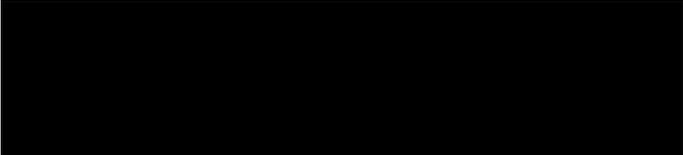


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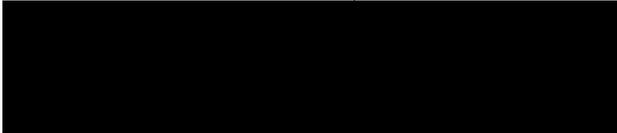
U.S. Citizenship  
and Immigration  
Services



FILE: WAC 03 029 51446 Office: CALIFORNIA SERVICE CENTER

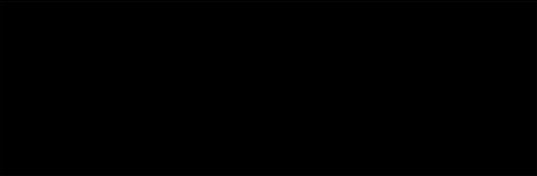
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IN RE: Petitioner:  
Beneficiary:



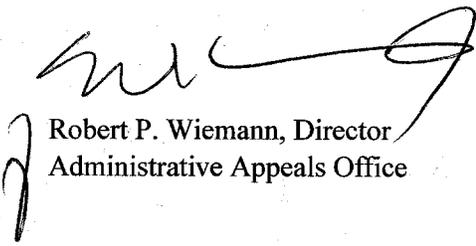
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

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prevent clearly unwarranted  
invasion of personal privacy

**DISCUSSION:** The Director, California Service Center, denied the employment-based 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 September 1997. It trades in sunglasses and other optical products. It seeks to employ the beneficiary as its 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: (1) a qualifying relationship with the beneficiary's foreign employer; or, (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services's (CIS) decision is arbitrary, capricious, and that the director did not fully consider the facts and documents submitted. Counsel also submits a brief in response to the director's decision.

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 foreign employer. 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. See section 203(b)(1)(C) of the Act.

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 petitioner submitted:

A September 16, 2002 letter accompanying the petition signed by the beneficiary indicating that the beneficiary's majority-owned Taiwanese company, Yuu Yeng Enterprise Co., Ltd (Yuu Yeng) invested \$211,250 for a 51 percent interest in the petitioner.

A September 17, 2002 petitioner's letter confirming that the president of Yuu Yeng agreed to invest \$211,250 for 51 percent of the stock of the corporation.

An October 31, 2002 letter signed by counsel stating that in 2001 Yuu Yeng purchased a 52 percent interest in the petitioner for \$211,250.

An undated agreement of the petitioner's purchase and sale of shares wherein the petitioner and Yuu Yeng agreed that the 30,000 outstanding shares were valued at \$195,000 and that the allocation of shares upon the execution of the agreement would be:

Yuu Yeng	52 percent interest	32,500 shares	\$32,500 stated value
Amy Shih	48 percent interest	30,000 shares	\$30,000 stated value

The petitioner's stock certificate number 1 showing 30,000 shares issued to Amy Shih on September 13, 1997.

The petitioner's stock certificate number 2 showing 32,500 shares issued to Yuu Yeng on February 5, 2002.

A California Corporation Commission Notice of Transaction dated February 1, 2002 valuing securities sold at \$211,250.

A wire transfer originating from Yuu Yeng dated November 16, 2001 in the amount of \$219,982 and the petitioner's bank statement showing a credit of \$219,982 on the same day.

The petitioner's 2001 Internal Revenue Service (IRS) Form 1120 for the fiscal year beginning September 1, 2001 and ending August 31, 2002 at Schedule L, Line 22(b) showing capital common stock valued at \$30,000 in the beginning of the year and valued at \$250,000 at the end of the year.

The director observed the inconsistencies in the above documents regarding the price Yuu Yeng paid for the petitioner's 32,500 shares. The director determined that the petitioner had not provided sufficient consistent evidence to establish a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel for the petitioner states that the petitioner has disclosed all information relating to the sale and purchase of the petitioner's stock. Counsel also submits the minutes of a telephonic meeting of the petitioner's shareholders held on November 5, 2003 indicating that to avoid filing an amended tax return, the shareholders have agreed to amend the purchase price for Yuu Yeng's 32,500 shares to \$220,000. Counsel contends that a review of all the documents shows that the beneficiary's foreign employer, Yuu Yeng owns and controls 52 percent of the petitioner's stock.

On review, the petitioner has submitted sufficient documentation to establish that Yuu Yeng owns and controls a majority interest in the petitioner. The AAO observes that the intent of the petitioner to sell a controlling interest has been established. Although the petitioner's documentation contains discrepancies, a review of all the documentation results in Yuu Yeng owning and controlling a 51 percent, 52 percent, or greater interest in the petitioner. In this matter, the petitioner's documentation is sufficient to establish that Yuu Yeng owns and controls a majority interest in the petitioner. The director's decision on this issue will be withdrawn.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 indicated on the petition that the beneficiary as president would be responsible for the overall management, establishment of goals, and directions with overall hiring and firing authority. In a September 17, 2002 letter appended to the petition, the petitioner stated that the current president's duties included

responsibility for the overall day-to-day operations. The petitioner also noted that the current president's responsibilities included making contacts with the manufacturing and exports facilities in China and Taiwan, sales and marketing, customer relations, quotations and proposals, general administration, troubleshooting, and working with the office manager and sales/warehouse manager. The petitioner stated that upon approval of this I-140 petition, the current president would become vice-president and the beneficiary would set the goals and direction and would hire the necessary subordinates in sales, marketing, and finance.

The petitioner also indicated that it employed an office manager responsible for finance and administrative functions including working with its custom freight broker; an accountant responsible for books of original entry, payroll, accounts receivable and payable, and preparation of budget, forecast, and other management reports; a sales/warehouse manager responsible for promotional programs, customers contact and taking orders, incoming and outgoing shipments, and scheduling inventory traffic and levels; and, two customer service personnel responsible for inquiries relating to the petitioner's products.

The petitioner submitted its organizational chart showing a president, an office manager, an accounting person, a sales/warehouse manager, two customer service personnel, and three warehouse employees.

On April 7, 2003, the director requested: (1) the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the fourth quarter in 2002 and the first quarter in 2003; (2) the petitioner's organizational chart, as of the date of filing the petition, that listed all employees by name and job title and included a brief description of their job duties; and (3) a more detailed description of the beneficiary's duties in the United States.

In a June 27, 2003 letter in response, the petitioner's current president stated the following concerning the beneficiary's duties:

As our president he shall remain as the top Executive of the various related operations, and shall be charged with the overall success of the United States operation and to formulate effective marketing program to gain a foothold in retail chains. On diurnal basis, he shall maintain contact with all top management personnel through an assortment of communication media and local meetings with the different management personnel individually or as a group in the process of decision making, laying out our plan and strategy and discuss the strength and weakness of our operation in meeting the competitive challenges we face both domestically and from overseas.

He shall retain subordinates who would perform the various different functions required by [the petitioner] and they would bring to his attention problems that they cannot resolve and major decisions that they believe his approval should be required, and resolve them through discussion and compromise.

He would meet with major customers, suppliers, financial institutions or dignitaries in the execution of contracts or simply socializing and shall share the daily management

responsibilities with myself who would be responsible for the day-to-day operation in his absence.

The petitioner provided a copy of the organizational chart previously submitted adding only the education levels and salaries for each individual. The petitioner also submitted its California Form DE-6 for the quarter in which the petition was filed. The California Form DE-6 showed that the petitioner employed eight individuals.

The director determined that: (1) the beneficiary's job description did not establish that the beneficiary would primarily perform in an executive capacity; (2) the petitioner's organizational chart and California Forms DE-6 showed the petitioner employed a president, an office manager, and accountant, and a part-time manager and part-time customer service and warehouse personnel; (3) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the day-to-day non-supervisory duties; (4) the beneficiary did not qualify as a manager because his position would not be over subordinate managers or professional employees; and, (5) the beneficiary would be performing routine operational duties rather than managing a function of the business.

On appeal, counsel for the petitioner contends that the petitioner needs leadership from the beneficiary to become profitable and to compete in the international market. Counsel submits a list of the petitioner's past and current employees with the dates of their employment as well as the most recent California Form DE-6 filing, copies of I-9s and IRS W-4s for the newly hired, and information on an employee recently hired who would be in charge of marketing.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO 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 job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In this matter the petitioner does not clarify whether it seeks to employ the beneficiary as primarily a manager or primarily an executive or whether it claims his duties will encompass all elements for both managerial and executive capacity.

In addition, the description of the beneficiary's duties is vague and nonspecific. For example, the petitioner states that the beneficiary will be charged with the success of the petitioner. However, this statement does not convey an understanding of what the beneficiary will do on a day-to-day basis to achieve this goal. Moreover, the petitioner indicates that the beneficiary will "maintain contact with all top management personnel . . . in the process of decision making, laying out our plan and strategy and discuss the strength and weakness of our operation." This statement is more indicative of an individual who will provide consulting services to 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). Further, the petitioner does not define the

petitioner's strategies, or clarify who will actually perform the tasks to necessary to execute the strategies. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103, *aff'd*, 905 F.2d at 41.

The petitioner's indication that the beneficiary will be responsible for retaining subordinates to perform the petitioner's various functions implies that the petitioner does not currently employ a sufficient number of individuals to perform the petitioner's operational and administrative tasks. On review, the totality of the record substantiates that the petitioner did not employ a sufficient number of individuals when the petition was filed to relieve the president from performing non-qualifying duties. As the director observed, several of the petitioner's employees appear to work part-time and intermittently. Furthermore, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. This failure of documentation is important because several of the beneficiary's daily tasks, such as meeting with major customer, suppliers and financial institutions do not fall directly under traditional managerial duties as defined in the statute. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Finally, the petitioner does not adequately distinguish the beneficiary's proposed daily tasks from that of the current president, who will "share the daily management responsibilities." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record is insufficient in this regard.

The record does not support counsel's contention that the petitioner needs leadership from the beneficiary to become profitable and to compete in the international market. Moreover, leadership does not comport with any particular element of the statutory definitions of managerial or executive capacity. Conclusory statements regarding the beneficiary's employment capacity are not sufficient. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As determined above, the petitioner has provided a non-specific description of the beneficiary's duties, has failed to provide the percentage of time the beneficiary spends on non-managerial and non-executive duties, has failed to distinguish the duties of the current president and the beneficiary's proposed position, and has failed to establish it has sufficient employees to carry out the day-to-day services of the business without the beneficiary's contribution to the day-to-day operational tasks. The petitioner has not established that the beneficiary's assignment would be primarily managerial or executive.

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.