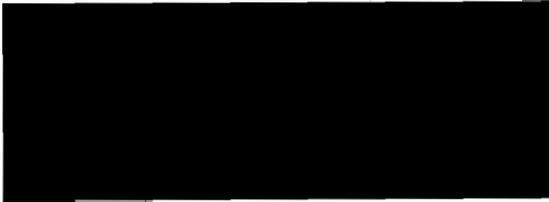


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FILE: WAC 05 131 53374 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



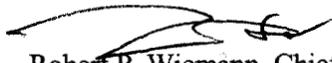
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 is a California corporation engaged in the marketing and distribution of products manufactured by its claimed parent companies. 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity; and 2) the petitioner failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings 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 first issue in this proceeding is whether the petitioner would employ the beneficiary in a capacity that is managerial or executive.

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 petition, the petitioner provided a letter dated March 24, 2005, which contained the following statements regarding the beneficiary's proposed position in the United States:

[The beneficiary] will perform the following duties as [p]resident of [the petitioner]: [d]irect and control all business activities of the [petitioner's] worldwide [business] region, including sales and marketing operations of [the petitioner] in the United States and Mexico; and provide leadership and development skills to enhance the capabilities of [the petitioner's] business heads. [The beneficiary's] primary objective is to ensure that [the petitioner's] group profit plan is implemented and met. . . .

Based on his critical experience acquired by managing worldwide and domestic sales and marketing for the parent company Dae Ha Cable as well as his acumen and managerial skill demonstrated during his tenure with our parent company in Seoul, Korea, [the beneficiary]'s services were deemed essential to provide a senior level of guidance and direction for the successful implementation of [the petitioner]'s international development policies in the United States and Mexico.

[The beneficiary] has a group of 6 managerial employees directly reporting to him. They include a [s]enior [p]lanning [e]ngineer, the [d]irector of [h]uman [r]esources, a [q]uality [c]ontrol [m]anager, a [p]roduction [m]anager, a [p]urchasing [m]anager, and a [c]ontroller. Each of the management level employees in turn have sales and/or production personnel reporting to them.

In a separate supporting document, the petitioner provided additional statements describing the beneficiary's proposed position in the United States. His primary duties and tasks were detailed as follows:

Set long term objectives for world wide [sic] business growth and profitability. These goals are then translated into short-range goals and strategies (plan of action) taking maximum advantage of our strengths. Maintain knowledge of the market; develop and foster contacts at all levels among the key customer base. Set up and maintain systems to take advantage of creative strengths throughout the [petitioning entity] and [the parent organization].

Set objectives for all direct reports, and ensure that objectives are se[t] [fo]r all employees in the company. Maintain systems for monitoring progress by all departments against the objectives.

Manage and direct the activities within the business as delineated above, establishing systems for smooth, cost effective functioning forces to deal with the primary objective. In addition, establish and periodically update an overall [b]usiness [p]lan for the [c]ompany, which, among other things, defines resources needed with the [c]ompany, from [the petitioner] to attain the objective, and which defines objectives subordinate to the primary objective.

With reference to the [b]usiness [p]lan, define annual cost and manpower budgets, short and long range, to meet the defined goals. Emphasize sales growth and maintenance of profitability. Ensure that client needs are uppermost. Maintain commitment to benchmarking business performance.

The petitioner stated that the petitioner has wide discretionary authority subject to review only by the president of one of the foreign parent entities. The petitioner also provided an organizational chart, which apparently represents the petitioning organization worldwide. Aside from the position of U.S. office controller, the chart overall does not appear to specifically represent the petitioner's U.S.-based organizational hierarchy.

On July 22, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide the following documentation regarding the beneficiary's proposed employment in the United States: 1) the petitioner's organizational chart illustrating its staffing levels and

identifying the beneficiary's subordinates by name and position title; 2) a detailed description of the beneficiary's proposed day-to-day duties describing the beneficiary's typical day on the job; 3) brief job descriptions of the beneficiary's subordinates, if any; and 4) the petitioner's quarterly wage statements¹ for the last four quarters as well as the petitioner's payroll summary and W-2 statements issued to its employees.

In response to the RFE, counsel provided a letter dated October 11, 2005 in which he included the following additional description of the beneficiary's proposed employment:

[The beneficiary] directs and controls all business activities of the [petitioner's worldwide] region, including sales and marketing operations . . . in the United States and Mexico. [The beneficiary] plans, directs, and coordinates the operations of [the petitioner].

Everyday, [the beneficiary] reviews customer MRP (Material Reorder Point) and requisition from customer's van line. He also evaluates [the petitioner's] production plan reports prepared by the production department. He works with the sales department to monitor the daily delivery schedule.

[The beneficiary] reviews internal quality control reports prepared by the [q]uality [c]ontrol department as well as customer's [sic] quality control reports. He also oversees [the petitioner's] MRP reports from the purchasing department. The accounting department submits [the petitioner's] financial reports to [the beneficiary], and he examines the reports for performance planning. He also reviews daily sales reports from the sales department. He makes [the] final decision regarding each report submitted by the various departments regarding future planning and allocation of resources. He visits [the] Mexico subsidiary and performs similar duties there.

In additional [sic] to reviewing the above described documents, he also meets with customers and their purchasing managers; and production and quality control senior managers twice a week in order to maintain timely client information.

As a [p]resident, [the beneficiary] makes all the final decisions regarding the company based on his assessment of the various department reports and his meetings.

With regard to the petitioner's organizational hierarchy, counsel identified two employees aside from the beneficiary. The first employee is a controller whose primary responsibility is to work with the company's accountant to create financial statements, which she then analyzes and reports to the beneficiary. She is also responsible for managing the petitioner's software system to facilitate the relationship between Korean vendors and customers. The other employee identified as part of the petitioner's hierarchy was the research and development and quality control manager whose primary responsibility is to develop new products for the petitioner's existing customers, monitor product quality, and prepare reports for the beneficiary's review.

¹ The AAO notes that the same RFE also instructed the petitioner to provide quarterly wage reports for various quarters in 1996, 1997, and 1998. However, with regard to the issue of the beneficiary's proposed position with the U.S. petitioner, the information found in quarterly wage statements that were filed years prior to the filing of the Form I-140 is irrelevant and need not be discussed.

The petitioner's response to the RFE also included its organizational chart, which identified the company hierarchy as of July 30, 2005. The beneficiary's position as president is shown at the top of the company's hierarchy. The two positions discussed above are shown as the beneficiary's two direct subordinates. No additional employees were identified. The petitioner provided the requested quarterly wage statements, which included the wage statement for the quarter during which the Form I-140 was filed. All three employees identified in the petitioner's organizational chart were identified in the relevant quarterly wage report and all three individuals' wages indicate that they were employed on a full-time basis when the petition was filed.

On March 21, 2006, the director denied the petition noting that the limited size of the beneficiary's support staff suggests that it is unlikely the beneficiary would be relieved from having to primarily engage in non-qualifying job duties. Although the AAO affirms the director's ultimate conclusion, the underlying analysis contains flawed comments, which the AAO will discuss below.

First, the director discussed information provided in the petitioner's 2004 quarterly wage reports. A 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). Accordingly, since the petition in the instant matter was filed on April 8, 2005, any events that took place prior to that date are irrelevant to the petitioner's overall eligibility for the benefit sought.²

Second, the director's analysis regarding the beneficiary's employment capacity is based almost entirely on the size of the petitioner's support staff. While this factor is certainly relevant, a determination cannot be made without first considering the proposed list of duties to be performed by the beneficiary under an approved petition. See 8 C.F.R. § 204.5(j)(5). Despite the director's determination that the beneficiary's "performance of those menial tasks precludes the beneficiary from being considered an executive," the decision lacks any actual analysis of the tasks the director deems to be "menial." Furthermore, the director's comment necessarily implies that a list of specific tasks was actually provided for review. However, a thorough analysis shows that the general statements describing the beneficiary's proposed employment discuss broad job responsibilities rather than specific duties and that the few duties that were identified, i.e., reviewing the reports prepared by subordinate department managers, cannot be deemed non-qualifying. As such, the AAO will withdraw both of the director's erroneous comments.

Notwithstanding the shortcomings of the director's analysis, the record in the instant matter does not warrant a favorable finding, as properly concluded by the director. As previously noted, in examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The significance of this information was further conveyed in CIS's RFE, which explicitly instructed the petitioner to provide statements illustrating the beneficiary's typical day on the job. 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). In the instant matter, the various statements regarding the beneficiary's proposed assignment provide limited information and fail to convey the requested illustration of the beneficiary's daily routine. Specifics are clearly an important indication of

² The petitioner's 2004 wage reports may be considered in the course of determining whether the petitioner was doing business for one year prior to filing the Form I-140 pursuant to 8 C.F.R. § 204.5(j)(3)(i)(D). However, failure to comply with 8 C.F.R. § 204.5(j)(3)(i)(D) was not the basis for the director's denial. Therefore, discussing the 2004 wage reports given the actual basis for denial was inappropriate.

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. *Id.* While counsel stated that the beneficiary's duties include reviewing reports created by subordinate managers and making decisions following review of the various reports, this limited description by no means illustrates the duties the beneficiary would primarily perform on a daily basis.

Furthermore, counsel's description, which was submitted in response to the RFE, stated that the reports that the beneficiary would ultimately review would be created by the heads of the petitioner's respective departments, including a production department, a quality control department, and a sales department. However, none of these departments are included in the petitioner's organizational chart.³ Thus, not only does the petitioner create an apparent inconsistency between counsel's statements and the petitioner's organizational chart, but it provides no clarification to explain who performs the production, quality control, and sales duties that would have been assigned to the employees of these respective departments.⁴

On appeal, counsel explains that each of the managerial employees within the U.S. organization has sales and production employees as their respective subordinates. However, neither the organizational chart provided in response to the RFE nor the petitioner's relevant quarterly wage report identifies such subordinates. 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. 503, 506 (BIA 1980).

Counsel also asserts that the beneficiary fits the definition of a function manager and, therefore, is not required to manage other employees. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

In the instant matter, aside from the petitioner's failure to provide a detailed job description identifying the duties to be performed by the beneficiary on a daily basis, the petitioner has indicated throughout this proceeding that the beneficiary would directly oversee and manage the work of the petitioner's two subordinate managerial employees. Thus, counsel's misdirected attempt to classify the beneficiary as a function manager appears to be the direct result of the petitioner's extremely limited support staff and the lack of

³ The petitioner has identified a research and development department with a quality control engineering manager as head of that department. However, it is unclear whether the research and development department is synonymous with a quality control department.

⁴ 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).

understanding of the role of a function manager. The petitioner cannot claim the beneficiary as a function manager merely in an effort to avoid having to explain a small support staff. In fact, a small support staff would not serve as a disqualifying factor if the petitioner were able to explain and document who performs the petitioner's daily operational tasks and to specifically articulate the beneficiary's actual duties. The petitioner has not succeeded in doing either and thus leaves the AAO to wonder what the beneficiary would actually do on a daily basis and who, if not the beneficiary, assists the petitioner's limited staff in carrying out the petitioner's daily operational tasks.

Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In Part 6, item 9 of the Form I-140, the petitioner indicated that the beneficiary's proffered wage under an approved petition would be \$101,000 per year. In a separate letter dated March 24, 2005, the petitioner explained further that only \$65,000 of the total provided in the Part 6 of the Form I-140 represents the beneficiary's base salary. The remaining \$36,000 comprised of what the petitioner referred to as "other fringe benefits." Therefore, despite the monetary amount provided in the Form I-140, the beneficiary's proffered wage is actually \$65,000.

In response to CIS's RFE, the petitioner provided its 2004 quarterly wage statements as well as the quarterly wage reports for the first two quarters of 2005. The petitioner also provided a copy of its payroll summary and the beneficiary's 2004 W-2 wage and tax statement. All of the submitted documentation shows that the petitioner has and continues to compensate the beneficiary the proffered base annual pay discussed in the March 24, 2005 support letter. Based on the evidence submitted, the AAO concludes that the petitioner has adequately documented its ability to pay the beneficiary's proffered wage. Therefore, the AAO hereby withdraws the director's second ground for denying the petitioner's Form I-140.

Nevertheless, the petition in the instant matter does not warrant approval based on the petitioner's failure to establish that it would employ the beneficiary in a primarily managerial or executive capacity.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. 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.

In the present matter, the petitioner claims to be 50% owned by Dae Ha Cable Co., Ltd., the beneficiary's foreign employer. In support of this claim, the petitioner initially provided the following documentation:

1. The petitioner's Articles of Incorporation filed on September 20, 1996. Article IV of the document indicates that the petitioner is authorized to issue one million shares of its stock.
2. Stock certificate nos. 3 and 4 dated March 5, 1997. Each certificate issued 125,000 shares of the petitioner's stock to each of two companies, the latter being the beneficiary's foreign employer.
3. The petitioner's stock transfer ledger showing that stock certificate nos. 1 and 2 were initially issued to the same two companies and were subsequently cancelled. Information discussed in No. 2 above is reiterated and each company is shown as having paid \$1.25 million in exchange for 125,000 shares of the petitioner's stock. The total paid for the issued stock was \$2.5 million.
4. The petitioner's 2003 corporate tax return including Schedule L, item 22(b), which shows that the petitioner received \$2.7 million in exchange for stock issued. Federal Statement 5 identifies the same two companies as named in the stock certificates as equal owners of the petitioner.

In response to the RFE, the petitioner provided the following additional documentation regarding its claimed qualifying relationship with Dae Ha Cable Co., Ltd.:

1. A translation of a Report of Overseas Direct Investment stating that Dae Ha Cable Co., Ltd. and Clover Hitch Co., Ltd. each invested \$1.35 million for the purchase of the petitioner's stock for a total investment of \$2.7 million. The report further explained that the foreign employer paid \$150,000 directly to another company for part of the petitioner's shares and, therefore, only invested \$1.2 million. These transactions were claimed to have taken place over the course of seven months from December 31, 1996 through August 1, 1997.
2. A Certificate of Remittance showing the petitioner's receipt of \$1,000,000 from Dae Ha Cable Co., Ltd. This document is undated.
3. A Certificate of Receipt indicating that Clover Electronics has received a total of \$150,000 from Dae Ha Cable Co., Ltd. with regard to "the investment in Mexico."

4. The petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f) dated March 5, 1997 indicating that the petitioner has received \$2.5 million in exchange for issuing its stock.
5. Another Notice of Transaction Pursuant to Corporations Code Section 25102(f) dated July 5, 1998 indicating that the petitioner has received an additional \$200,000 in exchange for issuing its stock.

The AAO finds that the documentation submitted in support of the petitioner's claimed qualifying relationship is inconsistent with regard to the amount of money paid for shares issued and with regard to the number of shares issued. While the stock transfer ledger suggests that a total of \$2.5 million dollars has been received in exchange for the petitioner's issuance of 125,000 shares, other documentation, such as the two California Notice of Transaction documents and the petitioner's tax return for 2003, suggest that the petitioner has issued a total of \$2.7 million worth of its stock. This purported additional stock issue is not documented in the petitioner's stock ledger nor is there other evidence that stock certificates were issued to account for the additional \$200,000. Additionally, while the petitioner has maintained that Dae Ha Cable Co., Ltd. has contributed \$1.35 million in exchange for its share of the petitioner's stock, the submitted Certificate of Remittance only shows \$1,000,000 contributed by the beneficiary's foreign employer. 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). In the present matter, the petitioner has neither resolved nor even acknowledged the existence of these considerable inconsistencies regarding the documentation submitted for the purpose of establishing the existence of a qualifying relationship.

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 of ineligibility as discussed above, this petition cannot be approved.

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 at 1043, *aff'd*, 345 F.3d 683.

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.