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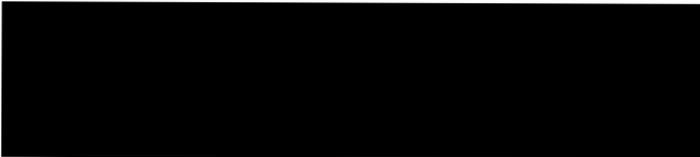
Office: VERMONT SERVICE CENTER

Date: JUL 06 2007

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:



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 Director, Vermont Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Delaware and is a holding company of sailing vessels owned by [REDACTED], also the owner of the petitioning entity. The petitioner seeks to employ the beneficiary as its sailing fleet director.

The director denied the petition concluding that the petitioner had not established that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; or (2) the foreign and United States entities enjoyed a qualifying relationship on the date of filing.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) improperly denied the immigrant visa petition, claiming that the beneficiary would be employed as a multinational executive of the petitioning entity, which counsel further claimed was an affiliate of the beneficiary's foreign employer. Counsel submits a brief in support of the appeal.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140 on December 1, 2005, noting that the beneficiary's responsibilities as the company's sailing fleet director would include the "care, maintenance, safety [and] administrative procedures of watercraft." The petitioner noted on the immigrant visa petition that the beneficiary was the sole employee of the United States organization. In an attached letter, dated October 14, 2005, the petitioner provided the following description of the additional responsibilities associated with the beneficiary's proposed position:

[The beneficiary] recruits, hires and supervises permanent and temporary employees, and outside contractors to provide repair, maintenance and support services for [the] watercraft [owned by the petitioning entity]. [The beneficiary] also supervises administrative and

financial procedures relating to [the] operation of vessels including licensing, safety and regulatory compliance, inspection and insurance. He is also responsible for planning, safety and navigation of [the petitioner's] vessels during ocean passages. [The beneficiary] also assesses and makes recommendations to [the petitioner] and ██████████ regarding the acquisition of new watercraft and related equipment. As necessary, [the beneficiary] entertains ██████████'s clients and other company guests.

The director issued a request for evidence on June 1, 2006, directing the petitioner to submit evidence that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director requested a breakdown of the hours the beneficiary would devote to performing each of the tasks associated with the position of sailing fleet director, and further asked that the petitioner submit evidence of its staffing levels or its use of contracted employees.

In an August 15, 2006 letter, the petitioner stressed the beneficiary's supervision over the petitioner's assets, valuing more than \$2,000,000. The petitioner stated:

[The beneficiary] has had substantial influence on the development of procedures and policies for [the petitioner] and a keen understanding of ██████████ management style, objectives, and standards. [The beneficiary] is completely responsible for the care, maintenance, safety and administrative procedures of all watercraft owned by [the petitioner]. He recruits, hires, and supervises contract employees and outside vendors to provide repair, maintenance, and support services for [the petitioner's] watercraft. He researches new products and upgrades for electronics and other equipment and is ultimately empowered to make the final decision on these purchases. [The beneficiary] negotiates for quality workmanship at the best price for all upgrades or replacements (including electronics such as radio and computer equipment and fixtures such as canvas awnings, seat upholstery). [The beneficiary] will also supervise administrative and financial procedures relating to operation of vessels including licensing, safety and regulatory compliance, inspection and insurance. He will make recommendations to [the petitioner] and ██████████ regarding the acquisition of new watercraft and related equipment. As necessary, he will entertain ██████████'s clients and other company guests. Whether he is at the dock in Darien, Connecticut or traveling across oceans, [the beneficiary] is in charge of enlisting a crew that can keep the watercraft well maintained to provide a safe and pleasant sailing experience for the Hokin family, business acquaintances and other related company guests.

Obviously, [the beneficiary's] schedule varies depending on whether the ships are in dock or at sea. When in dock, [the beneficiary] routinely spends a [sic] five to seven hours a week planning for the various events and cruises and scheduling any required maintenance and repair. This includes evaluating the need for an obtaining crew members for longer cruises, obtaining the necessary supplier, and coordinating the cruises and maintenance and repair projects.

When the ships are in dock, [the beneficiary] arranges maintenance and repair for the ships. This includes assessing what repairs, replacements, and upgrades are needed. [The beneficiary] meets with vendors and service providers to evaluate proposals and determines what equipment will be purchased and installed. As necessary, [the beneficiary] will

supervise work being done to the boats, including the sanding and painting, minor repair work, and installation of new equipment. [The beneficiary] inspects all repairs and maintenance work to ensure satisfactory completion. He also reviews all expense reports and arranges for the payment of vendors and contractors. Including meeting with and negotiating the contracts for repairs and maintenance, about half of [the beneficiary's] workweek is spent arranging for and supervising the maintenance and repair work.

[The beneficiary] is responsible for ensuring all safety inspections are completed and all applicable regulations are complied with. [The beneficiary] conducts a safety inspection of the ships each week, including running checks on navigational instrumentation and propane tanks for all vessels, the fuel tanks, hydraulic system and bow thruster for the Swan sailing yacht. The safety inspections take three to four hours each week.

If the Hokin's [sic] are scheduled to sail, [the beneficiary] hires two or more contract crew to ensure a comfortable and safe cruising experience. He supervises and assists the crew with preparing for the cruise. He will inventory provisions and safety equipment and arrange for restocking as needed. This typically accounts for nine hours each week.

While at sea, [the beneficiary] supervises the crew's activities and ensures the safety of crew and passengers. When in international waters, he also is responsible for charting and navigating the course. When cruising to and from the [foreign entity] in the British Virgin Islands, this consists of his entire workweek. When the cruises are local, in and around Long Island and the Northeast coast, this consists of four to eight hours a week.

In a decision dated September 30, 2006, the director concluded that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director compared the beneficiary's proposed responsibilities with those held by the beneficiary in the foreign entity, stating that the beneficiary's job duties in the United States "appear to relate only to the personal fleet of the family." The director concluded that the beneficiary would not be supervising any functions related to the business of the petitioning entity. Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on November 2, 2006. In an appended appellate brief, counsel claims that the beneficiary would be employed in a primarily executive capacity as he would direct the function "of the entire operation of maintaining and operating [redacted] personal fleet," which counsel notes is comprised of three sailing vessels valuing more than \$2,000,000. Counsel restates the additional responsibilities of caring for and maintaining the safety of the watercraft, determining the necessary crew, and contracting for maintenance repairs.

Counsel states that the beneficiary would also establish the goals, policies, and procedures "for ensuring that the crafts receive all needed maintenance and safety inspections" and "determines what equipment upgrades are needed." Counsel further notes the beneficiary's discretionary authority in choosing vendors and directing the activities related to the care and maintenance of the watercraft, stating that the beneficiary "receives only general supervision from [redacted]"

Upon review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The AAO notes that according to the petitioner's income tax returns, the petitioning entity is a holding company of the family's assets created "only for liability purposes," and as will be discussed in further detail below, does not appear to be doing business in the United States. This is relevant to the beneficiary's employment capacity, as it suggest that the beneficiary would essentially be employed as an employee of the Hokin family to maintain and navigate its watercraft for the family's personal pleasure or for entertaining the clients of the family's business.

The statutory definitions of "managerial capacity" and "executive capacity" require the petitioner to show that the beneficiary would perform the high-level responsibilities that are specified in the definitions. *See* §§ 101(a)(44)(A) and (B) of the Act. While the beneficiary would make decisions regarding the care and maintenance of the boats, or choose crew members to assist in sailing, these tasks do not rise to the level of managerial or executive decisions. Additionally, because the petitioner is not operating in the United States, it is questionable what goals or policies the beneficiary would establish for the benefit of the petitioning entity. *See* § 101(a)(44)(B)(ii). Moreover, the crew members occasionally hired by the beneficiary are not represented as managerial, supervisory or professional employees as required in § 101(a)(44)(A)(ii) of the Act.

Furthermore, the offered job descriptions establish that the beneficiary would be responsible for personally performing such non-managerial and non-executive tasks as: conducting safety inspections; meeting and negotiating contracts with vendors; reviewing inventory; determining supplies; entertaining passengers; and, navigating the boats. As noted by the director, the record suggests that the beneficiary would be responsible for performing all functions related to the maintenance and operation of the watercraft, and would enlist the assistance of contract workers on an as needed basis. The AAO notes that 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the present record, the petitioner has not established that the tasks to be performed by the beneficiary would be primarily managerial or executive in nature. The AAO notes that merely assigning a managerial or supervisory title to the beneficiary, such as "sailing fleet director" in the present case, is not sufficient to establish the beneficiary's employment as a manager or executive. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In its initial filing, the petitioner noted the existence of an affiliate relationship between the foreign and United States entities, stating in its October 14, 2005 letter that [REDACTED] owns 50 percent of the foreign entity and is the sole owner of the United States company. As evidence, the petitioner submitted: (1) a June 30, 2000 annual list of members of the foreign entity, naming [REDACTED] and [REDACTED] as joint owners of a cumulative amount of 5,000 shares in the foreign organization; (1) share certificate numbers five and six issued by the foreign entity identifying [REDACTED] and [REDACTED]' and [REDACTED] and [REDACTED] respectively, as joint owners of the issued stock; (3) the foreign entity's share registry reflecting the interests of the company's prior and current shareholders; (4) a May 16, 1991 stock certificate number one naming [REDACTED] as the owner of 1,000 shares of stock issued by the petitioning entity; (5) a Preorganizational Subscription Agreement authorizing the petitioner to issue 1,000 shares of stock, and identifying [REDACTED] as the designated shareholder; (6) a share register naming [REDACTED] as the recipient of 1,000 shares of stock on May 16, 1991; and (7) affidavits from the secretary and assistant secretary of the petitioning and foreign entities attesting to the ownership of each organization.

The AAO notes that the director did not request additional evidence of whether the foreign and United States entities shared a qualifying relationship on the filing date.

In his September 30, 2005 decision, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Referencing the titles of each stock certificate, the director stated that the record did not establish [REDACTED] ownership of 50 percent of the foreign entity because [REDACTED] name was listed first on only one certificate. As a result, the director concluded that the beneficiary owned only 50 shares, or 1 percent, of the foreign entity. Consequently, the director denied the petition.

On appeal, counsel for the petitioner challenges the director's finding that the beneficiary does not own 50 percent of the foreign entity. Counsel states that "[CIS] appears to place unsupported weight on the order of the names given on the share certificates," and claims that the "name order" does not convey ownership rights to one joint owner over the other. Counsel states:

Both certificates of shares indicate both [REDACTED] and [REDACTED] are the owners and that the shares are held jointly. The share register for [the foreign entity] clearly indicates that [REDACTED] and [REDACTED] jointly own all shares [of the foreign entity]. Furthermore, the Assistant Secretary of [the foreign entity] attested that all outstanding shares are owned jointly by [REDACTED] and [REDACTED]. As there are only two owners of [the foreign entity] and all shares are issued jointly [REDACTED] as an undivided, fifty-percent ownership interest and veto power over [the foreign entity]. Fifty percent ownership is recognized as having control over the organization by virtue of having veto power. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Therefore, [the petitioning entity] and [the foreign entity] are affiliates under [CIS] regulations.

Upon review, the petitioner has demonstrated the existence of a qualifying relationship between the foreign and United States organizations.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As correctly explained by counsel, despite being named second on one of the foreign entity's share certificates, [REDACTED] is a joint owner of the 5,000 shares issued by the foreign organization. A "joint tenancy" is an interest or possession of real or personal property in which two or more co-owners take identical interests simultaneously by the same instrument and with the same right of possession. *Black's Law Dictionary* 1477 (7<sup>th</sup> Ed., West 1999). As a joint owner of the foreign entity's issued and outstanding shares, [REDACTED] maintains ownership and control of the overseas organization. [REDACTED] ownership and control of the United States company is not in dispute. Therefore, the record demonstrates that the foreign and United States organizations are affiliates based on common ownership and control by [REDACTED]. *See* 8 C.F.R. § 204.5(j)(2). Accordingly, the director's decision with respect to this issue only will be withdrawn.

Beyond the decision of the director, an additional issue is whether the petitioner has been doing business for at least one year in the United States as required in the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

As noted previously, the petitioner's 2003 federal income tax return indicates that the United States company was formed for liability purposes, holds no assets, and has no reportable taxable income or deductible expenses. The record is devoid of additional evidence, such as sales invoices or receipts, demonstrating the

"regular, systematic, and continuous provision of goods and/or services" by the petitioner. 8 C.F.R. § 204.5(j)(2). 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)). The AAO notes that while the record contains copies of invoices, they represent services performed by outside companies for the maintenance and care of the watercraft owned by the petitioner. The record as presently constituted does not establish that the petitioner has been doing business for at least one year in the United States. For this additional reason, the petition will be denied.

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).

The AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary.<sup>1</sup> It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> Prior to CIS' approval of the beneficiary as an L-1A nonimmigrant intracompany transferee, the beneficiary received two L-1B nonimmigrant visas as an intracompany transferee with specialized knowledge.