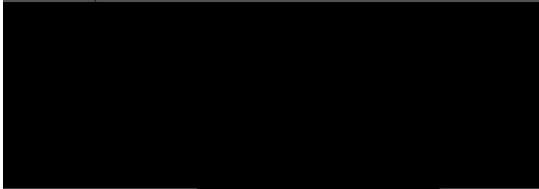




U.S. Citizenship
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FILE: [Redacted]
WAC 97 226 52902

Office: CALIFORNIA SERVICE CENTER

Date: JUN 04 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 preference visa petition was initially approved by the Director, California Service Center. Pursuant to an on-site investigation of the claimed foreign affiliate, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation claiming to be engaged in the importing and exporting of water systems and porcelain lighting. It claims to be a subsidiary of [REDACTED], located in Hong Kong. The petitioner seeks to employ the beneficiary as its "treasurer/chief financial official." 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. Upon further review of the record, the director determined that the petitioner failed to provide credible evidence to corroborate its claimed qualifying relationship with the beneficiary's foreign employer and revoked the prior approval of the petition.

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

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 has provided credible evidence to establish that it has a qualifying relationship with the beneficiary's claimed foreign employer.

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

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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

In support of the Form I-140, the petitioner provided a letter dated August 8, 1997 in which it claimed that [REDACTED] is the parent company, owning all of the petitioner's issued stock. The following documentation was submitted as supporting evidence:

1. The foreign entity's Directors' Report and Financial Statements for the year ending March 31, 1996. Page nine, item 5 of the report names the petitioner as "a related company" owing money to the foreign company. The exact nature of the relation is not specified. However, a notation at the bottom of item 5 indicates that Mr. [REDACTED] and Mr. [REDACTED] control the petitioner.
2. The petitioner's 1996 corporate tax return. Page two of the Federal Statements page identified the foreign entity as owner of 100% of the petitioning entity. Form 5472, which is part of the same tax return, reiterates the information provided in the Federal Statement.

The record also contains copies of the petitioner's Articles of Incorporation and a stock certificate issued by the petitioner to the claimed parent entity, although it is unclear whether these documents were submitted at the time of filing of the Form I-140 or sometime subsequent to such filing. Regardless, the documentation provided supports the petitioner's claim regarding its ownership.

On May 17, 2006, the director issued a notice of his intent to revoke (NOIR) approval of the petition. The basis for the director's notice was a report of an investigation conducted by an overseas investigator at the business location of the claimed parent entity. The investigator cited a number of observations, which led to the conclusion that a qualifying relationship does not exist between the petitioner and the beneficiary's foreign employer. First, the investigator observed a single employee, an administrative executive, at the business location. When asked to provide personnel records of the foreign entity, the administrative executive stated that the files were not ready to be retrieved from her computer. Next, the investigator questioned the

administrative executive about six other companies' business licenses that were hung on the walls of the parent company. Although the administrative executive responded when questioned regarding the extra business licenses, a credible explanation was not provided.

Then, upon request, the administrative assistant provided the foreign entity's financial statement for the year ending March 31, 2000. After reviewing the document, the investigator noted that it did not contain any information regarding its purported investment in the petitioner or any details regarding any subsidiaries. The director concluded that the documentation does not establish that the foreign entity and U.S. petitioner fall under the regulatory definitions of either affiliate or subsidiary. *See id.* The petitioner was allowed 30 days in which to respond to the adverse findings cited in the NOIR.

In response, counsel submitted a letter dated June 14, 2006 in which he reaffirmed the petitioner's claim regarding its qualifying relationship with the beneficiary's foreign employer, claiming that the foreign entity's investment in the petitioning entity has been "both continuous and substantial." In support of this claim, the petitioner provided documentation of numerous fund transfers in which the foreign entity was identified as the originator and the U.S. petitioner was identified as the recipient of the funds.

On July 6, 2006, the director issued notice revoking the prior approval of the Form I-140. The director restated many of the observations that were noted in the overseas investigator's report and concluded that the record lacks sufficient evidence of a qualifying relationship between the petitioner and the foreign entity claiming to own the petitioner. While the AAO concurs with director's ultimate conclusion regarding the issue of a qualifying relationship, his underlying analysis places undue emphasis on common ownership and control and does not include a comprehensive discussion adequately conveying the significance of several of the investigator's findings. Specifically, a necessary component of a qualifying relationship is a petitioner that conducts business in two or more countries, one of which is the United States.¹ Thus, not only must the petitioner establish common ownership and control, it must also provide documentation showing that the foreign entity actually conducts business and does not exist in name only. While the director's analysis contains the relevant observations of the overseas investigator, his sole reliance on common ownership and control as the basis for his conclusion is erroneous.

Regardless, in the present matter, the petitioner was properly informed of the investigator's relevant observations in the director's notices. Namely, the investigator observed that, while the foreign entity's claimed business location was outfitted with some office equipment, only one individual was present at the time of the investigation. The administrative executive was unable to provide the investigator with personnel records to establish whom the company employed at the time of the investigation. This information was relevant in light of the fact that three out of six of the company's employees, one of whom was the company's director, were transferred to be employed by the U.S. petitioner. Following the on-site investigation, the investigator sent the foreign entity a notice dated January 11, 2001 in which the personnel records were again requested. Although the foreign entity provided its organizational chart, a registry document identifying the company's officers, and a profit and loss statement for the year ending March 31, 2000 showing that it paid salaries, personnel records were not provided despite the investigator's request and the director's subsequent statements in the NOIR and in the final notice of revocation strongly suggesting the significance of such documentation. Going on record without supporting documentary evidence is not sufficient for purposes of

¹ See 8 C.F.R. § 204.5(j)(2) for definition of *multinational*.

meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, while counsel places great emphasis on the petitioner's submission of fund transfers from the foreign entity to the petitioner, such transfers do not establish that the foreign entity has been and continues to do business. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the 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." The foreign entity's repeated transfer of funds to the petitioner does not establish its presence as anything other than an agent or office. According to counsel's letter dated August 18, 1997, the foreign entity "is one of the main automobile parts distributors in the Greater China area, including mainland China." However, the record lacks evidence to establish that the foreign entity has maintained a staff of employees or has continued to engage in the sale of a product since the filing of the instant petition. Fund transfers, while often used to establish one entity's purchase of another entity's stock, is not sufficient for the purpose of establishing that an entity is doing business. In fact, in the foreign entity's response dated January 12, 2001 addressing the overseas investigator's request for information, the managing director stated that in an effort to reduce operating costs, the company laid off employees, changed business locations, and reassigned most of its previously commenced business transactions to its claimed affiliate company, located in Guangzhou. The managing director further stated that the company now derives its income from management fees, but provided no further explanation as to who provides the management services and to whom such services are provided.

Accordingly, in light of the specific facts in the present matter, the director's emphasis on the ownership and control of the U.S. petitioner and the beneficiary's claimed foreign employer is misplaced. While these factors are generally key to establishing a qualifying relationship as defined in 8 C.F.R. § 204.5(j)(2), such a relationship cannot exist if both entities are not actively doing business. As properly noted by the director, the evidence of record does not establish that the foreign entity is operational and continues to engage in the sale of auto parts. The validity of the petitioner's claim is further undermined by the fact that six other entities' business licenses were found hanging on the walls of the foreign entity's business premises. Although the foreign entity's administrative executive provided an explanation for this apparent anomaly, no documentation has been submitted to corroborate statements whose credibility is questionable at best. In the alternative, even if the AAO were to consider the U.S. petitioner an affiliate of the current foreign entity that is doing business, the record lacks evidence to establish that the two entities are commonly owned and controlled by the same parent. *See* 8 C.F.R. § 204.5(j)(2).

On appeal, counsel merely reiterates the administrative executive's explanation for the presence of the different business licenses at the business premises of the foreign entity and emphatically disputes the director's dismissal of what he deems as a plausible explanation. However, 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). As such, it appears on its face that the foreign office is being used jointly by the various shell companies and corporations that are not doing business and that exist in name only.

Additionally, in an effort to establish the continued existence of a qualifying relationship, the petitioner submits its more recent corporate tax returns all of which identify the beneficiary's claimed foreign employer as the 100% owner of the petitioner. However, as discussed above, establishing the petitioner's ownership does not resolve the adverse information in the investigator's report, which suggests that the petitioner cannot

be deemed a multinational entity. *See* 8 C.F.R. § 204.5(j)(2). As the petitioner has failed to provide sufficient documentary evidence to establish that the beneficiary's foreign employer continues to engage in the provision of goods, the AAO affirms the director's conclusion that a qualifying relationship, for which a multinational entity is a necessary component, has not been established.

Furthermore, the record supports a finding of ineligibility based on additional grounds that were not previously addressed in the director's decision.

First, 8 C.F.R. § 204.5(j)(3)(i)(A) states that the petitioner must establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to filing the Form I-140. Similarly, 8 C.F.R. § 204.5(j)(5) requires that the petitioner provide a detailed description of the beneficiary's proposed duties in order to determine that the proposed employment in the United States would be within a qualifying managerial or executive capacity. In the instant matter, the petitioner's letter dated August 8, 1997 stated that the beneficiary's responsibilities abroad included directing the activities of the accounting department, examining and analyzing the company's financial and accounting records, and preparing reports regarding the company's finances based on its income, expenses, and earnings. However, this broad statement of responsibilities fails to define with any specificity what duties the beneficiary actually performed on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without more detailed information as to the beneficiary's daily tasks, it is impossible to conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

With regard to the beneficiary's proposed duties, the petitioner merely provided a general statement dated February 15, 2000 from the company's president stating that the beneficiary has performed well in her position with the U.S. entity. Despite the submission of its organizational chart, the petitioner has provided virtually no information about the beneficiary's duties or responsibilities. 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). As the petitioner has failed to comply with this key requirement, the AAO cannot conclude that the beneficiary's proposed position in the United States is within a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds 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.