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File: WAC 03 047 54773 Office: CALIFORNIA SERVICE CENTER Date: JUN 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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further consideration.

The petitioner was incorporated in 1969 in the State of Wisconsin and operates as a real estate investment and management firm. It seeks to employ the beneficiary in the United States as its president and managing director. 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 that it has a qualifying relationship with a foreign entity and denied the petition.

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.

In his decision, the director noted that [REDACTED] ownership of the U.S. entity, while only totaling 54% of the foreign entity, does not meet the requirements of an affiliate relationship as defined in the above regulation. The director specified that "[a]lthough some commonality of ownership may exist, common control must exist for a qualifying relationship." The director also pointed to inconsistencies among several of the petitioner's tax returns, most of which indicated that M [REDACTED] owns 25% of the U.S. entity's stock rather than 100%, as initially claimed in the statement submitted in support of the petition.

On appeal, counsel vehemently disputes the director's finding, referring to various documents submitted with the initial petition and subsequently in response to the request for evidence. Namely, counsel points to the Minutes of Special Meeting dated January 28, 2000 in which Ms. [REDACTED] signature appears identifying her as the petitioner's "Director and Sole Shareholder." Counsel further asserts that the director acknowledged that Ms. [REDACTED] owns a majority of the U.S. and foreign entities and suggests that the director, therefore, effectively admitted that a qualifying relationship exists between the two entities despite the director's error in assigning a smaller ownership interest of the foreign entity than Ms. [REDACTED] actually owns. Counsel referred

to the petitioner's submission of the foreign entity's 1999 Shareholders Extraordinary Meeting Minutes, which assigned additional shares to ██████████ giving her a 77% ownership interest in the foreign entity.

Additionally, the petitioner submitted a letter from its certified public account (CPA) and amendments made to the petitioner's tax returns for the years 2000 through 2002. The CPA explained that he inadvertently submitted erroneous information in regard to the petitioner's ownership and the status of its shareholder. It is noted that the amendments show Ms. ██████████ 100%, rather than 25%, shareholder of the U.S. petitioner.

Upon reviewing the evidence of record, particularly focusing on the contemporaneous documentation, which clearly identifies Ms. ██████████ as the sole owner of the U.S. entity and majority owner of the foreign entity with a 77% ownership interest, the AAO concludes that the director's determination was erroneous. Accordingly, the director's decision is hereby withdrawn.

However, the appeal cannot be sustained at this time as the record lacks sufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity.

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

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

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

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

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

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

In support of the initial petition, the petitioner submitted the following description of the beneficiary's proposed duties in the United States:

Responsible for all activities conducted by [t]he [c]ompany. Manages a variety of general office activities by performing the following duties personally or through [a] subordinate. In charge of employees and supervisions of there [sic] functions. Hire ring of all personal [sic]. And all final decision making for the company. Directs and oversee[s] all the financial activities of the corporation including preparation of current financial reports as well as summaries and forecasts for future business growth and general economic outlook. Directs the preparation of all income statements, balance sheets, [and] tax returns. Reviews reports to analyze projections of sales and profit against actual figures, budgeted expenses against final totals.

The petitioner also submitted an organizational chart naming the beneficiary as its president and an import and export director as his immediate subordinate. Also named in the organizational chart were an import and export assistant, a secretary, administrative assistant, "accounting," an accounting assistant, and a janitor. The petitioner also provided an additional description of the beneficiary's duties in response to the director's request for additional evidence.

In response to the director's request for evidence dated April 29, 2003, counsel for the petitioner provided the following additional description of the beneficiary's duties:

[The beneficiary] directs and controls the U.S. real estate investments of the company and he also is charged with directing the company's artificial flower operations to increase U.S. sales. As such, [the beneficiary] is a function manager rather than a first-line supervisor because [he] has managerial control and authority over a function or component of the company, the purchasing, sales and administration of real estate investments in the United States as well as the U.S. operations of its artificial flower business.

[The beneficiary] works through other employees to achieve the organization's goals and he therefore fits the definition of function manager[,] thereby qualifying as a manager under the definition found in the I-140 regulations. [He] directs others in his company and is not engaged in production activities Moreover, he is relieved from performing non-

qualifying duties by other members of the staff. [The beneficiary] functions at a senior level within the U.S. company and he performs managerial duties beyond those of a first-line supervisor.

Upon review of the information provided in regard to the beneficiary's proposed job duties, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties and would therefore be employed in a qualifying capacity. Accordingly, this case will be remanded and the director shall review the record in its entirety so that a determination can be made as to the nature of the beneficiary's proposed employment. The director may, at his discretion, request any additional evidence or information he deems necessary for a proper determination as to the beneficiary's eligibility and shall allow the petitioner adequate time to respond.

ORDER: The decision of the director dated March 17, 2004 is hereby withdrawn. The case is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which is to be certified to the AAO for review.