employed only two individuals in the first two months of the quarter and four employees in the third month of the quarter. The petitioner indicated that the office manager assisted the vice-president in overseeing the company's operation. The petitioner indicated that the salesperson promoted the company's product, negotiated "contact" with clients prior to the vice-president's approval and that the research and

development person explored the Asian market and modified products according to clients' requests.

The director determined that the petitioner's job description for the beneficiary's duties did not establish that the position was either a managerial or executive position. The director also determined that, when the petition was filed on January 2, 2002, the petitioner employed only the beneficiary and the office manager. The director concluded that given the organizational structure it was reasonable to believe that the beneficiary would be assisting in day-to-day non-supervisory duties. The director further determined that the petitioner had not submitted evidence to establish that the beneficiary was a first-line supervisor over professional employees or was a functional manager.

On appeal, counsel asserts that the beneficiary performs in an executive capacity for the petitioner and as a marketing manager for the overseas entity. Counsel asserts that the beneficiary supervises professional staff for the petitioner and manages the company overseas. Counsel submits an updated organizational chart and asserts that the beneficiary supervises all the employees on the chart. Counsel asserts that two of the employees under the beneficiary's supervision also supervise independent contractors. Counsel also submits several documents signed by the beneficiary in support of the petitioner's claim that the beneficiary is acting in a managerial and executive capacity.

Counsel's assertions 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's description of the beneficiary's duties is more indicative of an individual performing the operational duties of a market researcher and of a potential supervisor. The job description is not comprehensive and fails to provide an understanding of the nature of the beneficiary's daily activities. It is not possible to discern whether the beneficiary is primarily performing duties that are managerial or executive duties or is primarily performing operational and administrative tasks. 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).

Moreover, the petitioner has not provided independent evidence that individuals other than the beneficiary perform the petitioner's operational and administrative tasks. When the petition was filed, the petitioner employed one other individual. 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). The petitioner stated that this individual assisted the beneficiary in overseeing the company's operation. The

petitioner has provided insufficient evidence to establish that it employed independent contractors or a sufficient number of employees to relieve the beneficiary from performing non-qualifying duties. 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).

Furthermore, the record does not substantiate counsel's assertion that the beneficiary performs in an executive capacity. Counsel submits several documents including a nondisclosure agreement with another company, a warehouse contract, a lease agreement, and a reseller distribution agreement between the beneficiary and an unrelated company in support of this claim. However, these documents do not demonstrate that the beneficiary's assignment is primarily in an executive capacity for the petitioner. In fact, the reseller distribution agreement suggests that the beneficiary signs documents on his own behalf rather than on behalf of the petitioner.

In sum, the petitioner has not provided sufficient evidence to establish the beneficiary's primary assignment for the petitioner will be in a managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to describe day-to-day duties of a manager or executive. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

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.