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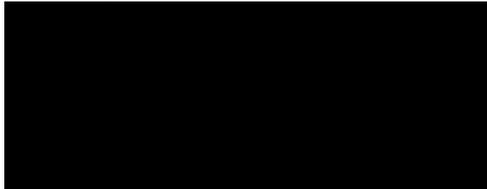
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FILE: WAC 03 041 50466 Office: CALIFORNIA SERVICE CENTER Date: **AUG 08 2005**

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 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 March 2000. It is a wholesaler of rubber gaskets. It seeks to employ the beneficiary as its president/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 determined that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; or (2) that there is a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel for the petitioner 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 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.

In a November 4, 2002 letter appended to the petition, the petitioner stated that the beneficiary currently serves as president and general manager for the foreign entity and would perform similar duties for the United States petitioner. The petitioner indicated that the beneficiary's duties included:

Plans, develops, and establishes policies and objectives of business organization in accordance with board directives and corporation charter: Confers with company officials to plan business objectives, to develop organizational policies[,] to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. Reviews activity reports and financial statement[s] to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and increase productivity. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public. Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives. May preside over board of engineering, and sales.

The petitioner added that the beneficiary would concentrate on developing sales in the United States, Canada, Mexico, and Central and South America. The petitioner also provided its proposed organizational chart depicting the beneficiary as president/general manager. The chart also showed an accountant and an operations manager reporting directly to the beneficiary. The operations manager position was shown to supervise a shipping department and a sales department. The shipping department consisted of one warehouse employee and the sales department consisted of three account managers.

The petitioner further outlined the beneficiary's duties as:

1. Establish and put into operation the duties and responsibilities of all management staff including, but not limited to, the positions of Accountant (aka Office Manager) and Operations Manager.
2. Develop, approve, and implement all marketing strategies as they related [sic] to the sales of manufactured goods distributed by [the petitioner].
3. Scrutinize, evaluate and give final approval of all real estate, capitol [sic] equipment and material purchases.
4. Administers to [sic] the requirements of [the petitioner's] research and development in the formation on improvement of existing product lines and the dissemination of new products for sale. Approximately fifteen (15) percent of the president's duties directly involve this area of development. [Emphasis in original.]
5. Develop, approve, and put into operation all sales territories and provide leadership to all geographical areas assigned to the operations of [the petitioner], including the United States of America, Canada, Mexico, Central and South America.
6. Interprets blueprints and evaluates samples as presented by customers in order to give competitive quotes.

7. Report to Management Board of Directors at [the foreign entity], on a regular basis to exhibit and evaluate [the petitioner] as to its progress against current and long-range goals.

The petitioner also listed the duties of the accountant and operations manager and provided their position descriptions.

The director requested California Forms DE-6, Employer's Quarterly Wage Report, for the fourth quarter of 2002, the quarter in which the petition was filed. The petitioner provided the California Form DE-6 in its response to the director's request for evidence. The California Form DE-6 confirmed the employment of the individuals identified on the organizational chart as the petitioner's accountant, operations manager, warehouse employee, and the three accounts managers.

The director determined that the description of the beneficiary's job duties did not establish that the beneficiary met the criteria outlined in the definition of executive capacity. The director also reviewed the petitioner's organizational chart and found the petitioner's organizational structure unreasonable as it labeled six individuals in a managerial capacity. The director determined that the beneficiary would be assisting in day-to-day non-supervisory duties. The director concluded that the beneficiary did not qualify as a manager as he would not be primarily supervising professional employees and that he did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function.

On appeal, counsel indicates that the beneficiary continues to serve as president of the claimed parent company and that his duties for the parent company qualify him as an executive. Counsel asserts that the beneficiary, who performs similar duties for the petitioner, must also qualify as an executive for the petitioner. Counsel observes that the petitioner's day-to-day non-supervisory duties are assigned to the six company employees thereby relieving the beneficiary from performing those duties. Counsel clarifies that the beneficiary is seeking eligibility as an executive but notes that it can also be argued that the beneficiary qualifies as a functional manager. Counsel contends that the beneficiary's primary objective is to develop sales for the petitioner and thus, it can also be argued that the beneficiary manages the sales function of the company. Counsel notes that the beneficiary spends minimal time (10 to 15 percent) supervising the accountant and operations manager, but that the beneficiary functions at a senior level within the organizational hierarchy and exercises discretion over the day-to-day operations of developing sales through the efforts of the operation manager. Counsel also advises that as the beneficiary is not a first-line supervisor, the director's discussion of professional employees is superfluous.

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 has not established that the beneficiary's tasks for the petitioner are primarily executive tasks. For example, the petitioner does not explain the necessity of the beneficiary establishing and putting into operation the duties and responsibilities of the management staff. The record indicates that the petitioner is already operating with an operations manager. In addition, the petitioner appears to be an established business that desires to develop sales in the United States, Canada, Mexico, and Central and South America. To effectively do so, the petitioner is requesting the beneficiary's services to "[d]evelop, approve,

and put into operation all sales territories and provide leadership to all geographical areas assigned to the operations of [the petitioner], including the United States of America, Canada, Mexico, Central and South America," and "[d]evelop, approve, and implement all marketing strategies as they related [sic] to the sales of manufactured goods distributed by [the petitioner]." The AAO is unable to conclude that the beneficiary's tasks associated with the petitioner's marketing services are primarily executive tasks rather than the necessary tasks required to expand the petitioner's operations. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Likewise, the beneficiary's task of scrutinizing, evaluating, and approving major purchases may be executive in capacity but may also be part of the routine operational tasks involved in making purchases. The beneficiary's involvement in research and development, interpreting blueprints, and evaluating samples is indicative of an individual providing the petitioner's essential product and services. Overall, the petitioner's description of the beneficiary's duties is non-specific and does not sufficiently distinguish between the beneficiary's purported executive tasks and those that involve an owner's operational 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 actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner has not presented evidence that the petitioner's six employees relieve the beneficiary from providing marketing services, making major purchases, and researching and developing the petitioner's products. The operations manager's primary duties are related to supervising the warehouse employee and the sales representatives, as well as troubleshooting, acting for the administrator/president, and representing the organization to staff, customers, and other organizations. While the beneficiary is relieved from performing these duties, the record does not show that the operations manager also markets the petitioner's product or is otherwise primarily involved in developing the petitioner's sales operations.

Counsel's assertion that the beneficiary manages the sales function of the company is also not persuasive. Counsel asserts that the operations manager carries out the day-to-day sales development operations but the description of the operation manager's duties does not include this task. 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 Obaighena*, 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). Moreover, when a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Further, as required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not articulated the necessity of the beneficiary's employment in a primarily executive capacity, when the petitioner's objective for the beneficiary is to expand the petitioner's sales territories. The reasonable needs of the petitioner appear to require the addition of an employee to expand sales territories rather than to add an individual in a primarily executive position. 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).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will incorporate primarily executive or managerial duties.

The next 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.

In the November 4, 2002 letter appended to the petition, the petitioner stated that the beneficiary owned 51 percent of the foreign entity's shares. The petitioner also stated that the beneficiary owned 100 percent of its shares. The petitioner submitted: (1) its Articles of Incorporation filed in March 2000; (2) stock certificate number 1 issued on September 19, 2002 to the beneficiary in the amount of 50,000 shares; and, (3) its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showing on Schedule K, Line 5 and an attached statement that the foreign entity owned 100 percent of the petitioner, and showing on Schedule L, Line 22b that the petitioner's outstanding common stock was valued at \$1,600,000.

The director requested proof of the petitioner's stock purchase, minutes of the U.S. company's meeting that listed the petitioner's stock shareholders and the number or percentage owned, and IRS Forms 1120 with all attachments for the years 1999, 2000, 2001, and 2002.

In response, counsel for the petitioner indicated that the petitioner was a "branch" of the foreign entity and that the beneficiary, as the majority shareholder of both the parent company and its "branch," controlled both entities. Counsel indicated that proof of the beneficiary's purchase of the petitioner's stock had been submitted and that the beneficiary was the petitioner's only shareholder. The petitioner also submitted its IRS Forms 1120 for the years 2000 and 2002. The IRS Forms 1120 showed on Schedule K, Line 5 and the attached statements that the foreign entity owned 100 percent of the petitioner, and on Schedule L, Line 22b that the petitioner's outstanding common stock was valued at \$1,600,000.

The director observed the inconsistencies in the record regarding the petitioner's ownership and control and determined that the petitioner had not provided sufficient consistent evidence to establish a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner acknowledges that the petitioner's IRS Forms 1120 contained errors and submits amended tax returns for consideration. Counsel also explains that the claimed parent company opened a branch office in Chicago, Illinois in 1998. Counsel submits a copy of a wire transfer in the amount of \$50,000 from the claimed parent company's bank account to the Chicago branch office. Counsel further explains that in 2000 the claimed parent company decided to open a branch office in California, dissolve the Chicago branch office, and invest the proceeds from the Chicago entity's goodwill (\$1,600,000) in the California branch. Counsel also notes that the petitioner failed to issue a stock certificate to the claimed parent company due to an oversight. Counsel asserts that the claimed parent company owns 400,000 shares of the petitioner, purchased at \$4.00 per share for a total of \$1,600,000 and that the beneficiary purchased 50,000 shares of the petitioner's stock in 2002 at a price of \$1.00 per share. Counsel concludes that the beneficiary's foreign employer was and is the petitioner's majority shareholder, that the foreign entity controls the petitioner, and that a qualifying relationship has been established. Counsel submits an October 9, 2000 agreement between the petitioner and the Escort Seal (Chicago) Co., Ltd. office stating that the petitioner will purchase from the Chicago office: (1) inventory in the amount of \$1,251,611; (2) equipment in the amount of \$96,000; and, (3) goodwill in the amount of \$160,000.

Counsel's assertion is not persuasive. As stated previously, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, the amended tax returns submitted after CIS points out the

errors raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the 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 Scientology International*, 19 I&N Dec. at 595.

In this matter, counsel's reference to the petitioner as a branch office is a misnomer. If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as a branch office of the same organization housed in a different location, since the United States incorporated company is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of the U.S. corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

The petitioner must present evidence demonstrating that it is either a subsidiary or an affiliate of the beneficiary's foreign employer. The petitioner initially claims that its sole shareholder is the beneficiary. The petitioner, through counsel, reiterates in response to the director's request for evidence, that the beneficiary is the petitioner's sole shareholder. Thus, the petitioner first represents that it is the foreign entity's affiliate, as the beneficiary claims to own and control a majority interest in each company. Only after the director points out the inconsistencies with the petitioner's claim that it is an affiliate and the petitioner's IRS Forms 1120 which indicate it is a subsidiary, does the petitioner attempt to show how the foreign entity obtained ownership and control of the petitioner.

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. at 591-92. However, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept contradictory evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Even if the AAO considered the petitioner's submission of limited

information regarding the foreign entity's investment in a Chicago "branch" office, its purported dissolution, and the foreign entity's purchase of the Chicago office's goodwill, such information is not sufficient to clarify and substantiate a qualifying relationship. The record continues to contain confusing and inconsistent information regarding the foreign entity's purported investment in the petitioner. The record does not support of counsel's claim that the foreign entity purchased 400,000 shares of the petitioner's stock. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner has not presented consistent evidence establishing the petitioner's ownership and control and its qualifying relationship with the beneficiary's foreign employer.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.