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U.S. Citizenship
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Services

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FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 15 2005**

WAC 99 048 50550

IN RE:

Petitioner:

[Redacted]

Beneficiary:

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, approved the employment-based visa petition on November 2, 1999. Following the beneficiary's subsequent application for adjustment of status and the director's receipt of new information, the director determined that the beneficiary was not eligible for the benefit sought. The director issued to the petitioner a Notice of Intent to Revoke the approval of the petition and properly provided the petitioner with an opportunity for rebuttal. The director ultimately revoked approval of the petition on April 23, 2003. The Administrative Appeals Office (AAO) subsequently reviewed and dismissed the petitioner's appeal. The matter is again before the AAO on a motion to reconsider.¹ The AAO will grant the motion. The previous decisions of the director and the AAO will be affirmed.

The petitioner filed the instant immigrant 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 import and export of goods. The petitioner seeks to employ the beneficiary as its president.

In a decision dated April 23, 2003, the director revoked approval of the petition stating that the petitioner had not demonstrated: (1) the existence of a qualifying relationship between the foreign and United States entities; or (2) that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. In an appeal filed on May 12, 2003, counsel asserted that the foreign company maintains ownership and control over the United States entity, and submitted affidavits addressing the transfer of funds from the foreign entity in exchange for stock ownership. Counsel also claimed that the beneficiary would function in a primarily managerial or executive capacity in his management of the company's operations, warehouse and financial departments. On June 18, 2004, the AAO affirmed the director's decision and dismissed the appeal. Specifically, the AAO concluded that the inconsistencies in the monetary transfers from overseas prevented a finding that the foreign entity is the purported shareholder of the petitioner's issued stock. The AAO further concluded that the petitioner's "vague and nonspecific description of the beneficiary's [job] duties," as well as its failure to identify professional, managerial or supervisory employees to be managed by the beneficiary demonstrates that the beneficiary would not be employed in a primarily managerial or executive capacity.

The petitioner filed the instant motion on July 20, 2004, claiming there is sufficient evidence in the record to establish the existence of a parent-subsidiary relationship between the foreign and United States entities, as well as the beneficiary's employment in the United States entity in a primarily managerial or executive capacity. Counsel challenges the discrepancies raised by the director and the AAO, stating that they "[do not go] to the heart of the claim that is the qualifying relation existed between the parent company in China and its US subsidiary – the petitioner." Counsel further contends that the "very specific and clear" descriptions of the beneficiary's job duties "truthfully [reflect]" what the beneficiary would do as the president of the petitioning entity.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

¹ The AAO notes that the petitioner has not identified any precedent decisions to establish that the decisions of the director and the AAO were based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. See 8 C.F.R. § 103.5(a)(3). However, as the petitioner has offered a statement addressing the relevance of the evidence in the record, the AAO will review this matter as a motion to reopen.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or documentary evidence.

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 first consider the issue of whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities.

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 support of the present motion, counsel submits a letter dated July 5, 2004, claiming that a parent-subsiary relationship exists between the foreign company and the United States entity. Counsel addresses the evidence previously submitted in support of the purported qualifying relationship, claiming "[it is] important in terms of proving that the funds were transferred by the two individuals and a third party to the US subsidiary" for the benefit of the foreign corporation. Counsel specifically refers to the affidavits of the beneficiary and a second individual, who was employed as the chairman of the foreign entity, both of who attested to personally transferring the foreign entity's funds to the petitioner for purposes of purchasing stock in the United States corporation. Counsel mentions that the foreign entity provided a notarized statement confirming its authorization for these two individuals to transfer funds to the United States corporation. Counsel also refers to an affidavit from a third party, Lishui City Foreign Trade and Economic Cooperation Bureau, which transferred additional monies to the petitioner, purportedly for the benefit of the foreign corporation. Counsel notes that the petitioner's corporate tax returns for the years 1997 through 2003 also identify the Chinese company as the owner of 100 percent of the petitioner's stock. Counsel states that although there may be discrepancies in the evidence regarding the dates of transfer and the dollar amounts, "these discrepancies were not going to the heart of the claim that is the qualifying relation existed between the parent company in China and its US subsidiary – the petitioner."

On review, the petitioner has not demonstrated the existence of the purported parent-subsiary relationship between the foreign entity and the United States corporation.

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.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration

furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner has not satisfied the essential requirement of establishing the foreign entity as the true owner of the stock issued by the petitioner. The AAO recognizes the affidavit submitted by the beneficiary, as well as those provided by a second individual and the entity [REDACTED] [REDACTED] attesting to the transfer of the foreign entity's funds by each for the benefit of the foreign corporation. However, these affidavits do not confirm that in fact the monies transferred belonged to the foreign entity, thereby satisfying the element of ownership. There is no evidence in the record, such as bank statements of the foreign corporation, reflecting the withdrawal of funds from an account belonging to the foreign entity and its transfer to [REDACTED] for purposes of purchasing the petitioner's stock in the name of the foreign company. Nor does the record contain fund transfer receipts, which would identify and confirm that the monies transferred by the beneficiary and the foreign entity's chairman originated with the foreign entity and were debited from the foreign entity's bank account. The AAO acknowledges the four "Money Transfer Notifications" reflecting deposits made to the petitioner's Bank of America account on April 29, 1996, and the 21st, 22nd, and 29th of January 1997 from "[REDACTED], [REDACTED], [REDACTED]" and [REDACTED]. However, these letters merely identify the transfers mentioned by the petitioner and do not confirm from what corporation and bank account the funds originated. 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)).

Additionally, while the record contains evidence of the foreign entity's authorization for funds to be transferred by the beneficiary and its chairman, the petitioner has not offered any evidence, such as a board of director's resolution or affidavit from the foreign entity confirming that the foreign company authorized Lishui City Foreign Trade and Economic Cooperation Bureau to transfer the purported initial investment of \$60,000. As previously noted by the AAO in its June 18, 2004 decision, the affidavit from [REDACTED] [REDACTED] created on March 5, 2002, more than six years after the claimed transfer, "[is] not sufficient to substantiate the legitimacy of the transaction to invest funds in the petitioner for another unrelated party." The petitioner did not offer any evidence on motion to rebut the AAO's finding. While not determinative of a qualifying relationship, this information is particularly relevant, as the monies transferred in this transaction were allegedly used to purchase stock in the petitioning entity for the foreign corporation.

The petitioner has also failed to explain the inconsistencies raised by the AAO in its June 18, 2004 decision. The AAO properly noted in its decision that the valuation of the petitioner's common stock at \$90,000 does not correspond to the more than \$500,000 supposedly transferred to the petitioner from the beneficiary and the foreign entity's chairman, as well as [REDACTED]. Moreover, the \$90,000 of common stock does not correlate with the initial \$60,000 transferred in April 1996 allegedly through [REDACTED] in order to assist this kind of enterprises to seek business development of foreign trade" and also "because of the [foreign entity's] management reasons." 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 explanation on motion that it would be against Lishui City Foreign Trade and Economic Cooperation Bureau's best interests to acknowledge the transferred funds as belonging to the foreign entity if in fact they

did not does not clarify the above-noted inconsistencies. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

On motion, counsel has not provided independent, credible evidence that the foreign entity furnished funds with which to purchase an interest in the petitioning entity, thereby creating the purported parent-subsidiary relationship with the beneficiary's foreign employer. As a result, the director correctly concluded that the petitioner failed to demonstrate the existence of a qualifying relationship between the two entities. Accordingly, the previous decisions of the director and AAO are affirmed.

The AAO will next consider the issue of whether, at the time of filing the petition, 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.

On motion, counsel restates the job description provided by the petitioner on appeal, and challenges the AAO's finding that it is insufficient to establish employment in a primarily managerial or executive capacity. Counsel claims that the job description is "as common" if not "more specific" than those job descriptions outlined in the *Occupational Outlook Handbook*, which counsel notes is edited by the United States Department of Labor. Counsel states:

The description provided by the petitioner specified how many departments that [sic] the beneficiary was supervising and what kind of job he was doing. The petitioner used words such as 'design[,] 'human resources plan[,] and 'business plan,' he 'fires and hires' employees, and 'he only receives general supervision and directions from executives of the parent company and reports to the board of directors.' He makes long term and short term goals, strategy, and policies for the company, etc. These words and descriptions are very specific and clear. They truthfully reflected what the beneficiary was doing. The beneficiary . . . has been performing and will continue to perform his job duties in a managerial/executive capacity as the president of the petitioner. The sub-executives who are under the direction/supervision of the beneficiary, such as department managers of the company have also been performing and will continue to perform their job duties in a managerial/executive capacity.

Upon review, counsel's statements are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity at the time of filing the petition.

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). As properly noted by the AAO in its June 18, 2004 decision, the petitioner's vague and nonspecific job description fails to identify the managerial or executive job duties primarily performed by the beneficiary on a daily basis. Contrary to counsel's claim on motion, the petitioner's use of certain words in its job description does not ensure a finding of employment in a qualifying capacity. The AAO does not acknowledge certain "buzz" words as conclusive evidence of an alien's employment in a primarily managerial or executive capacity. Rather, the petitioner is obligated to submit a detailed description of the managerial or executive job duties to be performed by the beneficiary. *Id.* The descriptions by counsel and the petitioner that the beneficiary establishes and coordinates the work of the petitioner's departments and approves actions related to human resources, as well as designs and supervises long and short-term business plans and policies do not answer the critical question of what the beneficiary does on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will 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 previously noted by the AAO, the beneficiary's job description is essentially a restatement of the statutory definitions of "managerial capacity" and "executive capacity." *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). Specifically, counsel represented in his March 21, 2002

letter that the beneficiary "supervises and controls the work of the managers" in three of the petitioner's departments, "hir[es] and fir[es]," and "receives general supervision and directions from executives of the parent company and reports to the board of directors." On motion, counsel repeats the broadly-stated job responsibilities of the beneficiary, stating that he "makes . . . goals, strategies and policies for the company." These conclusory statements in no way "[reflect] what the beneficiary was doing," as claimed by counsel on motion. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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. at 1108.

Counsel has failed to overcome the AAO's finding that the beneficiary would not be supervising a subordinate managerial, supervisory or professional staff. Counsel merely claims that the "sub-executives" or "department managers" under the beneficiary's supervision would continue to perform managerial or executive job duties. Again, absent documentary evidence explaining the role and job duties performed by the beneficiary's lower-level employees, counsel's blanket assertions are not sufficient to demonstrate that the beneficiary would in fact supervise a managerial, supervisory, or professional staff. 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. at 506.

Counsel has failed to demonstrate how the new facts submitted with the motion justify a finding of employment in a qualifying capacity. 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 AAO will affirm the previous decisions of the director and the AAO.

Beyond the decision of the director, the petitioner has not demonstrated that prior to his transfer to the United States the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B). Other than noting in its November 5, 1998 letter that the beneficiary held the position of general manager, the petitioner has not offered any information regarding the beneficiary's employment overseas. 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. at 165. As the director did not address this issue in the Notice of Intent to Revoke, the AAO notes this deficiency for the record and will not discuss it further.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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 approval of the petition will be revoked.

ORDER: The previous decision of the AAO, dated June 18, 2004, is affirmed.