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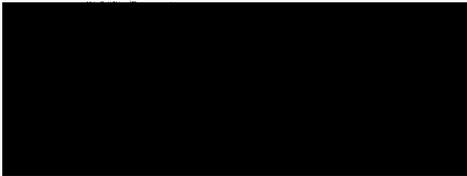
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FILE: [REDACTED] SRC 03 015 50913 Office: TEXAS SERVICE CENTER Date: JUN 13 2005

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, Texas 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 Florida in August 1999. It imports, exports, and distributes information technology products and related components. It seeks to employ the beneficiary as its vice-president of operations. 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 petitioner; or (2) a qualifying relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts: (1) that it has filled previously open positions subordinate to the beneficiary; and, (2) that the petitioner's accountant made a clerical error with respect to the company's ownership on the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return and those returns are being amended.

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 a September 24, 2002 letter appended to the petition, the petitioner stated:

With his transfer to [the petitioner,] [the beneficiary] will manage our technical and services operations, direct and coordinate network designs, supervise design and installation of structured cabling, supervise design and installation of systems, supervise installation of network softwares, [sic] equipment configuration, documentation, tests and certification of the systems installed.

The petitioner added:

[The beneficiary] will supervise the work of professional employees, recommend hiring, dismissal or promotion of personnel, exercise discretion over day-to-day activities of the technical and services division, and establish goals and policies as needed for the accomplishment of our expansion projects. He will also act as the president of the company during [the president's] frequent absences.

On September 13, 2003, the director requested that the petitioner answer the following questions regarding the beneficiary's proposed position: (1) will he directly supervise any other employees? (2) if yes, provide their names, titles and duties; (3) if yes, what will his supervisory duties be? (4) what are his proposed daily duties (not areas of responsibility) with the U.S. company and what percentage of time will he spend on the various duties?

In a December 1, 2003 response, the petitioner indicated that: (1) as soon as the beneficiary started his new position, he would identify and hire a technical service department manager and two technicians and would supervise the work of the three technicians; (2) the technicians would need experience in installing, operating, and maintaining local and wide area networks; and, (3) the beneficiary would spend 25 percent of his time meeting with the technical manager regarding new customers, existing projects, and follow-ups, 30 percent of his time on "high-level" contact with customers in order to sell new contracts, prepare estimates for new services, set up conference calls and meetings with customers and suppliers, and the remaining portion of his time on duties such as, providing design, installation, and technical support, scheduling and directing equipment installation, troubleshooting tasks performed by technicians, reviewing problems, determining requirements, designs, orders and schedules, planning, prioritizing, and scheduling software changes, and defining staff training requirements and schedules.

The petitioner also provided its 2003 organizational chart showing the beneficiary's proposed position as vice-president of operations over three open positions.

The director determined that the petitioner did not employ technicians or any individuals for the beneficiary to supervise and that the petitioner did not employ individuals to perform the tasks of technical design,

installation and troubleshooting. The director concluded that the beneficiary would be required to perform those non-qualifying tasks and thus would not be considered a manager or an executive.

On appeal, counsel for the petitioner notes that one of the beneficiary's proposed duties is to build a team of trained and skilled workers. Counsel claims that on the beneficiary's recent visit to the United States (August 2004) the beneficiary interviewed and hired two technicians.

The information submitted on appeal does not establish that the beneficiary's primary duties will be to perform in a managerial or executive capacity. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). When the petition was filed, the petitioner proposed to expand its business and created a position for the beneficiary to fill. However, this visa classification was created for the transfer of managers or executives from foreign companies to the United States in order to continue to render managerial or executive services to the qualifying entity, not to begin the operations necessary to create a managerial or executive position.

The petitioner has not established that the beneficiary's proposed position will be managerial or executive. 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). In this matter, the beneficiary will not be performing managerial or executive tasks but will be performing the operational and first-line supervisory duties of the petitioner's technical services department. As the director observed, 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).

The AAO notes that the proposed organizational structure of the petitioner's operational department, even if the positions subordinate to the beneficiary had been filled, would not establish that the beneficiary would perform primarily managerial or executive duties. The petitioner's description of the beneficiary's duties is indicative of an individual assisting in the performance of the petitioner's day-to-day operational tasks and performing first-line supervisory duties of non-professional employees. 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). Of further note, the AAO observes that the petitioner routinely refers to the "technical service department manager" position as a technician position and that the record does not demonstrate that this position will comprise managerial or supervisory components. The evidence does not substantiate that the duties of the beneficiary and his subordinates correspond to their proposed placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The petitioner has not provided evidence of an organizational structure sufficient to elevate

the beneficiary's proposed position to a supervisory position that is higher than a first-line supervisor of non-professional¹ employees.

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

The second issue to be considered 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.

The director observed that the record contained conflicting evidence regarding the petitioner's ownership. Specifically the director noted that the petitioner had issued three stock certificates: stock certificate number 1 to the foreign entity for 6,500 shares and stock certificates 2 and 3 to two individuals for 250 shares each.

¹ The petitioner's description of the technicians' job duties does not describe "professional" positions. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The director compared this evidence with the petitioner's 2001 IRS Form 1120 that showed one individual owned 100 percent of the petitioner.

On appeal, counsel for the petitioner claims that the petitioner's accountant made a clerical error and submits the accountant's letter of explanation and statement that the tax returns will be amended to reflect the correct ownership.

The record does not contain the amended tax returns. The AAO notes further that the petitioner's 2001 IRS Form 1120 at Schedule L, Line 22(b) shows the value of the petitioner's stock as \$500. However, the petitioner's Articles of Incorporation state that each of the petitioner's shares is valued at \$1 and that two individuals each own 250 shares. 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).

The petitioner has not provided sufficient evidence to resolve the inconsistencies in the record regarding its ownership and control. 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 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, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The petitioner has not provided sufficient evidence to overcome the director's decision on this issue.

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.