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FILE: [REDACTED]
EAC 04 085 54106

Office: VERMONT SERVICE CENTER

Date: AUG 08 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant 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 limited liability corporation authorized to operate as a Thai restaurant under the laws of the Commonwealth of Virginia. The petitioner seeks to employ the beneficiary as its restaurant manager-chief operating officer.

The director denied the petition concluding that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary would be employed in both a managerial and executive capacity. Counsel claims that the beneficiary would be a functional manager, as he would spend his time performing primarily managerial duties and coordinating the essential functions of the organization. Counsel references the beneficiary's job duties and the time spent on each as evidence of the beneficiary's employment as a manager and executive.

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 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 employment-based petition on February 2, 2004 requesting employment of the beneficiary as its restaurant manager-chief operating officer. The petitioner noted on the petition that it employed nine workers. In an attached letter, dated January 30, 2004, counsel stated that the beneficiary's prior overseas employment as an operations manager and deputy director qualify him for the proposed position in the United States. Counsel claimed that the beneficiary's position in the United States company would encompass both primarily managerial and executive job responsibilities, and stated:

As a Chief Operating Officer, [the beneficiary] will be responsible for directing and coordinating the day-to-[-]day operations of the [petitioning entity] to obtain optimum

efficiency and economy of operations and maximize profits. He will be responsible for planning and developing organization[al] policies and goals, and implements goals through subordinate administrative personnel.

In addition, he will direct and coordinate promotion of the restaurant to develop new markets, increase share of market, and obtain competitive position in [the] industry. He will also analyze division budget requests to identify areas in which reductions can be made, and allocates operating budget and direct preparation of directives to division administrator outlining policy, program, or operations changes to be implemented.

[The beneficiary] will be solely responsible for personnel management and will have the discretion to hire and fire employees and make other personnel decisions such as promotions and leave authorization as well as pay raises.

Counsel noted that, in the position of restaurant manager-chief operating officer, the beneficiary would receive an annual salary of \$16,000.

In a request for evidence, dated April 28, 2004, the director asked that the petitioner submit the following documentary evidence that the beneficiary would be employed in a primarily managerial or executive capacity: (1) a detailed description of the beneficiary's proposed job duties, including a breakdown of the number of hours per week the beneficiary would devote to each task; (2) an organizational chart reflecting the petitioner's personnel structure and clearly identifying the positions over which the beneficiary would have managerial or executive authority; (3) copies of the petitioner's 2003 Forms W-2 and W-3 and its 2004 payroll roster; and (4) Form 941 for the third and fourth quarters of 2003. The director indicated that in preparing its description of the organizational structure, the petitioner should address the following issues: (1) the number of supervisors subordinate to the beneficiary; (2) the job titles and duties of the employees managed by the beneficiary; (3) the managerial, executive, and technical skills required to perform in each position; (4) the amount of time the beneficiary would spend performing non-managerial and non-executive job duties; (5) the amount of discretionary authority granted to the beneficiary over the company's daily operations; and (6) who would run the business during the beneficiary's absence.

Counsel responded in a letter dated July 16, 2004. With regard to the beneficiary's employment in a primarily executive capacity, counsel claimed that the beneficiary has been solely responsible for the establishment of the petitioning entity and would continue to be responsible for directing the management of the organization and establishing the company's goals and policies. Counsel noted that the beneficiary would report directly to the petitioner's partners. Counsel stated that the beneficiary would be employed in a managerial capacity, explaining that as the chief operating officer, the beneficiary would be in charge of the kitchen staff and the restaurant floor staff. Counsel stated that the beneficiary would supervise two shift managers, six servers, a cashier and at least one hostess. In addition, counsel restated the beneficiary's above-quoted job responsibilities as listed in her January 30, 2004 letter. Counsel further provided the following list of the beneficiary's job duties:

Analyzes operations to evaluate performance of company and staff to determine areas of cost reduction and program improvement. 4 hours

Reviews financial Statements and sales and activity reports to ensure that organization's objectives are achieved. 3 hours

Assigns or delegates responsibilities to subordinates. 7 hours

Organize[s] and direct[s] worker training programs, resolve[s] personnel problems, hire[s] new staff, and evaluate[s] employee performance in dining facilities. 3 hours

Establishes internal control procedures. 1 hour

Monitor[s] compliance with health and fire regulations regarding food preparation and serving and building maintenance in dining facilities. 2 hours

Estimate[s] food, liquor, wine, and other beverage consumption in order to anticipate amounts to be purchased or requisitioned. 10 hours

Monitor[s] budgets and payroll records, review[s] financial transactions in order to ensure that expenditures are authorized and budgeted. 6 hours

Review[s] menus and analyze[s] recipes in order to determine labor and overhead costs, and assign[s] prices to menu items. 4 hours

Counsel submitted a vague organizational chart for the petitioning entity identifying the position of "chief operating officer" and the subordinate positions of shift managers, executive chef, servers, hostess, cashier, and kitchen staff. Counsel also provided the petitioner's Forms W-2, Wage and Tax Statement, for ten workers employed in 2003. As additional evidence of the beneficiary's employment capacity, counsel provided invoices, utility bills and insurance statements authorized and signed by the beneficiary.

In a decision dated November 19, 2004, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity. The director noted discrepancies in the evidence provided by the petitioner, specifically stating that the petitioner's organizational chart lists sixteen employees whereas the petitioner claimed on the petition to employ a staff of nine workers. Counsel also stated that the petitioner's Forms W-2 reveal that the beneficiary was the only employee employed full-time by the petitioner during 2003.¹ The director noted the petitioner's failure to submit a "well-defined" organizational chart, stating that the petitioner only identified on the chart positions within the organization and did not specifically name its employees. The director further noted that, although requested, the petitioner failed to provide a description of the positions held by subordinate employees and the time devoted to each of their job duties.

With regard to the beneficiary's position, the director stated that the description was vague and did not specifically explain the managerial and executive job duties to be performed by the beneficiary. The director concluded that the beneficiary would likely assist in performing the sales and services of the petitioning

¹ The director incorrectly reviewed the petitioner's Forms W-2, concluding that the individual identified as [REDACTED] was the beneficiary. In fact, the beneficiary is not identified as an employee on the petitioner's 2003 Forms W-2.

organization, as the petitioner did not employ full-time managerial or professional employees. Consequently, the director denied the petition.

Counsel filed an appeal on December 13, 2004, claiming that the director's determination that the beneficiary would not be employed as a manager or an executive is "contrary to law." Counsel asserts that the beneficiary "clearly" functions in both a primarily managerial and executive capacity, stating that as an executive, the beneficiary would: (1) be solely responsible for directing the management of the organization; (2) perform an essential managerial function of the organization; (3) establish the company's goals and policies; and (4) exercise wide latitude in discretionary decision-making. Counsel states that in his executive capacity, the beneficiary has been solely responsible for establishing the petitioning entity and receives only general supervision from the petitioner's partners. Counsel references an unpublished AAO decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee.

With regard to the beneficiary's managerial capacity, counsel states that the director incorrectly analyzed the number of workers employed by the petitioner and erroneously concluded that the beneficiary was the only full-time employee. Counsel explains that the nature of the restaurant business is such that the petitioner's personnel level fluctuates according to the season. Counsel notes that there are often turnovers in the petitioner's business, as students occupy many of the positions during the summer. Counsel explains that the petitioner employed a full-time shift manager, who the director erroneously concluded was the beneficiary, and notes that the beneficiary has been paid by the foreign entity. Counsel claims that, as the manager, the beneficiary has been supervising the work of the shift manager.

Counsel challenges the director's request for the job titles and descriptions of the petitioner's employees, stating that "[Citizenship and Immigration Services (CIS)] does not require a specified number of employees, nor does it focus on the functions of the employees in determining whether a position is [of] a 'managerial capacity'." Counsel claims that as a function manager, the beneficiary need not oversee any employees. Counsel states that the description of the beneficiary's job duties, including the time allocated to each, demonstrates that the beneficiary primarily performs managerial job duties and coordinates the essential functions of the organization. Counsel again submits the petitioner's business licenses and tax records, which counsel claims demonstrate the beneficiary's employment in a primarily managerial capacity.

On appeal, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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). As correctly determined by the director, the petitioner has not provided a detailed description of the beneficiary's proposed position so as to establish employment in a primarily managerial or executive capacity. In her January 30, 2004 letter, counsel merely restates the criteria for "managerial capacity" and "executive capacity" as evidence of the beneficiary's qualifying employment capacity. Although the director specifically requested a detailed description of the beneficiary's position, counsel's response essentially reiterated the same limited description of the beneficiary's managerial job duties as outlined in her January 30, 2004 letter. While counsel provided a supplemental list of job duties performed by the beneficiary, this list was equally vague and inadequate. Counsel does not identify the specific tasks involved in the beneficiary's job duties of analyzing the company's operations and establishing its internal control procedures. 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 actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

Moreover, the list of job duties provided by counsel with her July 16, 2004 letter clearly demonstrates that the beneficiary would be performing non-managerial and non-executive functions of the business. Specifically, the beneficiary would spend approximately twenty-five hours of his forty hour work week organizing worker training programs, evaluating the work performance of the hostess, servers and cashier, monitoring the food preparation and building maintenance for compliance with health and fire regulations, analyzing the petitioner's food and beverage supplies, determining supplies to be reordered, reviewing menus, assigning prices, monitoring payroll records and reviewing financial transactions. As counsel neglected to respond to the director's request for the job duties performed by the beneficiary's subordinates, the AAO cannot conclude that the lower-level employees would relieve the beneficiary from spending the majority of his time on non-qualifying job duties of the business. The petitioner has failed to prove that the beneficiary *primarily* performs the high-level managerial and executive responsibilities and does not spend a majority of his or her time on day-to-day functions. *See Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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 AAO addresses counsel's challenge of the director's request for the job titles and descriptions of the petitioner's employees. Counsel erroneously claims in her brief on appeal that the functions performed by the lower-level employees are not considered in determining managerial or executive capacity. On the contrary, this information is both relevant and necessary in establishing the beneficiary's employment as a manager or executive, as it would confirm that employees other than the beneficiary perform the non-qualifying tasks of the business. As noted above, although requested, counsel neglected to provide this essential information. The 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).

Although previously mentioned, the AAO again notes counsel's failure to supply detailed and adequate information on the management and personnel structure of the petitioning entity. The organizational chart submitted by counsel fails to identify the beneficiary by name in the position of chief operating officer, and does not even reference his position as "restaurant manager." Despite the director's reference to the limited organizational chart, counsel submitted the same obscure chart on appeal. Additionally, the fact that the restaurant business experiences many turnovers does not excuse the petitioner from providing accurate information regarding the workers employed at the time of filing the petition and the job duties performed by each, and from submitting documentation, such as the petitioner's quarterly wage returns, evidencing the petitioner's workers in February 2004. The AAO cannot be expected to determine the petitioner's actual staffing levels from the minimal evidence submitted. 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)).

Counsel's additional claim that the beneficiary would be employed as a function manager is not supported by the record. 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). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As previously discussed, the petitioner has not provided evidence that the beneficiary *primarily* manages an essential function. Moreover, counsel's blanket assertion that the beneficiary "has been coordinating the essential functions of the organization" since its establishment is not sufficient to establish that the beneficiary is managing an essential function. *See* 8 C.F.R. § 204.5(j)(5) (requiring that the petitioner submit a written job offer clearly describing the duties to be performed by the beneficiary).

Furthermore, counsel's reference to an unpublished AAO decision does not demonstrate the beneficiary's employment as a manager or an executive. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Counsel cannot submit a copy of the unpublished matter and expect the AAO to ascertain its relevance to the instant petition. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The description of the beneficiary's foreign job duties submitted with the petition includes such non-managerial and non-executive job duties as reviewing financial statements and sales reports, directing worker training programs, monitoring compliance with health and fire regulations, determining supplies to be reordered, reviewing menus and determining prices. The beneficiary essentially performed the same non-qualifying job duties overseas as those associated with his position in the United States entity. Again, 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. Consequently, the petition will be denied for this additional reason.

Another issue not addressed by the director is whether the petitioner established the existence of a qualifying relationship as required in the Act at section 203(b)(1)(C).

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.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Here, the petitioner claims that the foreign and United States entities are affiliates as both are owned and controlled by the beneficiary. The record, however, does not demonstrate that the beneficiary is a majority shareholder of the foreign entity. The attached shareholder list for the foreign entity indicates that the beneficiary owns 4,897 of the company's 10,000 issued shares, or 48.97% of the corporation. While the beneficiary may hold the largest individual share in the corporation, he does not own a majority of the corporation. The beneficiary does not own and control the foreign organization. Accordingly, the petitioner has not demonstrated that the foreign and United States entities have a qualifying affiliate relationship. *See* 8 C.F.R. § 204.5(j)(2) (defining "affiliate," in part, as one of two subsidiaries both of which are owned and controlled by the same parent or individual). For this additional reason, the petition will be denied.

An additional issue not directly addressed by the director is whether the petitioning entity has been doing business for at least one year as required in the regulation at 8 C.F.R. § 204.5(j)(3)(D). The record contains work invoices associated with the establishment of the petitioner's restaurant. The documentation includes such work as installing cushions on the restaurant seats and carpeting, installing a hot water heater and kitchen exhaust system, and providing rice cookers. Each of these invoices is dated during the month of March 2003. It is reasonable to conclude that without these essential fixtures, the petitioning entity had not begun operating the restaurant until sometime after March 2003. As the instant petition was filed in February 2004, the petitioner has not been doing business in the United States for at least one year prior to filing the petition. The petition will therefore be denied for this additional reason.

Lastly, the director did not address the issue of whether the petitioner has the ability to pay the beneficiary the proffered wage as required in the regulation at 8 C.F.R. § 204.5(g)(2). The foreign entity noted in its June 23, 2002 letter that while employed in the United States, the beneficiary would be paid by the foreign entity. The regulation at 8 C.F.R. § 204.5(g)(2) states that the *prospective United States employer* must demonstrate its ability to pay the beneficiary the proffered wage. Accordingly, the foreign entity's claim is not sufficient for purposes of meeting the regulations.

In 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 did not establish that it had previously employed the beneficiary.

As an alternate means of determining the petitioner's ability to pay, the AAO will examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. As the petition's priority date falls on February 2, 2004, the AAO must examine the petitioner's tax return for 2004. The record does not contain financial documentation for the year 2004. The petitioner's 2002 U.S. Return of Partnership Income is the most recent financial document provided by the petitioner. Counsel references the petitioner's "Food and Beverage Report" as evidence of the petitioner's monthly gross income of \$25,000, however, the report, which itself is vague, does not adequately document the petitioner's ability to pay. See 8 C.F.R. § 204.5(g)(2). Consequently, the petitioner has failed to satisfy this essential element. For this additional reason, the petition will be denied.

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.