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U.S. Citizenship  
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Services

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By

FILE: WAC 01 254 53434 Office: CALIFORNIA SERVICE CENTER Date: JUL 26 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.

*Erica Falda*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner is a corporation organized in the State of California in June 1994. It facilitates the sale and trade of United States made medical and dental supplies to and from Japan. 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 petitioner filed Form I-140, Immigrant Petition for Alien Worker on June 19, 2001. On April 10, 2002, the director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity. On appeal, the AAO affirmed the director's decision on the issue of the beneficiary's managerial or executive capacity. The AAO also determined that the record did not establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On April 9, 2004, counsel for the petitioner submitted a motion asserting that the AAO's denial was contrary to law and fact and that the AAO was precluded from issuing a decision on an issue not raised in the director's decision.

Counsel's motion is granted and the matter will be reopened for further consideration.

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 petitioner has established a qualifying relationship between the petitioner and the foreign entity. 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.

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.

The petitioner asserts that [REDACTED] and Clinic [REDACTED] the foreign entity in this matter, owned 50 percent of the petitioner and that the beneficiary owned 50 percent of the petitioner. The petitioner also claims that the beneficiary owns 100 percent of Nochi Japan. The record contains the petitioner's stock certificates one and two. Stock certificate number one was issued to Nochi Japan for 50,000 shares of stock; stock certificate number two was issued to the beneficiary for 50,000 shares of stock.

The AAO determined that the record contained insufficient documentary evidence to demonstrate that: (1) the foreign entity exercised control of the petitioner with its 50 percent interest; or, (2) the beneficiary owned 100 percent of the foreign entity's stock. The AAO also stated that the petitioner could not be considered a 50-50 joint venture because it is owned by one individual and one company, not two or more economic entities.

On motion, counsel for the petitioner does not submit documentary evidence to clarify the issue of the petitioner's control; but rather claims that the AAO's denial on this issue, without giving the petitioner an opportunity to respond, is a violation of Citizenship and Immigration Services (CIS) regulations and constitutional due process.

Counsel should note that 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 this matter, the AAO noted an additional reason that the petition could not be approved. The petitioner had opportunity on motion to submit evidence to refute the AAO's determination. The petitioner did not submit further evidence or provide legal argument on this issue.

Moreover, on the substantive issue of qualifying relationship, counsel also should note that a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The petitioner has failed to submit documentary evidence on motion to establish the ownership and control of the foreign entity. Likewise, the petitioner has failed to submit documentary evidence that the beneficiary owns and controls both the petitioner and the foreign entity, or alternatively, evidence that the foreign company exercises control of the petitioner with its 50 percent interest. 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).

When two owners each hold 50 percent of a corporate entity, the petitioner must supply evidence that one of the corporate owners has agreed to relinquish control, such that if the two equal owners disagreed, the organization could continue operations. Without evidence that one or the other of the corporate owners exercises control of the petitioner, the petitioner has not established a qualifying relationship. In this matter, the question of actual control still remains. As the AAO previously determined, the record does not include any evidence of voting proxies or other agreements showing that one of the petitioner's owners has relinquished control. Further, the petitioner has not provided evidence in this matter that it is a joint venture, as referenced in *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). There are no provisions in statute, regulation, or case law that allow for the recognition of *de facto* veto power exercised through negative control in other than a 50-50 joint venture.

In this matter, neither counsel nor the petitioner has provided independent documentation on motion establishing a qualifying relationship between the petitioner and the foreign entity.

The second issue in this proceeding is whether the petitioner established that the beneficiary would 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.

When the petition was filed, the petitioner stated that the beneficiary's duties included:

[D]irect the work of our General Manager in charge of Projects and Sales and Assistant General Manager in charge of Exports, as [the beneficiary] has been and will continue to be responsible for the establishment and implementation of company policies and goals. He will continue to examine and review market opportunities within the dental and clinical equipments industry and exercise wide discretion in planning present and future business developments in the United States. He will continue to direct large-scale contract negotiations as well as the implementation and/or modification of all company policies, goals and marketing strategies through subordinate personnel. He will continue to be responsible for making final decisions and determinations as to our company's business and continue to build upon its current success and growth.

On December 20, 2001, the director requested evidence to show that the beneficiary would be performing the duties of a manager or an executive with the United States entity. The director requested: (1) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels; (2) the beneficiary's position on the chart and all employees under the beneficiary's supervision by name and job title; (3) a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; (4) a more detailed description of the beneficiary's duties in the United States and the percentage of time the beneficiary spends in each of the listed duties; and, (5) copies of the petitioner's California Forms DE-6, Employer's Quarterly Report.

In a March 4, 2004 response, the petitioner indicated that:

As President, [the beneficiary] has been responsible for establishing our sales, marketing and provision of seminars as well as our company policies. [The beneficiary] has been and will continue to be responsible for our continued provision of quality dental educational and promotional seminars. He will continue to liaise with potential suppliers in the United States and oversee our managerial employees to market new seminars towards expansion of services and products. He will continue to be responsible for communications with industry executives and expanding market opportunities, while assessing the technical needs of our parent company and industry clients in Japan. [The beneficiary] will continue to oversee subordinate managers in monitoring our company's market position and build relationships with industry manufacturers. He will continue to establish company policies through regular meetings with our managers and Nochi Japan executives. He will continue to be the final authority in directing and determining fiscal priorities, authorizing corporate spending and project management, including all matters related to the hiring, firing and promotions of personnel.

The petitioner stated that the beneficiary as president had two professional positions under his direction:

- (1) A general manager who was "responsible for seminar sales, plans and organizes details of seminar events, monitors general direction and overall business strategy of [the

petitioner], makes recommendations for personnel matters, including hiring, promotions, and terminations."

- (2) An assistant manager who was "responsible for detailed planning of [the petitioner's] seminar activities, plans and arranges transportation, hotel accommodations and other travel seminar materials, creates advertising copy and other promotion materials for seminar events, supervises administrative assistant."

The petitioner's organizational chart depicted the beneficiary as president, a general manager directly beneath the beneficiary's position, an accounting/administrative assistant and an assistant general manager directly beneath the general manager's position, and finally an alloy salesperson reporting to the assistant general manager. The petitioner's California Form DE-6 confirmed the employment of individuals in the positions listed on the petitioner's organizational chart.

The director determined that the proffered position was not in an executive or managerial capacity, based in part on its staffing levels. On appeal, counsel objected to the director's reliance on staffing levels. The AAO noted that counsel correctly asserted on appeal that the size of the petitioner, alone, without taking into account the reasonable needs of the organization, could not be the determining factor in denying a visa to a multinational manager or executive. The AAO withdrew the director's decision as it related to the reasonable needs of the petitioning business.

However, the AAO affirmed the director's denial on this issue noting that a review of the entirety of the record failed to provide complete information regarding the duties of each of the petitioner's employees. The AAO concluded that CIS could not determine whether the beneficiary would manage or direct the provision of the petitioner's services, or would perform the tasks necessary for the petitioner to provide its services.

On motion, counsel for the petitioner observes that the petitioner supplied job descriptions for the "relevant managerial level employees directly subordinate to [the beneficiary]." Counsel also notes that the two other employees listed on the organizational chart perform accounting and administration services and perform the alloy sales. Counsel concludes that based on the beneficiary's job description and the job descriptions of the beneficiary's subordinate employees, the petitioner has established that the beneficiary is an executive. Counsel asserts that both the AAO and the director's decisions failed to consider all the pertinent facts and are conclusory without any facts to support their conclusions.

Counsel's assertion is not persuasive. Although the AAO concedes that its decision could have more explicitly detailed the petitioner's failures on this issue, the record does not support counsel's conclusion that the beneficiary's position is an executive position.<sup>1</sup> 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.

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<sup>1</sup> The AAO notes that the record contains brief job descriptions for the petitioner's general manager and assistant manager, two of four of the beneficiary's subordinates, and withdraws its previous conclusion that "the petitioner never supplied this information." However, as discussed below these job descriptions are insufficient to establish that the beneficiary will be relieved of performing primarily non-qualifying duties.

§ 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.*

On review, the petitioner's description of the beneficiary's duties is vague, nonspecific, and fails to demonstrate the beneficiary's day-to-day duties. For example, the petitioner twice paraphrases section 101(a)(44)(B)(ii) of the Act in its initial description of the beneficiary's duties and twice in its response to the director's request for evidence. Specifically, the petitioner states that the beneficiary will "be responsible for the establishment and implementation of company policies and goals," and will be responsible for the "implementation and/or modification of all company policies, goals and marketing strategies through subordinate personnel;" and in response to the request for further evidence, the beneficiary will be "responsible for establishing our sales, marketing and provision of seminars as well as our company policies," and will "continue to establish company policies through regular meetings with our managers and Nochi Japan executives." In addition regarding the description of the beneficiary's duties, the petitioner provides the general phrase "exercise wide discretion in planning present and future business developments in the United States," a paraphrase of section 101(a)(44)(B)(iii). The petitioner does not further define the petitioner's organizational goals and policies or sufficiently clarify who will be responsible for implementing the petitioner's goals and policies. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In addition, the petitioner initially indicated that the beneficiary will "direct large-scale contract negotiations," and "examine and review market opportunities within the dental and clinical equipments industry." In response to the director's request for evidence, the petitioner indicated that the beneficiary is "responsible for our continued provision of quality dental educational and promotional seminars," and "liaise[s] with potential suppliers in the United States," and is "responsible for communications with industry executives and expanding market opportunities, while assessing the technical needs of our parent company and industry clients in Japan." These duties are not sufficiently detailed to provide an understanding of whether the beneficiary performs primarily executive or managerial duties in regard to the duties or whether the beneficiary actually performs the tasks associated with the duties. 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).

As the AAO observed in its previous decision, a review of the totality of the record does not provide evidence that the petitioner is employed in primarily a managerial or executive capacity. For example, the petitioner initially stated that the beneficiary directed the general manager who was in charge of projects and sales and added in response to the director's request for evidence that the beneficiary oversaw "managerial" employees in marketing seminars and in monitoring market position. However, the brief description of the general manager's duties indicates that the general manager is the individual performing the operational tasks associated with seminar events. The remaining portion of the description of the general manager's position is couched in the general statements: "monitors general direction and overall business strategy of [the petitioner], makes recommendations for personnel matters, including hiring, promotions, and terminations." Specifics are clearly an important indication of whether 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. at 1108.

The AAO notes further that the petitioner has not provided a consistent description of the assistant general manager's duties. Initially the assistant general manager was in charge of exports; however, in response to the director's request for evidence, the assistant general manager's position appears to assist with the operational and administrative tasks of planning seminars. 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).

Upon review of the general and inconsistent statements regarding the beneficiary's subordinates' duties, the AAO cannot conclude that the general manager or the assistant general manager's duties relieve the beneficiary from performing primarily non-qualifying duties. The petitioner fails to provide a comprehensive description of the beneficiary's actual daily duties, fails to provide an understanding of the duties of the four remaining employees, and fails to explain the nature of the petitioner's business and how each employees' position satisfies the daily requirements of the petitioner's operations. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified 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 record in this matter does not contain sufficient evidence to establish that the beneficiary's job duties comprise primarily managerial or executive functions. The petitioner has not provided evidence to overcome the prior decisions on this issue.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The decision of the AAO dated March 11, 2004 is affirmed.