

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B4

FILE: WAC 02 113 55097 Office: CALIFORNIA SERVICE CENTER Date: JUL 21 2005

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

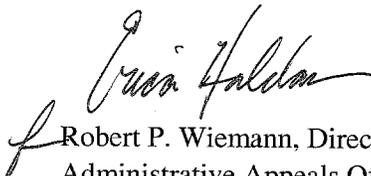
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, California Service Center, denied the employment-based petition. On February 13, 2003 the petitioner filed an appeal with the Administrative Appeals Office (AAO). The AAO dismissed the appeal in a decision dated October 31, 2003. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion. The previous decisions of the director and the AAO will be affirmed.

The petitioner filed the employment-based petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of California that is engaged in the sale, trade, distribution and marketing of food products. The petitioner seeks to employ the beneficiary as its president.

In a decision dated January 16, 2003, the director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. On appeal, counsel asserted that as the "top level executive" of a five-person company, the beneficiary would be employed in a managerial and executive capacity. The AAO subsequently affirmed the director's decision and dismissed the appeal concluding that the beneficiary would not be employed by the petitioner in a primarily managerial or executive capacity. Specifically, the AAO noted that: (1) the petitioner failed to clarify the beneficiary's employment capacity as a "hybrid executive/manager"; (2) the beneficiary appears to be performing non-qualifying tasks necessary for the operation of the business; and (3) the petitioner has not established that the beneficiary would be managing an essential function of the business.

Counsel filed the instant motion to reconsider on November 28, 2003, stating the motion "is based upon [the] Petitioner's belief that the AAO was erroneous in its application of the law based upon the facts set forth in [the] Petitioner's initial petition." Counsel challenges the AAO's reference to the beneficiary as a hybrid manager and executive, claiming that the beneficiary, an executive, could also qualify as a manager as his executive job duties overlapped with the managerial responsibilities outlined in the regulations.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial 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 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 AAO will consider the issue of whether the petitioner demonstrated that 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.

In support of the present motion, counsel submits a brief, in which he outlines the statutory definitions of "executive capacity" and "managerial capacity" and claims that the beneficiary qualifies for the employment-based visa, as he would be employed as both a manager and an executive. Counsel challenges the AAO's finding that the petitioner represented the beneficiary as a "hybrid 'executive/manager'" stating:

The fact that [the beneficiary] qualifies under the [Act's] managerial definitions such as 'has the authority to hire and fire or recommend those as well as other personnel actions,' etc., only means there always exists an overlap of duties and responsibilities between executive and managers.

* * *

The fact that [the beneficiary's] executive position meets all statutory definition of executive, as well as manager, does not mean that [the] Petitioner never stated his duties or responsibilities were executive. Page 3 of [the] Petitioner's letter states 'As Vice Chairman, he will serve as the senior ranking executive for the S&B group of companies in the United States, including [the petitioning entity] and S&B Hawaii Corporation.

Counsel challenges the AAO's finding that the description of the beneficiary's job duties was too general. In addition, counsel claims that the AAO incorrectly determined that the petitioning entity, a five-employee company, did not demonstrate the need for an executive. Counsel notes that for the fiscal year ending March 2001, the petitioner had a gross profit of \$1,509,992 and annual sales of \$10,768,428. Counsel states:

Although [the beneficiary] establishes policies and directs the operations of a 'food import company,' his executive duties should be viewed no less executive than if he were an executive for any other U.S. company. Without hiring the Anderson School of Business to conduct a formal study, it seems obvious that companies of this nature do not normally require 100 people to operate export/import operations. The number of employees the company retains is average based upon the current economy and expands, just like any other company, when the economy becomes stronger. Another obvious fact is that the company's export activities help the U.S. economy and also promote job opportunities either through its own employment, but also through its purchasing of products for overseas exports. If one were to poll American companies with 5 employees, or companies engaged in food import/export or manufacturing to see whether they felt an executive was necessary to direct and establish policy for the company, would one even question what the answer would be?

One wonders why this case, or export companies in general must assume a higher course of business standard.

Counsel further contends that the AAO was vague in its generalization that the beneficiary would not have managerial control over a function, department, subdivision or component of the company. Counsel states that rather than having control over a specific function or department of the company, the beneficiary "is in charge of all U.S. operations." Counsel states that contrary to the AAO's finding, three of the beneficiary's subordinates are professionals, as they each hold a bachelor's degree.

On review, the petitioner has not demonstrated 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). The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's suggestion that the size of the foreign company and the number of products produced abroad, as well as the petitioner's annual profit and sales demonstrate that the beneficiary would be employed in a primarily executive capacity is not sufficient to overcome the AAO's findings. Counsel does not offer a more detailed description of the beneficiary's job duties. Rather, counsel asserts that the AAO was equally "general [in its] use of language in its denial." 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). Counsel has failed to provide the necessary description of what the beneficiary would primarily do on a daily basis. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, as correctly noted by the AAO in its decision, counsel has not provided a clear explanation as to whether the beneficiary would be employed primarily as an executive. Counsel notes that the petitioner claimed to employ the beneficiary as an executive, yet also states that the beneficiary "qualified under both definitions as a[n] executive and a manager." Counsel notes an "overlap of duties and responsibilities between executives and manager." Counsel's discussion as to the beneficiary's employment capacity is circular. Although counsel states the beneficiary is an executive, he also claims that the beneficiary would perform managerial tasks. Counsel is required to clearly explain whether the beneficiary would be employed as an executive or a manager and provide a detailed explanation as to how the beneficiary meets the four criteria set forth in the statutory definition for executive capacity or the statutory definition for managerial capacity. If the petitioner is representing the beneficiary is both a manager *and* an executive, the petitioner must establish the beneficiary's eligibility by meeting the requirements of *both* managerial capacity and executive capacity. 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.

Counsel has failed to refute the AAO's finding that the beneficiary would be performing non-qualifying tasks of the organization. Counsel merely asserts that three of the beneficiary's subordinate employees are professionals as each has earned a bachelors degree. Counsel does not offer any documentary evidence such as diplomas or college transcripts confirming the claim that each employee is a college graduate. 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)). Moreover, simply stating that lower-level employees are professionals does not qualify as "independent and objective evidence" that the beneficiary is relieved from performing non-managerial and non-executive tasks of the organization. See *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner is required to prove that the beneficiary *primarily* performs the high-level managerial or executive responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner has failed to meet this essential requirement.

Furthermore, counsel has not provided sufficient evidence that the reasonable needs of the organization would be met by the beneficiary's employment in a primarily executive capacity and the employment of four other workers. Counsel's blanket claim that a "poll" of American import-export companies would confirm the need for an executive does not demonstrate how the petitioner itself would be able to employ the beneficiary in a primarily managerial or executive capacity. 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).

Counsel has failed to demonstrate how the director's and the AAO's decisions were based on an incorrect application of law or CIS policy. See 8 C.F.R. § 103.5(a)(3). Based on the foregoing discussion, the director correctly concluded that the beneficiary would not be employed in a primarily managerial or executive capacity. Accordingly, the previous decisions of the director and the AAO are affirmed.

Beyond the decision of the director, the petitioner has not established the existence of a qualifying relationship between the United States and foreign entities as required in section 203(b)(1)(C) of the Act. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Here the petitioner submits two stock certificates and an "issuance of stock" agreement as evidence of a parent-subsidary relationship between the two entities. The two stock certificates reflect an issuance of 1,000

shares of stock to "S & B Shokuhin Co., Ltd." on April 1, 1992 and 1,000 share of stock to [REDACTED] on September 1, 1992. The petitioner notes in its January 16, 2002 letter that [REDACTED] is the former name of "S & B Foods Inc.," the foreign entity. However, the petitioner has not provided documentary evidence confirming the foreign entity's name change. Additionally, it is unclear from the record whether the 1,000 shares issued to "S & B Shokunhin" on April 1, 1992 were reissued under the company's new name, "S&B Foods Inc.," or whether an additional 1,000 shares of stock were issued on September 1, 1992. The record does not contain a stock transfer ledger, stock certificate registry, or evidence of consideration given in exchange for stock which would demonstrate the existence of a parent-subsiary relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

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. Accordingly, the decisions of the director and AAO will be affirmed and the petition will be denied.

ORDER: The petition is denied.