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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 13 2005
WAC 03 135 51140

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:
[REDACTED]

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 July 2000. It provides non-emergency ambulance services. 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) a qualifying relationship between the petitioner and the foreign entity; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that: (1) the beneficiary owns and controls 100 percent of the U.S. corporation and owns and controls 51 percent of the foreign entity, thus the criteria for a qualifying relationship have been met; (2) the beneficiary satisfies the criteria for a manager or an executive; and, (3) Citizenship and Immigration Services (CIS) has implemented a policy shift making it more difficult for small companies to establish that their employees are performing managerial duties, and that the policy shift and lack of clear guidelines has resulted in a violation of due process to small company owners. Counsel also cites several unpublished decisions in support of her assertions.

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 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 beneficiary had been issued 25,000 of the petitioner's shares and did not note that the petitioner had issued any other shares. The director observed that the beneficiary owned 76,710 shares of the foreign entity and that another individual owned 73,290 shares of the foreign entity. The director concluded that as the record did not show that the two entities are owned and controlled by the same parent or individual or that the two entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity, the evidence did not reflect that the petitioner is an affiliate of the foreign entity.

However, the AAO has determined that if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition

even if there are multiple owners. In this matter the beneficiary owns 100 percent of the U.S. entity and owns more than 50 percent of the foreign entity. The AAO notes that control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). The petitioner has established through the evidence submitted that the beneficiary owns and controls the petitioning entity and owns a majority interest in the foreign entity and exercises "*de jure*" control by ownership of the majority interest. Based on the evidence submitted, the petitioner has established that a qualifying relationship exists between the U.S. and foreign organizations. Accordingly, the director's determination with respect to this issue will be withdrawn.

The second 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 March 20, 2003 letter appended to the petition, counsel for the petitioner stated that the beneficiary satisfied the criteria of both a manager and an executive. Counsel indicated that the beneficiary managed the organization; spent 50 percent of his time on customer servicing, including managing client relations to identify problems and opportunities for improvement; spent 25 percent of his time on marketing and sales; and spent 25 percent of his time managing accounts and office business. Counsel noted that the beneficiary had complete authority to make all hiring, firing, and promotional decisions; that he exercised discretion over the day-to-day operations of the activities and functions for which he had authority; and that he established goals, policies, and procedures for the company.

On May 6, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a more detailed description of the beneficiary's duties; an organizational chart describing its managerial hierarchy and staffing levels and listing all employees under the beneficiary's supervision by name and job title, and a brief description of their job duties; and the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the first and second quarters of 2003.

In a July 19, 2004 response, the petitioner indicated that: the beneficiary as the head of the corporation made decisions to hire people and to add assets to the corporation; the beneficiary was responsible for sales and marketing including developing a customer base, building the company's level of service, and soliciting business; the beneficiary was responsible for the profitability of the corporation, the timely billing of customers and vendors and receipt of their payments, and payment of tax liabilities; and the beneficiary was responsible for the company's general management including the validity of all licenses and contracts, insurance coverage, and employment training.

The petitioner also submitted its organizational chart showing the beneficiary as president, his wife as manager of operations, and two of his sons as quality control officer and as an office assistant, and three individuals in the position of driver. The organizational chart also showed the positions of marketing executive, dispatcher, and one driver as unfilled. The petitioner's California Form DE-6, for the first quarter of 2003, the quarter in which the petition was filed, substantiated the beneficiary's employment and the employment of one driver. The California Form DE-6 also listed two part-time employees whose names did not correspond to names identified on the organizational chart.

The director determined that the petitioner's job description re-stated portions of the definitions of managerial and executive capacity and listed duties that were indicative of an individual performing tasks to provide a service or product. The director also noted that it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with day-to-day non-supervisory duties. The director further determined that the petitioner had not demonstrated that the beneficiary was a function manager.

On appeal, counsel asserts that the beneficiary supervises the operations manager who is primarily responsible for customer service. Counsel claims that the operations manager is a professional who supervises a billing/office assistant. Counsel further claims the beneficiary directs day-to-day operations, including overall administration, sales, and marketing through the operations manager. Counsel avers that the beneficiary is responsible for financial strategy and has negotiated contracts with hospitals for the petitioner's services.

Counsel cites several unpublished decisions in support of her assertions. Counsel also argues that it is inappropriate to use the frequently cited *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) as it relates to the beneficiary's managerial or executive capacity. Counsel contends that the statement that a beneficiary whose primary task is to provide a petitioner's services or product is not a manager or an executive is not the holding of the case but is essentially dicta. Counsel also notes that the director did not consider evidence submitted regarding a separate company also organized and operated by the beneficiary. Finally, counsel asserts that a perceived policy shift by CIS affecting small companies has resulted in a violation of due process to small company owners.

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). Counsel for the petitioner asserts that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

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). Counsel's initial description of the beneficiary's duties allocated the beneficiary's time to customer service, to marketing and sales, and to managing the company's accounts and business. Counsel also paraphrased portions of the definitions of managerial and executive capacity in the description. The actual described duties indicated that the beneficiary was providing customer service, was performing the petitioner's sales and marketing services, and generally was managing the petitioner's accounts. These are basic operational tasks of the company. In addition, when the petition was filed, the petitioner employed only the beneficiary, a driver, and two individuals in undefined part-time positions. The

record did not substantiate that the petitioner employed sufficient personnel to relieve the beneficiary from performing primarily operational duties.

In the second iteration of the beneficiary's duties in response to the director's request for further evidence, the petitioner depicted the beneficiary as the individual primarily responsible for sales and marketing, developing a customer base, soliciting business, billing the customers and vendors and ensuring payment was made, and maintaining the petitioner's licenses, contracts, and insurance coverage. As noted above, the petitioner's California Forms DE-6 for the time period when the petition was filed did not substantiate the number of staff depicted on the organizational chart. 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)).

On appeal, counsel asserts that the beneficiary supervises a professional and that the professional in turn supervises a billing/office assistant, and that the beneficiary directs the petitioner's daily operations through the work of this individual. However, 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 Obaighena*, 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). In addition, as observed above, the petitioner's California Forms DE-6 do not substantiate that the operations manager or the billing/office assistant were employed when the petition was filed.

Counsel's objection to the director's reliance on *Matter of Church Scientology Int'l* is also misplaced. 19 I&N Dec. at 593. As it relates to this petition and the requested visa classification, the *Matter of Church Scientology Int'l* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. *See* 8 C.F.R. § 103.3(c).

Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be "primarily at the managerial or executive level," the AAO stated: "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 Int'l*, 19 I&N Dec. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive. Likewise, in this matter, the beneficiary's job duties are principally composed of selling and marketing the petitioner's services and performing administrative tasks including billing, maintaining licenses, contracts, and insurance coverage, the routine duties of a staff officer or specialist. The record demonstrates that the beneficiary primarily performs non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

Counsel's citation to unpublished decisions is not probative. Counsel does not provide evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

Counsel's reference to a second company created by the beneficiary is not relevant to this proceeding. The second company is not the petitioner in this matter. Moreover, the record does not contain sufficient evidence to establish that the second company was conducting business on behalf of the petitioner or was doing so when the petition was filed. The AAO observes that the Form I-140 submitted in this matter, noted in Part 5 that the employer in this matter was "self." However, first-preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from a petitioner. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981). In this matter, the petitioner is incorporated and thus 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). Although the beneficiary is the sole owner, the petitioner must operate as a separate legal entity to avoid the presumption that it was created solely as vehicle to transfer the beneficiary to the United States.

Counsel's final assertion that CIS' adjudication of this visa classification evidences a policy shift and thus produces a violation of due process to small company owners is not relevant to the adjudication of this visa petition. Counsel's perceived trend of an increase in denying first preference petitions is based solely on counsel's observation that there was a significant increase in the number of AAO decisions for this visa classification for viewing on the CIS public website. However, counsel's observations are not indicative of the purported trend. Further, the petitioner has not demonstrated any error by the director in conducting his review of the petition. The director in this matter applied the pertinent law and regulations to the facts of the matter. The AAO is without authority to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991)

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily managerial or executive. The petitioner references the beneficiary's previous experience in creating companies but does not provide a comprehensive description of the beneficiary's duties for the foreign entity. In addition, the petitioner does not detail the foreign entity's staff or organizational structure. For this additional reason, the petition will not be approved.

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.

ORDER: The appeal is dismissed.