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[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: FEB 07 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

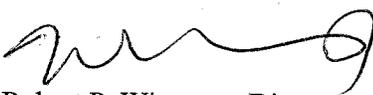
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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 denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation claiming to be a software distribution company. It seeks to employ the beneficiary as its 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 failed to establish that it has a qualifying relationship with a foreign entity. She also concluded that the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments.

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, 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 petitioner has submitted sufficient evidence to establish 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;

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The record suggests that the petitioner claims to be a subsidiary of Nexys De Colombia, S.A., located in Colombia. In support of this claim the petitioner submitted its 2001 tax return containing Schedule K-1 in which the beneficiary is noted as owner of 49% of the petitioner's stock, and the foreign entity is noted as 51% owner of the petitioner's stock.

On September 3, 2003, the director issued a notice requesting additional evidence. The director stated that the petitioner submitted only one membership certificate and instructed the petitioner to submit evidence to establish who paid for ownership of its shares. Among the requested documents were the petitioner's tax return for 2002, as well as its quarterly tax returns for all four quarters of 2002 and all available quarterly tax returns for 2003.

In response, counsel submitted a letter dated December 2, 2003, asserting that the director's request to establish who paid for ownership of the petitioner is irrelevant, as it is not required by Florida state law. However, the mere fact that something is not required by state law does not relieve the petitioner from having to meet certain statutory and regulatory burdens directly associated with the filing of the instant immigrant petition. Therefore, the director's request for the additional evidence was reasonable and lawful. *See* 8 C.F.R. § 204.5(j)(3)(ii). The petitioner's response also included a membership certificate showing that the foreign entity owns 51 units of the petitioner's stock. Although the petitioner submitted another membership certificate indicating that the beneficiary also has ownership interest in an organization, the membership certificate does not contain a legible reading of the name of that organization or the number of units owned. In addition, the petitioner submitted its 2002 tax return, including Schedule K-1, in which the beneficiary is noted as owner of 49% of the petitioner's stock, and the foreign entity is noted as 51% owner of the petitioner's stock.

On January 14, 2004, the director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with a foreign entity. The director noted the deficiency of one of the submitted membership certificates and stated that the petitioner failed to establish that the foreign entity paid for its ownership of the petitioning entity.

As previously stated by the director, 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 the 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.

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.

In the instant case, counsel asserts on appeal that the petitioner "presented two clearly readable copies of Membership Certificates," which she claims confirmed the petitioner's own claim regarding its ownership. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's mere disagreement with the director's correct observation falls short of the documentary evidence required to overcome the director's conclusion.

Counsel also discusses the petitioner's submission of several of its tax returns and cites from Florida's Statute Section 608.432, claiming that the director's request for evidence establishing who paid for ownership of the petitioner's stock is unreasonable. Contrary to counsel's belief, however, the director can and should look at all matters concerning the petitioner's ownership in establishing whether it and its foreign counterpart are similarly owned. In the instant case, the petitioner claims that majority of its stock is owned by the foreign entity. It was therefore logical and within reason for the director to request proof to establish that the foreign entity actually made a capital contribution in return for ownership of its shares. That proof has not been submitted based, in large part, on counsel's mistaken belief that such evidence is irrelevant to the issue of a qualifying relationship.

A thorough review of the record indicates that the petitioner has not established that the foreign entity paid for its ownership interest in the U.S. petitioner. As such, the AAO concludes that the petitioner has failed to establish that it has a qualifying relationship with the claimed foreign entity. Based on this initial reason, this petition cannot be approved.

The other issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

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 petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

[The beneficiary] will continue to be responsible for the overall development and profitability of the operation in Miami, Florida. He will control the review of financial statements and

profit margins and determine cost expenditures. In addition, [the beneficiary] will have total discretionary authority to reduce costs in order to improve the opportunity for profits. He will decide on purchase of stock and inventory and will establish budgetary restraints in conjunction with these expenditures. He will be responsible for determining personnel need and for the hiring and dismissal of employees. As General Manager, [the beneficiary] will have discretionary authority to make necessary changes in the structure of the business, responding directly to the Board of Directors.

In the request for evidence, the director instructed the petitioner to list all of the petitioner's employees, their position titles, and their daily duties. The petitioner was also asked to indicate whether each employee worked on a part- or full-time basis.

In response to the director's request, the petitioner provided the following description of the beneficiary's proposed duties:

- Maintain an active relationship with the regional managers and directors of [the petitioner's] key vendors Meet at least once a quarter with each one of them to evaluate market situation, define new sales strategies, address issues or inconveniences, propose sales promotions and marketing campaigns [sic] (15%)
- Visit the in-country operations of [the petitioner] . . . at least once a quarter; meet with each one of the general managers to evaluate market share, business opportunities, competitors, sales and marketing strategies and financial issues among others. Meet with resellers, clients and vendors when necessary (30%)
- Follow-up on business opportunities that require to be invoiced and shipped by Nexsys International (12%)
- Attend regional or worldwide meetings and conventions of main vendors (7%)
- Seek for [sic] new vendors in the US [s]oftware [m]arket; prepare business plans and present to those vendors [i]f necessary; negotiate terms, territory assignment and support that they will provide (10%)
- Review financial statements, prepare comparison results against budget; meet quarterly with CPA (5%)
- Prepare cash flow and financial projections on a weekly basis, together with the office assistant (5%)
- Sign checks and wire transfers; approve payments to vendors and extraordinary expenses (2%)
- Meet weekly with staff to review the operations of the company, bank statements, collections, shipments and pending issues (3%)

- Review new projects in IT and follow-up on the evolution of the e-commerce strategy of the company (5%)
- Get involved in the solution of critical complaints and requirements from vendors (3%)
- Meet at least quarterly with the Business Software Alliance BSA to review their regional strategy and suggest new actions that could improve the software market in the countries where [the petitioner] has local operations (3%)
- Prepare a periodical analysis of market share, most significant competitors and potential treats [sic] to our market position (2%)

The petitioner also submitted the requested quarterly tax returns for all four quarters of 2002 and the first three quarters of 2003. According to the petitioner's fourth quarterly tax return for 2002, and based on the petition, the petitioner employed a total of four employees at the time the petition was filed. However, based on the employee salaries and the petitioner's own admission, two of the four employees were employed on a part-time basis leaving the petitioner with only two full-time employees, including the beneficiary.

In the denial, the director concluded that based on the nature of the petitioner's business and its relatively small staff, the beneficiary is most likely involved in performing the daily operational tasks rather than merely overseeing the petitioner's daily operation.

On appeal, counsel asserts that the beneficiary is "an essential player" within the petitioning organization and focuses on several of the duties listed above. While the beneficiary may occupy the top position within the petitioner's structural hierarchy, the AAO cannot overlook the fact that the petitioner's entire organization consisted of only two full-time employees at the time the petition was filed. A critical analysis of the nature of the petitioner's business coupled with the petitioner's small support staff undermine counsel's assertion that the beneficiary is relieved from performing non-qualifying duties. Based on the record of proceeding, the beneficiary's job duties are principally composed of essential, yet non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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. While the size of a company may not be the only consideration, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the instant case, the petitioner claims that the beneficiary oversees other general managers of the "in-country operations" of other foreign organizations that comprise the Nexsys Group. However, the petitioner has submitted no evidence to illustrate how the beneficiary can manage, on a daily basis, individuals that are thousands of miles away. It is noted that 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).

Counsel also disputes the director's conclusion that the beneficiary does not manage supervisory, managerial, or professional employees. However, based on the employees named in the petitioner's fourth quarterly tax return for 2002, the individuals under the beneficiary's supervision included a part-time office assistant, a

part-time logistics assistant, and one full-time logistics manager. Based on the description of duties provided, only one of these individuals could be deemed managerial, supervisory, or professional. The remaining two employees performed clerical office tasks. Thus, while counsel disputes the director's finding, she fails to provide evidence to overcome it. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the description of the beneficiary's job duties in light of its organizational structure and lack of sufficient support staff strongly suggest that the beneficiary would be actively involved in carrying out many of the petitioner's daily operational tasks, including soliciting clientele and meeting with existing clientele, all in an effort to sell the petitioner's software products. It is noted that 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. 604. While the beneficiary's absolute discretionary authority with respect to all business matters clearly places the beneficiary at the top of the petitioner's hierarchy, the record indicates that the petitioner has not reached a level of complexity where the beneficiary would focus primarily on managerial or executive duties. Therefore, the AAO cannot conclude that the beneficiary would be employed in a qualifying managerial or executive capacity.

It is noted that on appeal, the petitioner has submitted a letter, dated January 26, 2003, signed by the original landlord where the petitioner is currently renting office space. This letter clears up a prior inconsistency discussed by the director in regard to the actual office space currently occupied by the petitioner. As the petitioner has submitted sufficient information establishing that it has an appropriate office space in which to conduct its business, the AAO concludes that the petitioner has overcome the director's objection regarding this matter. Nevertheless, due to the reasons stated in the above discussion, this petition cannot be approved.

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.