

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

FILE:

WAC 97 127 51240

Office: CALIFORNIA SERVICE CENTER

Date: AUG 26 2005

IN RE:

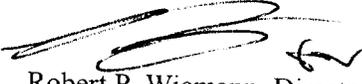
Petitioner:
Beneficiary:

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 preference visa petition was initially approved by the Director, California Service Center. Upon further review, the director determined that an approval was not warranted and issued a notice of intent to revoke approval of the petition. A revocation subsequently followed on September 1, 2004. The matter is currently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation that operates as an investor in California restaurants and international trade. It seeks to employ the beneficiary as its vice 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 based his decision to revoke approval of the petition on three separate grounds: 1) the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; 2) the beneficiary was not employed abroad in a qualifying capacity for one out of three years prior to entering the United States as a nonimmigrant; and 3) the petitioner failed to submit sufficient evidence to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel submits a brief disputing the director's conclusions.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 in a 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) 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 support of the initial petition, which was filed on April 3, 1997, the petitioner submitted a letter dated March 25, 1997, which contained following statement in regard to the beneficiary's position within its organization:

During the past year, [the beneficiary] has been very instrumental in contributing to the initial operations and development of our U[.]S[.] subsidiary's business. As [v]ice [p]resident of the subsidiary, [the beneficiary] has been managing our company's marketing and business operations.

Functioning autonomously, [the beneficiary] has been developing [the petitioner]'s marketing plans, policies and strategies for our restaurant and trading businesses; supervising quality control of our products and services in compliance with local commercial and health standards; and directing the sourcing and procurement of supplies and raw materials. To facilitate corporate take-off and growth, [the beneficiary] has also been contacting and networking with U.S. manufacturers, suppliers and trade associations for business opportunities and arrangements. In addition, he has been coordinating [the petitioner]'s advertising and promotion activities with various local media. Lastly, [the beneficiary] has been playing the critical role of coordinating business transactions with the Chinese parent company and other business entities in the United States and China.

In the coming years, [the beneficiary] will basically continue the above-described duties with this company while becoming more specialized in some managerial functions. This is because further expansion and diversification of this company's operations will bring about ever-growing complexity of the corporate transactions and administrative process.

On June 23, 1997, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a list of its employees, including their names, job titles, and dates of employment. The petitioner was also asked to submit its organizational chart describing its managerial hierarchy and staffing levels and briefly indicating each employee's job duties.

In response, the petitioner provided the list of employees, their position titles, and brief job descriptions. The following positions were part of the petitioner's organization as of the filing date of the petition: president, vice president, corporate secretary/vice president, kitchen department manager, restaurant manager, and another vice president who according to the petitioner was sent back to China on April 30, 1997 when his nonimmigrant visa expired. Although the petitioner listed four additional restaurant staffers, three of them were no longer employed at the time the petition was filed and the fourth was not hired until three months after the petition was filed. As the four restaurant staffers were not working for the petitioner at the time the petition was filed, they will not be considered in the adjudication of this matter. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, based on the information submitted, the petitioner had three vice presidents, and two restaurant managers, but no restaurant staff at the time the petition was filed.

The petitioner also submitted an organizational chart, which suggests that the petitioner is divided in half based on its two types of business operations—the restaurant operation and the trading operation. The chart indicates that the beneficiary is the vice president of the restaurant operation and that his two subordinates include a corporate secretary and the restaurant manager. It is noted that the person named as the corporate secretary is also identified as the vice president of the petitioner's trading operation. The organizational chart does not indicate that the petitioner's restaurant has any staff aside from the kitchen department manager and the service department manager. As such, it is unclear who actually services the restaurant's patrons.

Notwithstanding the apparent deficiencies regarding the petitioner's eligibility to classify the beneficiary as a multinational manager or executive, the petition was approved.

On July 17, 2004, after another, more thorough, review of the evidence of record, the director issued a notice of intent to revoke approval of the petition (ITR). The director discussed the beneficiary's October 2, 1998

interview in connection with his Form I-485 application for adjustment of status. Specifically, the director stated that in response to various interview questions, the beneficiary indicated that he was in charge of the petitioner's Grandview Restaurant and stated that the petitioner has no other businesses in the United States. The beneficiary further stated that the petitioner has no vice presidents, only managers, one of whom is the beneficiary, whose job duties, according to the beneficiary himself, include recruiting employees, overseeing the quality of the food served, purchasing supplies, and other duties associated with running a restaurant.

The director stated that the beneficiary's responses at the adjustment interview suggest that the beneficiary's position title and job duties as indicated initially in support of the petition were inflated for the purpose of demonstrating the beneficiary's eligibility for classification as a multinational manager or executive. The director stated that the beneficiary's interview responses did not indicate that the petitioner is involved in a trade-related business or that the beneficiary performs duties outside those directly related to the restaurant business. The director properly pointed out that the petitioner's organizational chart is inaccurate, as there is no actual staff to work for the international trading operation. The director also stated that the beneficiary's subordinates do not appear to be professional as defined by 8 C.F.R. § 204.5(1)(2). The director concluded that the evidence of record fails to establish that the beneficiary has been and would be employed by the U.S. petitioner in a qualifying managerial or executive capacity.

The petitioner submitted a response to the ITR in the form of a letter from counsel dated August 13, 2004. Counsel stated that the description of the beneficiary's job duties and the organizational chart corroborate the petitioner's claim that the beneficiary is eligible for classification as a multinational manager or executive. Counsel stated that the beneficiary was working through managerial employees, who relieve him from having to perform nonqualifying duties.

Additionally, counsel explained that the elimination of the trade department is "only temporary due to shifted business needs in China" and claims that the initial description of the beneficiary's duties, which suggests that a portion of the beneficiary's time would be devoted to the trade department, is an accurate reflection of what the beneficiary would eventually be doing. However, based on the evidence submitted, the latest trade transaction in which the petitioner was engaged took place in February of 1996, more than one year prior to the date the petition was filed and more than eight years prior to the director's issuance of the ITR. The petitioner has submitted no documentation to indicate that the petitioner has resumed any of its previous trading activity. 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)).

Furthermore, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant matter, the beneficiary's responses at his adjustment interview contradict various representations made in the Form I-140 petition. The petitioner's sole attempt to reconcile these considerable inconsistencies is counsel's statements. However, 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). As the petitioner has submitted no documentation in support of counsel's statement, the questions raised by the director regarding the credibility of the petitioner's claims remain unanswered.

Counsel also disputed the director's statement regarding the petitioner's failure to provide evidence of the specific goals, policies, and discretionary decisions made by the beneficiary within a random six-month timeframe. Counsel's point regarding the arbitrary six-month time frame is valid, particularly in light of the fact that the beneficiary first arrived to the United States in July of 1995 and adjusted his status to that of an L-1A nonimmigrant in October of 1995, more than one year prior to the date the I-140 petition was even filed. Based on the petitioner's March 31, 1995 date of establishment, it appears that the beneficiary was coming to the United States to help set up the petitioner as a "new office." See 8 C.F.R. § 214.2(l)(1)(ii)(F). As such, the beneficiary would not be expected to primarily perform managerial or executive duties during his entire first year as an L-1A intracompany transferee. Furthermore, the Form I-140 is an immigrant petition, which is meant to explore the beneficiary's prospective employment. Proof of the beneficiary's prior work while in L-1A status is neither required nor relevant for the purpose of establishing eligibility as a multinational manager or executive under an I-140 immigrant petition. Therefore, the director's inquiry into the beneficiary's activity during the petitioner's first year of operation as a new office is irrelevant.

Notwithstanding the director's comment, the director properly concluded that the record lacks evidence that would establish that the petitioner was prepared to employ the beneficiary in a primarily managerial or executive capacity at the time the petition was filed. Accordingly, this issue served as the first of three grounds for the director's September 1, 2004 decision to revoke the approval of the petition.

Although the petitioner has appealed the director's decision, the brief submitted in support of the appeal is virtually identical to the statement submitted in response to the ITR. No additional evidence or further statements have been offered to overcome the director's grounds for issuing the revocation.

On review, the petitioner has failed to establish that it was prepared to employ the beneficiary in a primarily managerial or executive capacity at the time the petition was filed. Although the petitioner's organizational chart and counsel's statements suggest that the beneficiary would oversee the work of subordinate employees who are managers in the petitioner's restaurant, 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). Thus, regardless of the beneficiary's oversight of managerial employees, the AAO cannot affirmatively determine that the beneficiary would be employed in a qualifying managerial or executive capacity if the record lacks a detailed description of the beneficiary's daily activities showing that the beneficiary would primarily perform qualifying tasks.

In the instant matter, the description of the beneficiary's duties suggests that a significant portion of the beneficiary's time would be attributed to the petitioner's trade operation. However, both the evidence of record as well as the beneficiary's responses at his adjustment of status interview suggest that the petitioner's trade operation had been inactive for some time, including the time period during which the petition was filed. This conclusion is supported by the fact that the most recent documentation of any trade-related transactions are dated February of 1996, more than one year prior to the filing of the I-140 petition. Furthermore, the petitioner's organizational chart, which indicates that the petitioner's organization is comprised of two operations, indicates that the beneficiary's only position with the petitioning organization is with the restaurant operation. The beneficiary's name does not appear anywhere in the portion of the chart that illustrates the organizational hierarchy of the trade operation. Thus, the organizational chart does not support the description of the beneficiary's duties, which is entirely focused on the petitioner's trade operation and provides no insight as to the beneficiary's day-to-day duties within the petitioner's restaurant, which currently

appears to be its sole focus. 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). Aside from the information provided by the beneficiary at his adjustment of status interview, the record lacks any indication as to the beneficiary's day-to-day duties. As the petitioner has failed to provide this crucial information, the AAO cannot conclude that at the time the petition was filed, the beneficiary would have been primarily performing qualifying managerial or executive tasks. For this initial reason, this petition cannot be approved.

The second issue in this proceeding is whether the beneficiary was employed abroad in a qualifying capacity for one out of three years prior to his nonimmigrant entry into the United States.

In the support letter submitted with the petition, the petitioner provided a description of the beneficiary's duties abroad. As that description has been recited in the director's ITR and final notice of revocation, the AAO need not repeat that description in the instant matter.

In the ITR, the director referred to the description of the beneficiary's duties abroad and stated that the petitioner failed to provide specifics that would indicate what the beneficiary actually did on a day-to-day basis. The director also pointed out that the petitioner failed to disclose any information about the job titles, job descriptions, or educational levels of any of the beneficiary's subordinates during his employment abroad.

In the response to the ITR, counsel stated that the petitioner had submitted the required information on several occasions, initially with the L-1A nonimmigrant petitions and more recently with the I-140 petition. However, while the AAO has reviewed the petitioner's record of proceeding in regard to the I-140 petition, evidence submitted in support of any of the petitioner's prior L-1A petitions is part of a different proceeding(s) and would, therefore, be part of a separate record of proceeding.

Furthermore, counsel argued that the petitioner has submitted sufficient details regarding the beneficiary's position abroad. However, this argument is without merit. The director has clearly informed the petitioner otherwise in the ITR. Merely disagreeing with the director's finding, as counsel has done, does nothing to overcome the director's conclusion on this issue.

Counsel mentioned the organizational chart of the foreign entity, which the petitioner also submitted in support of the petition. However, the chart merely showed that the beneficiary served as the vice president of the Shunfa Hotel subdivision, which was further divided into five departments. The chart did not name any of the beneficiary's subordinate employees or list any of their position titles. Thus, the chart provided no information to add to Citizenship and Immigration Service's (CIS's) understanding of the beneficiary's job duties abroad.

As previously stated, counsel's only response to the director's final notice of revocation was a virtual copy of the response to the ITR. As such, the petitioner has failed to submit sufficient evidence to establish that the beneficiary was employed abroad in a qualifying capacity for the requisite period of time. Based on this second deficiency, this petition cannot be approved.

The third issue in this proceeding is whether the petitioner established that it has a qualifying relationship with a foreign entity.

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 letter submitted in support of the petition, the petitioner stated that it is a wholly owned subsidiary of Dalian Shunfa Housing Development Company, located in Dalian, China. In support of this claim, the petitioner submitted the following:

1. Stock certificate dated April 13, 1995 showing the foreign entity's ownership of all of the petitioner's authorized stock;
2. Stock transfer ledger showing the issuance of the petitioner's authorized stock in the amount of \$10,000;
3. Certificate of Corporate Officer of the petitioning entity indicating that a total of 10,000 shares of the petitioner's stock has been authorized for issuance and that the entire amount has, in fact, been issued. The certificate is dated September 30, 1996.

In the director's RFE, the petitioner was instructed to submit evidence that the foreign entity actually paid for its ownership of the petitioner's stock.

In response, the petitioner submitted a copy of a traveler's check issued on June 6, 1995 by the Bank of China in Dalian, China. Although a separate letter listing the traveler's check as one of the exhibits explains that the check was in the amount of \$100,000 and was physically brought to the United States by the manager of the Shunfa Hotel, the pertinent information in the copy of the check is illegible and cannot be confirmed.

The petitioner also submitted a copy of a fund transfer receipt dated July 31, 1995. The receipt names the petitioner as the beneficiary and Wen Fengjin as the originator of the funds. The petitioner did not explain Wen Fengjin's relation, if any, to the U.S. petitioner.

Although the petitioner also indicated that the president of the Chinese company physically brought \$200,000 to be used to purchase the restaurant where the beneficiary was employed, the petitioner has submitted no evidence that these funds were used by the foreign entity to purchase its ownership of the U.S. petitioner. As previously noted, 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)).

Furthermore, the petitioner claimed to have submitted evidence of an additional fund transfer totaling \$8,500 originating from the German branch. However, evidence of this transfer has not been located. Additionally, while the record contains a number of receipts of what appear to be fund transfers, which originated in Fukuoka, Japan, the receipts do not provide any information as to the destination of the funds and are not dated so that a determination cannot be made as to when the fund transfers took place. While the petitioner claimed that the party that initiated the Japanese fund transfers is the Chinese parent company's Japanese branch, the petitioner submitted no documentation evidencing this claimed ownership.

The director's ITR stressed the importance of providing documents to show that the foreign entity paid for its ownership of the petitioner's stock. However, counsel's response did not adequately address this concern. Rather, counsel merely stated that moving money out of China is difficult because of poor banking systems and strict government restrictions on foreign exchange. However, the petitioner provided no documentation to corroborate this claim. *See id.*

Counsel also claimed that the Chinese company issued a decision at one of its shareholders meetings that the petitioner would retain all of its earnings in order to ensure its continued operation. However, even if this claim were properly documented, which it was not, it does not serve as evidence that the foreign entity provided funding to purchase its ownership in the petitioning entity.

Additionally, the AAO notes a significant discrepancy between the petitioner's stock transfer ledger, which indicates that the petitioner received \$110,000 in exchange for 10,000 shares of stock, and schedule L of the petitioner's 1997 corporate tax return, which indicates that only \$50,000 worth of common stock had been issued. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has neither acknowledged nor offered any evidence to resolve this considerable inconsistency regarding the issuance of its stock.

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.

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. In the instant matter, the petitioner has failed to submit this crucial documentation, thereby precluding the AAO from affirmatively determining that the petitioner has paid for its ownership of the petitioning entity. As such, the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

Notwithstanding the AAO's dismissal of the petitioner's appeal, it is noted that the director erroneously suggested that the petitioner was required to submit evidence of the parent company's continued exchange of funds with the U.S. petitioner to establish that the two entities are maintaining a qualifying relationship. There are no laws or regulations that require the petitioner to submit such documentation. Therefore, the director's erroneous statements in this regard are hereby withdrawn.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.