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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2005
WAC 03 165 51008

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

The petitioner is a California corporation operating as a jewelry wholesaler. It seeks to employ the beneficiary as its general manager. 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 failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and denied the petition.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 issue in this proceeding is whether the petitioner has a qualifying relationship with a 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.

In the statement appended to the petition the petitioner stated that the U.S. entity is a wholly owned subsidiary of the beneficiary's foreign employer. In support of this claim, the petitioner submitted the following documentation:

1. Articles of Incorporation filed on February 2, 1998. Part IV of the document indicates that the petitioner is authorized to issue 10,000 shares of stock with no assigned par value.
2. Stock certificate No. 1 dated February 4, 1998 showing the beneficiary's foreign employer as the owner of 10,000 shares of the petitioner's stock.
3. The petitioner's stock transfer ledger documenting the transfer of 10,000 shares of the petitioner's stock.
4. The petitioner's corporate tax returns from 2000 to 2002, the 2002 tax return being the latest tax return filed at the time the petition was filed. Schedule L, item no. 22(b) of the tax return showed that the petitioner had issued \$188,560 worth of its stock.

On July 22, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit evidence documenting the foreign entity's purchase of the petitioner's stock. Specifically, the petitioner was asked to submit copies of the original wire transfers showing where the funds originated and identifying the recipient of the funds. The petitioner was also asked to provide the Notice of Transaction Pursuant Corporations showing the total offering amounts as well as the minutes of the meeting listing the petitioner's stockholders and their respective ownership interests.

In response, the petitioner submitted the following documents:

1. The petitioner's import record summary indicating the value of goods that have been exported by the petitioner's claimed parent organization to the petitioner from 1998 through 2002.
2. A copy of the previously submitted stock certificate and a copy of the previously submitted stock transfer ledger.

3. An undated copy of the Notice of Transaction Pursuant to Corporations Code §25102(f), which indicates that the petitioner received \$802,570 in consideration other than money in return for securities sold by the petitioner.
4. Minutes of the Meeting listing the petitioner's shareholders. The document was dated August 1, 2004 and indicated that Hana Jewelry, Inc. was the petitioner's sole shareholder owning 10,000 shares of the petitioner's issued stock.
5. The petitioner's 2003 corporate tax return. Schedule L, item no. 22(b) of the tax return indicates that at the beginning of the year the shareholder's equity totaled \$188,560 and that at the end of the tax year that amount increased by \$75,000.

The petitioner also provided a written statement dated September 27, 2004 explaining that, because the original start-up cost for leasing office and warehouse space was less than \$10,000, one of the foreign company's employees personally delivered the sum to the United States. The petitioner further explained that, after office and warehouse space was secured, the foreign entity supplied and transferred jewelry to the petitioner in lieu of providing monetary compensation to fund the U.S. operation. The petitioner claimed that the total value of the jewelry initially transferred to fund the U.S. operation is indicated in the Notice of Transaction Pursuant to Corporations Code §25102(f). The petitioner reaffirmed its claim that it is entirely owned by Hana Jewelry Co., Ltd., located in Korea.

On October 28, 2004, the director denied the petition concluding that the petitioner failed to submit sufficient evidence documenting a qualifying relationship with the foreign entity. Specifically, the director noted that the petitioner's 2000 and 2001 tax returns as well as its Notice of Transaction Pursuant to Corporations Code §25102(f), all of which address the issue of the amount of stock authorized for issuance, are significantly inconsistent from the petitioner's Articles of Incorporation, its stock transfer ledger, and its first issued stock certificate, which indicate that the petitioner was authorized to issue no more than 10,000 shares of stock.

While the director properly concluded that the petitioner failed to establish a qualifying relationship, his analysis of the submitted documentation is flawed. The Articles of Incorporation initially submitted by the petitioner specifically indicated that no par value would be assigned to the 10,000 authorized shares of stock. The petitioner also did not disclose the dollar amount of 10,000 shares in its stock transfer ledger. Thus, in reality, the evidence before the director at the time of his decision does not indicate that the value of the issued shares was \$10,000. Rather, based on the petitioner's Notice of Transaction Pursuant to Corporations Code §25102(f), assuming that the document was filed simultaneously with the Articles of Incorporation, a more likely conclusion would have been that the 10,000 shares of issued stock would have been valued at \$802,570, not \$10,000 as assumed by the director.

Despite the director's flawed analysis, his ultimate conclusion was correct in that the petitioner did, in fact, fail to establish a qualifying relationship with the beneficiary's foreign employer. However, the AAO bases this finding on the lack of contemporaneous documentation to explain the discrepancy between the \$802,570 shown in the petitioner's Notice of Transaction Pursuant to Corporations Code §25102(f) and the various monetary figures shown in Schedule L, item no. 22(b) of the petitioner's tax returns. More specifically, the record indicates that the petitioner may have experienced events that lead to a change in the value of its shares, from \$802,570, when the petitioner was initially incorporated, to \$188,560 in 2002, when the petition was filed. However, the petitioner submitted no contemporaneous documentation as evidence of these

changes. 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)). Furthermore, 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).

On appeal, the petitioner submits an updated stock transfer ledger and two additional stock certificates, one issued in 1999 and another in 2003, showing the petitioner's issue of an additional 253,560 shares of stock. The petitioner also submits a certificate dated November 13, 2004 amending its Articles of Incorporation to show a change in the number of authorized shares from 10,000 shares to 1,000,000 shares. The petitioner also submits the Minutes of Meeting List of Corporation's Shareholders. Like the Minutes of Meeting initially submitted in response to the RFE, the document submitted on appeal is also dated August 1, 2004 and also names Hana Jewelry, Inc. as its sole shareholder. However, rather than the 10,000 shares indicated in the document that was submitted in response to the RFE, the document submitted on appeal shows that Hana Jewelry, Inc. now owns 263,500 shares. The petitioner's attempt to represent the more recently submitted Minutes of Meeting as a contemporaneous document gives rise to serious doubt regarding the credibility of the petitioner's claim in light of its prior submission of virtually the same document, which showed that a significantly smaller number of shares had been issued. There is no reasonable explanation to account for this large discrepancy in the number of shares where the documents submitted was purportedly executed on the exact same date. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Counsel attempts to explain the various discrepancies in the record by stating that the petitioner simply neglected to update its documents to reflect the changes in the value of the petitioner's stock. Counsel further explains that since the petitioner is not a publicly traded company the petitioner's team of managers "did not realize the importance of amending the stock certificate and recording it unto the stock transfer ledger to reflect the increases in the value of stock shares." However, 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).

The petitioner has claimed that the foreign entity initially contributed \$10,000 towards set-up costs and has presented an undated Notice of Transaction Pursuant to Corporations Code §25102(f), which indicates that the petitioner was provided with goods valued over \$800,000 as compensation for its stock. However, there is no documentary evidence of the transfer of the \$10,000; nor has the petitioner submitted any shipping documents, such as bills of lading or customs forms, to corroborate the claim that the foreign entity transferred goods as compensation for obtaining the entire amount of the petitioner's 10,000 authorized shares. Furthermore, the petitioner indicates that as of the date the petition was filed it had received a total of \$188,560 in exchange for shares given to its stockholder(s). However, as previously stated, the petitioner has submitted no contemporaneous documentation to corroborate this exchange. *See Matter of Soffici*, 22 I&N Dec. at 165. The record as presently constituted is replete with inconsistencies and claims that are entirely unsupported by contemporaneous documentary evidence. As such, the AAO concludes that the petition does not warrant approval.

Beyond the director's decision, the record shows that the petitioner's RFE instructed the petitioner to provide detailed information regarding the beneficiary's typical day of work. Although the petitioner's response

discusses the beneficiary's responsibilities, the statement is entirely too general and fails to convey a detailed description of what specific duties comprise the beneficiary's day and how much time the beneficiary spends on each of his duties. 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. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, the petitioner's statement indicates that the beneficiary negotiates contracts with customers, "manages customer relationship[s]" and conducts various marketing-related activities, which are tasks that cannot be deemed qualifying. 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 petitioner has failed to establish that the beneficiary would primarily perform qualifying duties in a managerial or executive capacity.

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). Therefore, based on the additional ground discussed above, this petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.