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Office: VERMONT SERVICE CENTER

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Petitioner:

Beneficiary:

[Redacted]

PETITION:

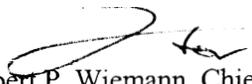
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 British Virgin Islands and has since opened a branch office in New York for the purpose of selling goods manufactured by its parent organization, which is located in Hong Kong. The petitioner seeks to employ the beneficiary as its manager and senior liaison. 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 would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's decision 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 primary issue in this proceeding is whether the petitioner would employ the beneficiary 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 submitted a letter dated May 31, 2005, which contained the following statement and list of duties and responsibilities associated with the beneficiary's proposed position with the U.S. branch and subsidiary of the foreign employer:

[The beneficiary] is responsible for working with the U.S. clients on product development and problem solving/decision making. She presents different fabric/garment options to the U.S. client based on current U.S. market trends. Her duties as Manager-Senior Liaison of [the petitioner] are managerial in nature, as she is responsible for all marketing/sales/production/pricing and delivery issues that arise between our major U.S. customer base and the [parent entity] home office. She directs a support staff of 45 college educated professionals within the [petitioner-]affiliated multinational sales/merchandising

team. In fulfilling these duties, [the beneficiary] manages and coordinates the pertinent department managers as to U.S. client requests. Her listed duties include the following:

- Give strategic guidance and make recommendations to [the parent entity's] [e]xecutive [b]oard & [m]anagement as to formulation of business plans for the expansions of the U.S. business based on client meetings and observations of [the] American market-[sic] including investment and factory allocation, etc.;

Report to [the parent entity's] [e]xecutive [b]oard;

Plan and develop policies designed to improve [the foreign and U.S. entities'] image and relations with customers;

Serve as chief liaison between various [parent entity's] departments in the Far East as to merchandising preferences of existing U.S. customers (including [f]actory [p]roduction, [m]arketing, [e]xecutive [b]oard, [r]aw [m]aterials, [f]abric [s]ourcing, [h]uman [r]esources);

Provide leadership and focus for the seamless and orderly transition of new U.S. based business activities and the related controls policies [sic], practices, procedures and protocols in [the parent entity-]affiliated companies;

- Assign manufacturing projects for U.S. clients to various [parent entity] facilities spread across the Far East;

Advise [the parent entity] management on issues such as quoting, pricing guidelines, marketing/sales, quality control, fabric preferences, manufacturing and long range planning;

- Direct [the parent entity's] colleagues and subordinates in establishing project teams to correct deficiencies, define project scope and objectives, and communicate the desired deliverables and milestones;

Instruct [the parent entity's] department managers of the current trends, and evaluate proposed fabric choice/[the parent entity's] product offering to the U.S. clients;

- Delegate projects and tasks among the sales/merchandising support staff as necessary;
- Negotiate and discuss product needs with various suppliers;
- Present and regularly meet with high profile U.S. clients as to [the parent entity's] product offering;

Assess the progress of the project deliverables and evaluate responsible team member's performance;

Monitor the U.S. customer market trends;

- Consult legal counsel with necessary; and
- Execute such deeds, mortgages, bonds, contracts, checks, or other instruments which may from time to time be approved by the [parent entity's] management.

On January 25, 2006, 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) a detailed description of the beneficiary's proposed day-to-day duties with an hourly breakdown of time assigned to each duty in order to indicate how much of the beneficiary's time would be devoted to each of the listed duties; 2) evidence of the U.S. entity's management and personnel structures; and 3) the U.S. entity's financial documentation, including its 2004 Form W-2's and W-3's, its 2005 payroll roster, complete Form 941's for the first two quarters of 2005, and a complete 2004 federal tax return.

In response, counsel provided a letter dated April 20, 2006, which contained the following hourly and percentage breakdown of the beneficiary's duties and responsibilities:

- 15% (6 hrs) Direct[s] and lead[s] teams in the United States and overseas to maintain relationship[s] and manage accounts of the key customers in the United States. Report the status and progress directly to the company CEO and COO.
- 20% (8 hrs) Direct fabric and garment teams overseas to work with customers and designers in the United States. Supervise issues such as new developments, seasonal sourcing, and the existing business strategies
- 25% (10 hrs) Perform managerial decision making in [h]uman [r]esources, [s]trategic [p]lanning, and overall [g]roup [b]usiness [d]evelopment in the United States and overseas.
- 15% (6 hrs) Supervise divisions working with American customers regarding quota and capacity allocations to provide efficient factory planning overseas resulting in quality control and on time deliveries in the United States.
- 15% (6 hrs) Work with teams and American customers to solve any problems regarding pricing, delivery, and quality. Make final decisions and negotiations on behalf of [the] company's factories and team subordinates.
- 10% (4 hrs) Develop and cultivate new customers in the United States and report progress directly to the COO.

With regard to the management and personnel structure, counsel stated that the beneficiary would oversee the work of ten managerial level employees who would oversee 20 of their own subordinates. The petitioner's organizational chart, which was submitted as part of Exhibit 1, illustrates the organizational structure of the petitioner's parent entity's subsidiaries and associated companies in Korea and Thailand and identifies two

positions in the petitioner's U.S. branch office. The top position in the United States is that of the beneficiary and the other position is that of merchandising manager, the beneficiary's only subordinate in the United States. The petitioner provided separate organizational charts illustrating the Thailand sales team and the Hong Kong and Taiwan fabric teams. In each of the foreign organizational charts the beneficiary is shown at the top of the hierarchy as each entity's vice president with a director or manager as her direct subordinate within each team.

With regard to the requested financial documentation, the petitioner provided the following:

1. W-2s issued to the beneficiary in 2004 and 2005, both of which show that the beneficiary was compensated \$72,000.
2. All four of the petitioner's 2005 quarterly tax returns.
3. The petitioner's Form 940, Employer's Annual Federal Unemployment Tax Return (FUTA), which shows the petitioner paid \$91,200 in wages in 2005. Therefore, the petitioner paid \$19,200 in wages to someone other than the beneficiary.
4. The petitioner's monthly payroll for 2005. The payroll for June of 2005, the month during which the petitioner filed the Form I-140, shows that the petitioner paid wages to the beneficiary and one other employee.

On May 30, 2006, the director denied the petition noting that most of the beneficiary's subordinates are employed abroad, which precludes such employees from being supervised by the beneficiary. The director further noted that the petitioner failed to corroborate its claims by submitting a payroll report. Based on the above discussion, which acknowledges the petitioner's submission of its 2005 payroll reports, the director's comment is erroneous and is hereby withdrawn. Regardless, based on the evidence of record, the AAO concurs with the director's ultimate conclusion regarding the petitioner's ineligibility.

On appeal, counsel states that the beneficiary's duties in the United States would be primarily of a managerial nature and provides an hourly breakdown of the beneficiary's typical day of work. The AAO notes that while counsel's breakdown of duties provides sufficient information regarding the beneficiary's daily tasks, it suggests that the primary portion of the day has been and would continue to be devoted to the supervision of employees of other entities, namely the U.S. petitioner's affiliate and associated organizations. Despite the claimed relationship between the beneficiary's foreign employer and the petitioner, the U.S. entity is, at most, a branch of the British Virgin Islands based company not of the beneficiary's claimed foreign employer, the [REDACTED]. Accordingly, the fact that the beneficiary's supervisory duties are primarily focused on staff employed by the parent organization, its subsidiaries and/or its associated companies suggests that the entity that filed the instant Form I-140 on the beneficiary's behalf will not be the recipient of the beneficiary's services and in effect has filed for the benefit of another entity. While the record suggests that the beneficiary performs certain sales and marketing related tasks directly for the U.S. petitioner, those tasks are not of a qualifying nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the only duties that the beneficiary performs directly for the petitioner are non-qualifying. The remainder of the duties, despite their nature, are performed for the benefit of an entity separate from the petitioner. The filing party in the present matter is the branch office of the foreign parent's subsidiary, which is an entity separate and distinct from the parent entity and its claimed Korean subsidiary. Accordingly, based on the evidence furnished, the AAO cannot conclude that the entity filing the Form I-140 would employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Furthermore, the record supports a finding of ineligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, the documentation provided to establish a qualifying relationship between the beneficiary's foreign employer and the petitioner is not sufficient to corroborate the claim regarding an affiliation between the two entities. In response to the director's RFE, the petitioner provided two stock certificates showing the petitioner's parent company as owner of 1,000 of its shares out of a total of 50,000 shares, which were authorized for issue. The petitioner failed to comply with the director's specific request for its stock ledger, which was likely to have identified any other parties with ownership claims to the petitioner's stock. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, the petitioner provided the parent company's annual reports for 2002 and 2003, both of which include the petitioner's name in its list of major subsidiaries and associated companies. However, the term "major subsidiary" is not defined in the report and no additional corroborating evidence has been submitted in support of the claimed relationships.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates and annual reports 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. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. As the petitioner has failed to provide sufficient documentation establishing the nature of its relationship with the beneficiary's foreign employer, the AAO cannot conclude that the petitioner has met the requirements discussed in 8 C.F.R. § 204.5(j)(3)(C).

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, 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.