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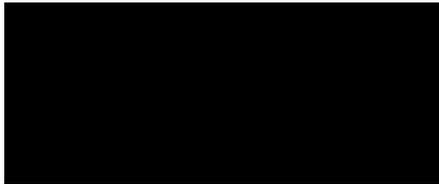
U.S. Department of Homeland Security  
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Washington, DC 20536



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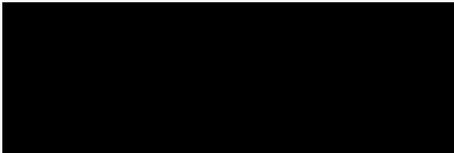
FILE: WAC 00 176 53636 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in July 1998. It manufactures software. It seeks to employ the beneficiary as its branch 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 determined that the petitioner had not established that: (1) the beneficiary had been employed for one year prior to entering the United States as a nonimmigrant in a managerial or executive capacity; (2) the beneficiary would be employed in a managerial or executive capacity for the United States entity; (3) a qualifying relationship existed with a foreign entity; and (4) it had the ability to pay the beneficiary the proffered annual wage of \$60,000.

On appeal, counsel for the petitioner asserts that the beneficiary has been and will be performing in a managerial capacity, that a qualifying relationship exists between the petitioner and the overseas entity, and that the petitioner has established its ability to pay the beneficiary the proffered wage.

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 that the beneficiary performed primarily managerial or executive duties for one year for the foreign entity prior to entering the United States as a nonimmigrant.

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.

Counsel for the petitioner initially stated that the beneficiary had been responsible for supervision of import, export, and distribution of the foreign entity's international product line. Counsel added that the beneficiary also had been responsible for marketing decisions, designing incentive plans, handling the distribution system, and developing new markets for the foreign entity. In response to a request for evidence, the foreign entity stated that the beneficiary had been in charge of the company's overseas sales operation and had been responsible for new product development as well as opening the United States market. The foreign entity also noted that the beneficiary was the only person who had experience in the communications product market in the United States and had been the key person in establishing a business relationship with a third party company. The petitioner also provided the foreign entity's organizational chart showing the beneficiary as the international import/export department/United States branch manager. The organizational chart did not show that the beneficiary supervised subordinate employees.

The director determined that the petitioner had not submitted sufficient evidence of the beneficiary's duties for the foreign entity to establish that the beneficiary was a manager abroad.

On appeal, counsel refers to the letter submitted by the foreign entity stating that the beneficiary had been in charge of the company's overseas sales operation and had been responsible for new product development as well as opening the United States market. Counsel asserts that this information is sufficient to establish the beneficiary's managerial capacity for the foreign entity.

Counsel's assertion is not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The foreign entity's general description of the beneficiary's duties suggests that the beneficiary has been involved in sales and in developing new products. The AAO cannot discern from this description whether the beneficiary performed primarily managerial duties in relation to the tasks or actually performed the 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).

The record does not contain sufficient evidence regarding the beneficiary's overseas position to establish clear distinctions between the beneficiary's proposed qualifying and non-qualifying duties. The petitioner bears the burden of documenting what portion of the beneficiary's duties was managerial or executive and what portion was non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The petitioner has not established that the beneficiary was relieved from performing primarily operational tasks for the foreign entity. The petitioner has not provided evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established that the proffered position is primarily managerial or executive.

The petitioner listed the beneficiary's duties for the United States petitioner in an April 17, 1999 document as:

1. Business activities relating to the exportation of the products to the U.S. and the securing the business counterparts;

2. Importation of new products and obtaining cooperation of technology relating to wireless communication and internet;
3. Collection of information and marketing survey relating to hi-technology necessary for the development of new products;
4. Establishment of the ground to set up U.S. branch to support the business of the parent company;
5. Performing the duty with full authority and responsibility to manage the business and control the personell [sic] matters of the branch as the general manager of the branch on behalf of the parent company.

The petitioner also provided its California Form DE-6, Employer's Quarterly Wage Report for the last quarter of 1999. The California Form DE-6 showed the beneficiary as the petitioner's only employee.

The director requested that the petitioner provide the beneficiary's job duties and responsibilities in detail. The director also requested the petitioner's organizational chart describing its managerial hierarchy and staffing level. The director further requested a list of all employees under the beneficiary's supervision by name, job title, and brief job description.

In response, the petitioner provided a document dated June 15, 1998 describing the beneficiary's duties and responsibilities for the petitioner. The petitioner indicated that the beneficiary was responsible for import and supply, development of business connection of "PCS, CDMA," communication components, and development of joint venture, new merchandise and business. The petitioner concluded by stating that the beneficiary had overall management responsibility of the branch office.

The petitioner also included an organizational chart dated March 2002. The chart showed the beneficiary in the position of general manager. The chart also depicted an assistant sales manager and a general affairs/accounting person under the supervision of the beneficiary.

The director determined that the petitioner had not provided evidence that the beneficiary managed other managers or professional employees. The director observed that the petitioner had not provided independent evidence that it employed individuals other than the beneficiary. The director also determined that the petitioner had not provided evidence that the beneficiary was a functional manager.

On appeal, counsel for the petitioner asserts that the beneficiary is managing other managers and professional employees but notes that there are no additional employees receiving wages like the beneficiary. Counsel also states that the beneficiary is involved in the performance of operational activities and controls the "cardinal function" of the enterprise.

Counsel's assertion 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this matter, the petitioner has generally described the beneficiary's duties. The beneficiary apparently performs the operational tasks relating to importing and exporting products, performs marketing tasks necessary to develop new products, and is attempting to establish the petitioner in the United States. The petitioner again has failed to document what proportion of the beneficiary's duties is managerial and what proportion is non-managerial and non-executive. See *Republic of Transkei v. INS*, *supra*. Counsel acknowledges that the beneficiary is involved in the petitioner's operational tasks and that the petitioner does not have employees receiving wages similar to the beneficiary. Again as observed previously, 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*, *supra*. Finally, the petitioner has not provided evidence that it employs personnel to carry out the day-to-day operations of the petitioner, thus relieving the beneficiary from performing primarily non-qualifying duties.

The petitioner has not provided evidence on appeal to overcome the director's decision on this issue.

The third issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign 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 and petitioner's counsel refer to the petitioner throughout the record as the "branch office" of the foreign entity. However, the petitioner was incorporated in California in 1998 as an entity separate from the foreign entity. The petitioner's articles of incorporation state that it is authorized to issue 5,000,000 shares. Counsel references this authorization, apparently as some evidence of the qualifying relationship.

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 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 proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings). However, the record does not contain stock certificates or a stock ledger to show the purported ownership and control of the petitioner.

Moreover, a stock certificate alone is often not sufficient to establish a company's ownership. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Furthermore, as ownership is a critical element of this visa classification, CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. The record is devoid of such evidence.

Further, the record contains the petitioner's 2000 California Form 100, California Corporation Franchise or Income Tax Return,<sup>1</sup> that provides information inconsistent with the petitioner's alleged relationship with the foreign entity. On side 2, line L, the petitioner indicates that another corporation did not own 50 percent or more of the petitioner during the taxable year. This information is inconsistent with other information found in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has not provided sufficient evidence to overcome the director's determination that the petitioner has not established a qualifying relationship with the beneficiary's foreign employer.

The fourth issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of \$60,000.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

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<sup>1</sup> The record does not contain any of the petitioner's Internal Revenue Service Forms 1120, United States Corporation Income Tax Return.

*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.

The petitioner initially provided no evidence of its ability to pay the beneficiary the proffered wage of \$60,000. The director requested evidence to substantiate that the petitioner had the ability to pay the proffered wage.

The petitioner provided copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to the beneficiary in 1999, 2000, and 2001. The Forms W-2 showed that the petitioner had paid the beneficiary \$18,000 in 1999, \$23,600 in 2000, and \$25,600 in 2001. The director determined that this was not sufficient evidence to establish that the petitioner had the ability to pay the beneficiary the proffered wage of \$60,000.

On appeal, counsel for the petitioner observes that the petitioner's claimed parent company has paid the beneficiary \$26,500 in 2000 and \$28,800 in 2001. Counsel also notes that the petitioner's claimed parent company has paid \$14,000 in housing subsidies to the beneficiary.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, *the petitioner* has not established that it has the ability to pay the beneficiary the proffered wage. (Emphasis added.) The petitioner has not provided evidence that it is a branch office of the foreign entity and has not established that its claimed parent company is obligated to support the beneficiary in his endeavors to establish the petitioner as a viable entity. The record does not contain sufficient evidence to overcome the director's decision on this issue.

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.