U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship
and Immigration
Services

[redacted]

B4

FILE: [redacted] WAC 05 168 53942 Office: CALIFORNIA SERVICE CENTER Date: AUG 0 7 2006

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, Chief
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 was incorporated in the state of West Virginia and is currently located in California importing and distributing decorative house ware and hand crafted items. It seeks to employ the beneficiary as its president/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 denied the petition on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; and 2) the petitioner does not have a qualifying relationship with the beneficiary's foreign employer.

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):
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> * * *
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> > (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 first issue in this proceeding is whether 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 Form I-140, the petitioner provided a letter dated April 13, 2005, which contained the following description of the duties to be performed by the beneficiary under an approved petition:

A. Responsibility for the direction of the day[-]to[-]day management of the company, which will require him[,] through subordinate managers[,] to supervise all projects and employees of the company, as well as make decisions necessary to maintain an efficient and successful enterprise.

B. Establish company policies, as well as oversee the implementation of those policies.... [The beneficiary] has sought to improve the company's warehouse in order to assure distributive efficiency and product quality, he has contacted and met with company sales persons in order to discuss company matters and encourage them to increase sales. In addition[,] [the beneficiary] has exercised discretion in setting goals to increase the company client base by overseeing the company's new mail campaign, and he is also implementing a new plan for the company to create a website as well as a new catalogue. [The beneficiary] will continue to direct, through subordinate personnel, these company policies, as well as implement new policies in order to achieve the company's goals.

C. Responsibility, through subordinate managers, for direction and supervision of [the petitioner]'s employees, which duty involves the hiring, promotion, firing, and directing of all activities of [the] personnel. In addition to the five full[-]time employees working within [the petitioner]'s headquarters, [the beneficiary] is responsible for maintaining and supervising a sales force consisting of several people. His position and goals will also continue to require him to keep abreast of his sales persons and to hold regular meetings with managers of that division in order to encourage them as well as monitor their success and progress.

D. Having profit and loss responsibility for the investment, and, relatedly [sic], the exercise of discretion in all matters relative to fiscal administration. This task will continue to require [the beneficiary to] oversee the day[-]to[-]day accounting for the company, and check [the petitioner]'s financial progress, as well as to work with outside accounting contractors completing [the petitioner]'s financial reports and taxes.

E. Serving as executive representative of [the petitioner] in negotiating with other business executives and managers in order to begin and cultivate business relationships necessary for operation of the business.

* * *

[The beneficiary] has full discretion and exercises wide latitude in setting corporate goals and policies. He only receives general direction from the [b]oard of [d]irectors and, therefore, can set company policies when appropriate. He also meets with managers of the business to discuss sales and in order to set sales and quality standard goals for the company.

The petitioner also provided an organizational chart in which the beneficiary is shown at the top of the company's hierarchy. The chart further suggests that the beneficiary's immediate subordinate is an independently contracted bookkeeper whose subordinates include the company's customer service employee and warehouse manager.

On September 30, 2005, the director issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation to assist in determining the beneficiary's employment capacity in the proposed position in the United States: 1) names, position titles, and job descriptions of the employees that are under the beneficiary's supervision; 2) a detailed description of the beneficiary's proposed day-to-day duties illustrating the beneficiary's typical working day; and 3) the petitioner's first three quarterly wage statements for 2005.

In response, the petitioner provided a letter dated December 21, 2005, which contained the following description of the beneficiary's duties:

> On a daily basis, the financial management of [the petitioner] consumes approximately thirty-five percent of [the beneficiary]'s time. [The beneficiary] supervises the accounting of the company, by overseeing the recording of checks, receipts, invoices, and the issuance of payroll. He also directs the issuance of company payroll and oversees independent contractors, working as accountants, in their preparation of financial documents for the corporation, including the preparation of financial reports and tax documents. Furthermore, [the beneficiary] reviews financial reports and statements for the company, and projects a path for the company based on profits and expenses. He determines the financial policies of the company based on his careful analysis of all financial factors and data.
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> Also, [the beneficiary] dedicates approximately twenty-five percent of his day to the supervision of [the petitioner]'s personnel. [The beneficiary] must not only direct the hiring, firing, promotion, and retention of company employees, but assure that company employees are working productively and efficiently in order to minimize costs and increase profits. [The beneficiary] oversees [redacted] duties in the customer service area in order to be certain that orders and complaints are being dealt with properly and that customer satisfaction remains high. Also, [the beneficiary] is ultimately responsible for assuring that company merchandise is being shipped timely, properly and in good order. In this capacity, he also supervises [redacted] who operates the warehouse, [sic] and those employees underneath her who are responsible for shipment.
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> [The beneficiary] spends twenty percent of his time on planning and implementing [the petitioner]'s business and financial policies. [He] must determine both long term and short term goals for the company and set company policies accordingly. His policy planning functions require him to constantly evaluate the present condition of the market and [the petitioner]'s position in that market as well as closely compare and evaluate the structure and success of competitors. He must also identify obstacles to [the petitioner]'s goals as well as opportunities to achieve goals. In addition, [the beneficiary] creates strategies for achieving the company's goals and supervises [the petitioner]'s employees in the implementation of those strategies.
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> * * *
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> In addition, [the beneficiary]'s ultimate responsibility to assure that [the petitioner]'s products are competitive in current markets, and he achieves this goal by taking part in product development planning . . . . As such, [he] spends ten percent of his time in [sic] meeting with representatives and artisans . . . to offer . . . thoughts on development of new products.
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> [The beneficiary] dedicates approximately five percent of his time directing quality control functions . . . . [He] must supervise the warehouse to be certain that products that are shipped meet the high quality standards set by [the petitioner]. In addition, [the beneficiary] is responsible for assuring that [the petitioner] complies with government regulations, and he regularly conducts reviews to that end. He meets with attorneys, accountants and other professionals in order to ensure that the policies he establishes for the company are sound and reliable.

> Finally, [the beneficiary] generally spends three percent of his day as a legal representative of [the petitioner], and in meeting with and negotiating with other business executives and managers . . . . [He] must serve as an executive in negotiating such things as lease agreements, new sales agreements, and agreements for outside contractors to supply materials and services . . . .

In compliance with the RFE, the petitioner provided a more detailed organizational chart indicating that the petitioner's sales activity is carried on by independent contractors who are purportedly compensated on a commission basis. The petitioner also provided its quarterly wage report for the second quarter in 2005. The report indicates that the petitioner was compensating five employees, including the beneficiary, at the time the Form I-140 was filed. Although the petitioner provided a list of individuals whom the petitioner purportedly contracts to carry out the sales function, the record does not contain any documentation corroborating the petitioner's claim.

On January 26, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director cited portions of the beneficiary's most recent job description and noted that it was comprised of general job responsibilities rather than specific job duties. The director included portions of the beneficiary's job description, noting that the description of duties contains portions of the statutory definitions of managerial and executive capacity. The director also noted that negotiating with business executives and managers is not a qualifying task.

While the AAO concurs with the director in his overall conclusion regarding the issue of the beneficiary's employment capacity in the proposed position, the AAO finds that the director's analysis in reaching the conclusion does not incorporate an accurate review of the record. More specifically, the director's analysis consists of a narrow review, which focuses on small portions of an otherwise lengthy discussion of the beneficiary's role with respect to others within the petitioning organization. While the AAO observes the petitioner's incorporation of aspects of the statutory definition, the beneficiary's description of the beneficiary's duties was not limited to only include the general terminology. Furthermore, the director's finding that one of the beneficiary's stated duties was not within a qualifying capacity cannot lead to the conclusion that the petitioner would not be employed in a qualifying capacity. Only if the record shows that the beneficiary primarily performs the duty perceived as non-qualifying can the performance of the non-qualifying task disqualify the beneficiary from meeting the definition of a multinational manager or executive. In the instant matter, the duty that the director perceived as non-qualifying was shown to consume only three percent of the beneficiary's time. Thus, even if the AAO were to agree with the director that the stated duty is of a non-qualifying nature, the performance of this duty alone cannot lead to the conclusion that the beneficiary would primarily perform non-qualifying tasks.

Notwithstanding the AAO's dissent from the director's legal analysis, the AAO concludes that the director's overall adverse finding is correct. This determination is primarily based on the lack of supporting documentation on record. More specifically, despite the AAO's overall satisfaction with the petitioner's description of the beneficiary's job duties, the petitioner's statements must be supported by documentary evidence. *See 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)). Thus, the petitioner's claim that it has a staff of independent contractors to carry out the sales-related duties is not enough; the record must be supported with documentation to support this claim. In the instant matter, the record indicates that the purported sales staff is generally compensated on a commission basis. However, there is no evidence in the record to serve as proof of such compensation. That being the case, the AAO has no way of knowing who actually performs the sales related duties; nor can the AAO conclude, with any degree of certainty, that the beneficiary does not assist in carrying out these non-qualifying tasks.

On appeal, counsel disagrees with the director's findings and asserts that the beneficiary would be employed in a managerial and executive capacity. The AAO notes that if a petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In the instant matter, the petitioner has not maintained all along that the beneficiary fits the statutory requirements of managerial *and* executive capacity. Nor is there an explanation in the record delineating the specific duties that fall under one category or the other. Rather, the petitioner has focused on the beneficiary's experience and knowledge as an executive. Therefore, counsel's assertion is baseless.

Counsel further restates the beneficiary's responsibilities, placing great emphasis on the beneficiary's discretionary authority over the petitioner's personnel, its finances, and the overall direction of the petitioner's business. Counsel discusses the beneficiary's subordinate employees and specifically states that the customer service manager is "responsible for coordinating with the sales force." However, as previously stated in this decision, the petitioner has provided no documentary evidence to establish the existence of a sales force and, as such, cannot be considered a supervisory position. Furthermore, contrary to the customer service manager's position title, neither his duties nor his level of education suggest that he is employed as either a manager or a professional employee. The record shows that he has no subordinates to manage or supervise and he further lacks the educational level to be deemed a professional employee pursuant to the regulatory definition. *See* section 101(a)(32) of the Act; *see also* 8 C.F.R. § 204.5(k)(2). The AAO notes that 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. 503, 506 (BIA 1980).

In conclusion, the record lacks sufficient evidence to warrant a favorable determination with regard to the beneficiary's employment capacity in the United States. For this initial reason, the petition cannot be approved.

The other 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:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
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> (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;
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> * * *
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> *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. and foreign entities are affiliates by virtue of having common ownership over 50% of both entities. More specifically, the petitioner indicated that the foreign entity is owned entirely by the beneficiary and his wife. With regard to its own ownership, the petitioner stated that the beneficiary and his wife each own 49% of its outstanding shares a third individual owns the remaining 2% of the outstanding shares. In support of its claim, the petitioner provided the following documentation: 1) its own articles of incorporation and bylaws; 2) stock certificate nos. 1-3 accompanied by a stock ledger; 3) its corporate tax returns from 2000 through 2003; 4) the articles of incorporation for the foreign entity; and 5) two sets of the minutes of shareholder meeting, one with regard to a meeting held on March 30, 1999, and another with regard to a meeting held on October 27, 2001.

In the RFE, which was issued on September 30, 2005, the director requested that the petitioner submit the minutes of the meeting for the U.S. petitioner where the petitioner's stock holders are listed.

The petitioner complied with the director's request by submitting the requested documentation. The petitioner explained (and the minutes of the meeting further reiterate) that the petitioner issued 1000 shares of its stock at a par value of \$20. Therefore \$20,000 in capital stock was issued according to the submitted documentation. The ownership breakdown previously discussed by the petitioner was further corroborated by the submitted documentation.

Nevertheless, the director denied the petition discussing the number of inconsistencies with regard to the amount of stock issued by the petitioner. The director further found that the submitted documentation shows that the foreign entity's ownership is divided among four individuals and that such a breakdown of shares is not the same or similar to the ownership breakdown of the petitioner itself.

On appeal, the petitioner provides sufficient documentation to resolve the inconsistencies cited by the director, thereby corroborating the original ownership breakdowns, wherein the beneficiary and his wife each owns 50% of the foreign entity and 49% of the U.S. petitioner, respectively. Despite the petitioner's belief, this ownership breakdown does not establish that a qualifying relationship exists between the U.S. and foreign entities. The evidence indicates that two individuals own the foreign company. The record further indicates that three individuals own the petitioning entity in the United States. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 204.5(j)(2)(emphasis added). While the beneficiary and his wife admittedly own most of the outstanding shares of the U.S. petitioner, neither individual has what can be deemed as majority ownership because each owns less than 50% of the petitioner's stock. The same is not the case with regard to the foreign entity, where only the beneficiary and his wife have control over the entity. Although counsel claims that the petitioning company and the overseas company are majority owned by the husband and wife due to the spousal relationship, this familial relationship does not constitute a qualifying relationship under the regulations. Therefore, the AAO cannot conclude that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.