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U.S. Citizenship
and Immigration
Services

B4

JAN 11 2005

FILE: WAC 03 025 54339 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in September 2001. It is a travel agency and property management company. It seeks to employ the beneficiary as its 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 determined that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; or (2) that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

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

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

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

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an October 15, 2002 letter appended to the petition, the petitioner stated the beneficiary's duties in the United States included:

Direct and coordinate activities of the U.S. Corporation. Formulate and administer organization policies; Participate in formulating and administering company policies and developing long range goals and objectives; Direct and coordinate activities of the company for which responsibility is delegated to further attainment of goals and objectives. Review analyses of activities, cost, operation and forecast data and objectives. Negotiate the contracts with the vendors and customers. Do market research to look into diversifying the business.

The petitioner also provided its organizational chart showing the beneficiary as president, an export/import manager position, a marketing position, and a secretarial position.

On April 7, 2003, the director requested: (1) the petitioner's organizational chart showing the managerial hierarchy and staffing levels as of October 31, 2002, the date of filing the petition; (2) that the petitioner's organizational chart include the names of all employees within each department and a brief job description, educational level, and annual salary of each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties; and (4) the petitioner's California Forms DE-6, Employer's Quarterly Report, for the fourth quarter of 2002 and the first quarter of 2003.

In a June 15, 2003 response, counsel for the petitioner stated that the beneficiary is responsible for overall management, operation, and administration of the business. Counsel described the beneficiary's duties as:

- a. He directs and coordinates activities of the U.S. Corporation related to the business development. Oversee the travel agency and the export/import, and Property Management business[;] 25%
- b. He coordinate the finance and formulate and administer organization policies [sic]; Participate in formulating and administering company policies and developing long range goals and objectives; 20%
- c. He studies the market for new venture[.] Do market research to look into diversifying the business. 15 %
- d. Meet the vendors. Negotiate the contracts with the vendors and the customers. 20%
- e. Review the property agreements, and follow up with escrow and management companies. Make profitable deals. Hire Management team to manage the properties purchased. Oversee the management team. 20%

The petitioner's organizational chart showed the beneficiary's position as president, and a business/operations manager position, a marketing/sales manager position, an export/import manager position, and a property management manager position. The petitioner's California Forms DE-6, for the last quarter of 2002 and the first quarter of 2003, confirmed that the marketing/sales manager position and the business/operations manager were either part-time employees or employed sporadically. The California Forms DE-6 showed that

the only full-time employee, other than the beneficiary, was the import/export manager and that the property management manager position was vacant.

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

On appeal, counsel asserts that the beneficiary performs executive duties. Counsel claims "managerial positions not only involve supervising personnel but can also involve supervising products, services, and the overall management, analyzing market, analyzing management policies, and analyzing financial information of the company." Counsel contends "the changes made to the 1990 Act specifically bars the number of persons supervised as the sole basis for denying managerial status to an employee." Counsel confirms that the petitioner is a new business and that the beneficiary's subordinates work part-time but claims that the petitioner is in the process of expanding. Counsel cites unpublished decisions to support his contentions.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[d]irect[ing] and coordinate[ing] activities of the U.S. Corporation," "[f]ormulat[ing] and administer[ing] organization policies," and "developing long range goals and objectives." The petitioner did not, however, define the petitioner's goals, policies, or clarify who actually performs the travel agency services or provides the daily property management services. 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). 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).

In addition, the beneficiary is the individual who is responsible for "[n]egotiat[ing] the contracts with the vendors and customers," and "the market research to look into diversifying the business." 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).

In response to the director's request for further detail regarding the beneficiary's daily duties, the petitioner again provides generalities rather than details. The petitioner indicates the beneficiary oversees the travel agency, the export/import business, and the property management business without clarifying who in the company is responsible for carrying out the daily operational and administrative tasks necessary to provide travel services and property management. Of note, the record does not contain evidence that the petitioner is actively engaged in importing or exporting products.

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "formulat[ing] and administer[ing] organization policies" and "[p]articipat[ing] in formulating and administering company policies and developing long range goals and objectives." Not only is the petitioner's description of the beneficiary's duties repetitive, the petitioner's conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The record does not support counsel's assertion that the beneficiary performs executive duties. 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). Moreover, while counsel's claim that managerial positions do not require the supervision of personnel is partially correct, counsel has not provided evidence that the beneficiary primarily manages a function. When a petitioner claims that a beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. As observed above, 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 at 604. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Counsel contends that the 1990 Act specifically bars the number of persons supervised as the sole basis for denying managerial status to an employee. In fact, section 101(a)(44)(C) of the Act requires that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. Further, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the petitioner has not presented evidence that the petitioner's part-time employees relieve the beneficiary from providing the petitioner's travel agency and property management services.

Counsel's explanation that the petitioner is a new business in the process of expanding is not persuasive. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel's citation to unpublished decisions is not probative. The regulation at 8 C.F.R. § 103.3(c) provides that while AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

The next issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

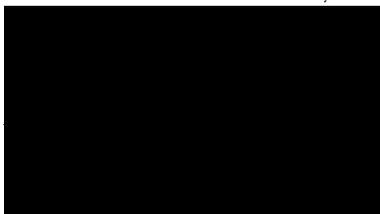
Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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

In its October 15, 2002 letter in support of the petition, the petitioner indicated that R.K. Steel Syndicate owned a 51 percent in the petitioner. The petitioner also included its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the petitioner's tax year beginning September 1, 2001 through August 31, 2002. In response to Schedule K, Question 5, the petitioner referred to an attached statement that indicated the beneficiary, an individual, owned 100 percent of the petitioner's voting stock. The IRS Form 1120 also showed at Schedule L, Line 22(b) that the petitioner's common stock was valued at \$76,730.

The director requested proof of the stock purchase including copies of original wire transfers from the parent company to the petitioner with the originators of the monies wired or deposited clearly shown. The director specifically required an explanation for all funds not originating with the foreign company. The director also requested the minutes of the U.S. company's meeting that listed the petitioner's stock shareholders, and the number or percentage owned, the petitioner's stock certificates issued, the petitioner's stock ledger, and the petitioner's Notice of Transaction filed with the State of California's Corporation Commissioner.

In response, counsel for the petitioner noted that the foreign company had paid a broker and the broker transferred money to the United States. Counsel indicated that the foreign entity and the petitioner were both family businesses. Counsel attached a copy of a wire transfer showing the originator of the \$20,000 in wired funds as [REDACTED] and showing the beneficiary as the petitioner's bank account. The petitioner's Notice of Transaction dated July 1, 2001 showed the value of the petitioner's securities sold as \$10,000. The petitioner's minutes of its organizational meeting listed the authorized number of shares at 10,000. The minutes listed the initial shareholders as:



5,100 shares at no par value
100 shares at no par value
2,000 shares at no par value
1,400 shares at no par value
1,400 shares at no par value

The petitioner provided copies of share certificates 1 through 5 showing the shareholders with the number of shares as above listed. The petitioner's stock ledger confirmed the number of shares that had been issued but showed that each shareholder had paid \$1.00 per share.

The director determined that the petitioner had not provided a clear path of funds from the foreign entity to the petitioner and concluded that the petitioner had not provided evidence to substantiate the claim of a qualifying relationship.

On appeal, counsel for the petitioner asserts that the foreign entity transferred money to the petitioner for its initial investment through one of its Canadian suppliers. Counsel attaches a letter purportedly from the foreign entity stating that the foreign entity "had some funds lying in reserve with their suppliers in Canada" and with the help of [REDACTED] transferred the funds to the petitioner to set up the new business.

Counsel's assertion is not persuasive. As stated previously, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. 1; *Matter of*

Ramirez-Sanchez, 17 I&N Dec. at 506. 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 context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the record contains inconsistencies regarding the petitioner's ownership and control. The petitioner's IRS Forms 1120 show that the beneficiary is the 100 percent owner of the petitioner's stock. This statement directly contradicts the petitioner's organizational minutes that show the beneficiary owns 1,400 shares of the 10,000 shares issued. In addition, the petitioner's IRS Form 1120 values the petitioner's common stock at \$76,730 while the petitioner's stock ledger shows that each shareholder had paid \$1.00 per share. This information is also inconsistent with the foreign entity's alleged transfer of \$20,000 to purchase its 51 percent interest in the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The record contains inconsistent information regarding the foreign entity's purported investment in the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

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

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.