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FILE: WAC 03 124 53000 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 filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in international trading. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not established that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) a qualifying relationship exists between the foreign and United States entities.

On appeal, counsel claims that as the "highest manager or executive in the U.S. company," the beneficiary satisfies the regulatory definitions of "managerial capacity" and "executive capacity." Counsel states that although the petitioner's staff is small, the fact that the beneficiary supervises lower-level professional employees and manages an essential function of the business demonstrates the beneficiary's employment as a manager. Counsel also claims that the previously submitted stock certificate, stock ledger, and wire transfer, as well as the minutes from the foreign entity's meeting, confirm the existence of a parent-subsidiary relationship. Counsel submits a letter on appeal in support of the foregoing claims.

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 or 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, which 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.

The first issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 filed the instant petition on March 12, 2003 stating that the beneficiary would be employed as its general manger. The petitioner noted that it presently employed three workers. In an appended letter, dated December 23, 2002, the petitioner provided the following description of the proposed position:

As the General Manager of [the petitioning organization], [the beneficiary's] duties will include but are not limited to the following: (1). Formulating and determining corporate

policies and strategies in accordance with general directives from parent company; (2). Directing and coordinating company activities to obtain optimum efficiency, economy of operations and maximization of profits; (3). Directing and coordinating activities to develop new markets and to explore business opportunities; (4). Supervising all subordinate company personnel and exercising ultimate authority to take personnel actions including hiring and dismissing; (5). Reviewing operating, sales reports and financial statements to determine business progress; (6). Planning and developing industrial, labor, and public relations policies.

The petitioner provided an organizational chart of the United States company identifying the beneficiary as the general manager. On the chart, the beneficiary was identified as the supervisor of the company's trading and financial departments and its administrative officer. The petitioner included on the organizational chart a job description for the beneficiary that was essentially the same as that outlined above.

The director issued a request for evidence, dated May 6, 2004, asking that the petitioner provide the following evidence related to the beneficiary's proposed employment as a manager or executive: (1) an organizational chart identifying the petitioner's staffing levels on March 12, 2003, the date of filing the petition, and noting the beneficiary's position and all subordinate employees; (2) a detailed description of the job duties performed by the beneficiary on a "typical day"; (3) California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report, for the first and second quarter of 2003 and the first quarter of 2004.

The petitioner responded in a letter dated July 28, 2004, stating that as the general manager, the beneficiary "is the highest executive/manager in the U.S. company." The petitioner submitted the same description of the beneficiary's job duties as that outlined above. On its organizational chart, the petitioner identified three lower-level workers employed in the company's trading and financial departments and as an administrative officer. The petitioner noted in its letter that each employee is a college graduate, and provided a brief description of the tasks performed by each worker.

On August 13, 2004, the director issued a second request for evidence noting that the wages identified on the petitioner's quarterly wage reports for 2003 do not coincide with the amount reported by the petitioner on its 2003 corporate tax return. The director requested certified copies of the petitioner's quarterly wage reports and corporate tax return for 2003. The petitioner's accountant responded in a letter dated November 3, 2004 noting that the petitioner's 2003 tax return has been changed to reflect the corrected classification of expenses.

In a decision dated November 30, 2004, the director determined that the beneficiary would not be employed by the petitioning entity in a primarily managerial or executive capacity. The director noted that the petitioner's description of the beneficiary's job duties was, in essence, a restatement of the regulatory definitions of "managerial capacity" and "executive capacity." The director stated that the petitioner "[did not] specify the activities associated with these broad job responsibilities." The director concluded that the petitioner's description was not sufficient to establish employment as a manager or an executive. The director also concluded that the beneficiary would likely be assisting in the day-to-day non-supervisory functions of the business. The director further noted that the beneficiary would not be employed as a function manager, as the petitioner had not demonstrated that the beneficiary manages the function. The director concluded that instead the beneficiary would be personally performing the function. Consequently, the director denied the petition due to the petitioner's failure to establish the beneficiary's proposed employment in a primarily managerial or executive capacity.

In an appeal filed on January 3, 2005, counsel claims that the beneficiary's position as general manager is "primarily managerial or executive in nature." In his letter, counsel provides the same job descriptions for the beneficiary as those previously submitted and outlined above. Counsel states:

The beneficiary is the highest manager or executive in the U.S. company and must make all executive decisions. There is no higher authority in the U.S. company on a day-to-day business. The beneficiary manages the U.S. company and functions at the highest senior level within the organization[al] hierarchy.

Counsel asserts that the beneficiary is not a first-line supervisor, but a functional manager. Counsel references three unpublished AAO decisions in which the AAO considered each beneficiary to be employed as a functional manager or an executive. Counsel also notes that managerial and executive capacity should not be based solely on the size of the organization's staff. Counsel states:

As the General Manager, the beneficiary clearly supervise[s] and controls the work of the departments of the organization. In our case at hand, the number of employees is relatively small, nonetheless, managing such essential functions, couples with the fact that the employees to be managed by the beneficiary are professionals in nature, constitutes managerial capacity as defined by 8 C.F.R. § 214(l)(1)(ii)(B).

Counsel notes that the three employees subordinate to the beneficiary are professionals who possess the financial and managerial capability to work with independent contractors, bankers, sales representatives, customs clearance agents and government agencies. Counsel again submits an organizational chart and a brief description of the responsibilities of the lower-level employees.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. While the beneficiary's job title as "general manager" implies employment in a managerial capacity, the petitioner refers to the beneficiary as the "highest executive/manager in the U.S. company," and identifies "executive" responsibilities, such as formulating the company's policies and directing activities of the company. On appeal, the beneficiary's true employment capacity is equally obscure, as counsel states that the beneficiary's position is "primarily managerial *or* executive in nature." (emphasis added). While counsel subsequently claims in his letter on appeal that the beneficiary "is qualified both as an executive or manager," counsel does not demonstrate that the beneficiary meets each of the four criteria outlined in "managerial capacity" and "executive capacity." A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As correctly noted by the director, the description provided by the petitioner of the beneficiary's job duties is vague, and essentially restates the

statutory definitions of managerial capacity and executive capacity. Although specifically requested by the director, the petitioner did not submit a detailed description of the beneficiary's "typical day" and the associated job duties. On appeal, counsel submits the same broad job description. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? It is unrealistic to expect the AAO to infer managerial or executive responsibilities when, having been afforded three separate opportunities to submit evidence, the petitioner provided the same insufficient job description. 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). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The record does not support counsel's claim that the beneficiary would be employed as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. 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. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily job duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). As discussed above, the petitioner has failed to provide a detailed and specific description of the beneficiary's proposed position. Absent additional evidence describing the function to be managed by the beneficiary, the AAO cannot conclude that the beneficiary manages an essential function.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the petitioner established the existence of a qualifying relationship between the foreign and United States entities.

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;

\* \* \*

*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 its December 23, 2002 letter, the petitioner claimed that the foreign entity is a majority shareholder of the United States corporation, thereby establishing a parent-subsidary relationship. As evidence of a qualifying relationship, counsel submitted the following: (1) a July 18, 2001 resolution by the foreign entity's board of directors affirming the establishment of the petitioning entity; (2) the petitioner's articles of incorporation; (3) a wire transfer receipt reflecting a transfer of funds from an individual, "Wen Lide," to the United States entity; and (4) the petitioner's balance sheet and financial statements for the first quarter of 2002.

In his May 6, 2004 request for evidence, the director asked that the petitioner provide the following evidence establishing the claimed parent-subsidary relationship: (1) wire transfer receipts confirming that the foreign entity paid for stock ownership in the United States company; (2) an explanation of where the transferred funds originated, if not transferred from the foreign entity, and the originator's affiliation with the foreign company; (3) an explanation of the bank accounts used in the transfer of funds; (4) the petitioner's bank statements which would confirm its receipt of the transferred monies; (5) the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f); (6) the minutes from the petitioner's meeting, which would identify the company's shareholders and the amount and price of stock held by each; (7) all stock certificates issued by the petitioner; and (8) the petitioner's stock ledger.

In its July 28, 2004 response, the petitioner provided stock certificate number one, dated March 15, 2002, identifying the foreign entity as the holder of 600,000 shares of the petitioner's 1,000,000 shares of authorized stock. The petitioner's stock transfer ledger also identified the foreign entity as the owner of 60% of the petitioner's issued stock. As evidence of the stock purchase, the petitioner again submitted a wire transfer receipt from February 26, 2002, reflecting a transfer of \$60,579.12 from "Wen Lide" to a checking account in the petitioner's name. The petitioner also provided its Notice of Transaction, dated March 15, 2002, which documented the sale of stock in the amount of \$60,000, as well as its articles of incorporation. In the articles of incorporation, the foreign entity was identified as the owner of 600,000 shares of stock in exchange for \$60,000.

The director determined in his November 30, 2004 decision that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities. The director addressed the documentary evidence submitted by the petitioner, yet noted that the transferred funds originated with an individual, "Wen Lide," rather than the petitioning entity. The director noted that the petitioner had not clarified this inconsistency, and concluded that Wen Lide was the owner of the stock. Consequently, the director denied the petition.

On appeal, counsel outlines the evidence submitted to establish a parent-subsidary relationship, and claims that a qualifying relationship exists. With regard to the transferor of the funds, counsel states:

The petitioner submitted a copy of a wire transfer receipt from the Bank of East Asia, dated February 26, 2002, showing that Wen Lide paid the petitioner \$60,579.12. Enclosed please find the letter from [the foreign entity] and the letter from Wen Lide demonstrate[ing] that [the foreign entity] has invested [in] Wen Lide through his individual account in Hong Kong to wire and transfer the fund to the U.S. subsidiary on behalf of the China company. The China company is the 100% and controlling owner of the U.S. subsidiary. There is a qualifying relationship between China and U.S.A. entities.

Upon review, the record does not establish the existence of the alleged parent-subsidary relationship between the foreign and United States entities. 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. 593 (BIA 1988); *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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. 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.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, the petitioner has not provided adequate documentation of the consideration furnished by the foreign entity in exchange for stock ownership in the petitioning organization. As correctly noted by the director, the wire transfer receipt indicates that the funds originated from a third party, not the foreign organization. This is relevant, as it suggests Wen Lide personally purchased stock in the petitioning entity and thereby is the sole shareholder of the organization.

Counsel's brief explanation on appeal regarding the source of the transferred funds does not establish the foreign entity's ownership of the petitioning organization. The "certifications" submitted by the foreign entity and Wen Lide are not sufficient to confirm that the petitioner's stock was purchased with funds from the

foreign entity. Although previously requested by the director, the petitioner did not supply the foreign entity's bank statements documenting the claim that Wen Lide received funds from the foreign entity for the purpose of purchasing the petitioner's stock for the foreign company. As previously noted, this evidence is an essential element in establishing stock ownership. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The unsupported "certifications" by the foreign entity and Wen Lide are not adequate to establish a qualifying relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also neglected to provide on appeal the petitioner's bank statements as secondary evidence. The bank statements would corroborate counsel's claim that the petitioner received \$60,579.12 from the foreign entity in exchange for stock ownership. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Based on the foregoing discussion, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i)(A). In its December 23, 2002 letter, the petitioner provided a brief and nonspecific outline of the beneficiary's job responsibilities as the assistant general manager in the overseas company. The petitioner does not describe the specific job duties associated with the beneficiary's responsibilities of "formulating policies and development plans for the corporation," "studying administrative efficiency," "streamlining departments and divisions," "formulating and designing import and export policies," and "exploring business, trading and cooperation projects with companies over the world." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). The petitioner has not satisfied this essential requirement. Accordingly, the petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.