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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



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JUN 08 2005

FILE: WAC 01 246 53521 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. On appeal, the Administrative Appeals Office (AAO) affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion and affirm the previous decision.

The petitioner, Fengling Musical Instruments (U.S.), Inc., endeavors to classify the beneficiary as a manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be a subsidiary of [REDACTED] located in China. It is engaged in the import, export, and wholesale business of musical instruments. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's general manager. The petitioner was incorporated in 2000 and claims to have five employees.

On March 15, 2002, the director determined that the petitioner failed to establish: (1) that the beneficiary's duties will be primarily managerial or executive, and (2) that the petitioner has a qualifying relationship with the foreign entity. Consequently, the director denied the petition.

The petitioner appealed the denial to the AAO. On February 5, 2004, the AAO affirmed the denial. In turn, the petitioner submitted a motion to reopen. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel for the petitioner submits a brief explaining the control of the company and the petitioner provides copies of its amended tax returns, bills of lading, and invoices. In addition, counsel claims, "the beneficiary will be employed in an "executive/managerial capacity" and submitted a description of the beneficiary's duties.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Pursuant to 8 C.F.R. § 214.2(l)(3), an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in this proceeding is whether a qualifying relationship exists between the petitioner and the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(ii)(G) defines the term "qualifying organization" and related terms as follows:

(G) Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation division or office of the same organization housed in a different location.

(K) *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.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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.

Initially, the petitioner submitted its 2000 Form 1120, U.S. Corporation Income Tax Return, articles of incorporation, stock certificates, stock transfer ledger, and its 2000 California Franchise Income Tax Return. The petitioner indicated on the petition and in an appended letter that the U.S. company is a subsidiary of the foreign entity. The petitioner's stock certificate and stock ledger showed that all of its stock, 100,000 shares, had been issued to the foreign company for \$100,000.

On August 24, 2001 in a notice of intent to deny letter, the director noted several inconsistencies based upon Schedule K of the petitioner's U.S. Corporation Income Tax Return, Tax Form 5472, and its California Corporate Income Tax Return. The director found that the financial records did not reveal that the petitioner was a subsidiary in an affiliated group or parent-subsidary controlled group. The director further noted that without additional documentation such as wire transfers or bank statements, the petitioner had failed to establish that the foreign and U.S. entities are qualifying organizations.

In response, the petitioner submitted a letter from its accountant claiming that the accountant erred in preparing the tax returns. In her letter, the accountant noted specific mistakes and indicated the responses which should have been given. The petitioner also submitted a copy of a board resolution from the foreign entity, a letter from a U.S. customer confirming payment into the U.S. account for musical instruments, and a copy of a bank cable reflecting a \$100,000 credit to the petitioner's account from the U.S. customer. In the foreign entity's resolution, the board of directors indicated its intent to transfer \$100,000 "that was recently received from [a third party] as prepayment to [the petitioner]" as initial capital.

On March 15, 2002, the director determined that the petitioner failed to establish that a qualifying relationship existed between the U.S. and foreign entities. The director found the accountant's letter insufficient to resolve the discrepancies in the petitioner's tax documents. The director noted that the petitioner failed to demonstrate that an amended tax return was actually filed. The director also found insufficient evidence to establish that funds were actually transferred into the petitioner's account from the foreign entity. Consequently, the director denied the petition.

The petitioner appealed the denial of the petition to the AAO. The petitioner submitted a revised 2000 Form 1120 U.S. Corporation Income Tax Return. On February 5, 2004, the AAO affirmed the denial of the petition and concurred with the director's grounds for denial based on the inconsistencies in the record and the petitioner's failure to establish that the foreign entity had in fact paid for its claimed ownership of the U.S. company.

On motion, counsel asserts that the petitioner is submitting evidence to show that the foreign entity controls the U.S. company. The petitioner submits a copy of three Forms 1120x, Amended U.S. Corporation Income Tax Return, for the years 2000-2002, filed with the Internal Revenue Service, previously submitted copies of wire transfers, bills of lading, and invoices. The petitioner claims that the invoices and bills of lading demonstrate that the claimed foreign parent shipped the related merchandise to the customer who made a prepayment of \$100,000 to the U.S. company. The petitioner also explains that all the related tax returns have been amended to resolve the inconsistencies in the record. All of the submitted tax returns are date stamped as received by the Internal Revenue Service on February 26, 2004.

In determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification, the regulation and case law confirm that ownership and control are the factors that must be examined. *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 general evidence of a petitioner's claimed qualifying relationship, stock certificates 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., supra.*

In the present matter, there is insufficient evidence to establish that a qualifying relationship exists between the petitioner and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(1). As noted in the AAO's previous decision, there are numerous discrepancies in the record.

On motion, the petitioner submits additional evidence in an attempt to cure the deficiencies. First, the petitioner submits amended U.S. income tax returns for the years 2000, 2001 and 2002, which were prepared and filed only subsequent to the AAO's decision to dismiss the petitioner's appeal. The petitioner was put on notice regarding the inconsistencies in its 2000 tax documents in the director's August 21, 2001 Notice of Intent to Deny. The petitioner and its accountant claimed that there were errors in the 2000 tax documents at the time it submitted its response, yet, it appears that the company proceeded to file its 2001 and 2002 income tax returns with the same "erroneous" information utilized on its 2000 return. Furthermore, the petitioner has not explained why it did not submit an amended tax return for 2000 after acknowledging the claimed errors in response to the director's notice in September 2001. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). For these reasons, the petitioner's amended tax returns, which were submitted three years after the petition was filed, carry no evidentiary weight in this proceeding. The petitioner has not submitted sufficient evidence to overcome the inconsistencies regarding its ownership as noted in its tax records.

Second, the petitioner has not submitted evidence on motion to overcome the previous finding that the foreign entity has not in fact paid for its shares in the U.S. entity. Counsel claims that a U.S. customer transferred \$100,000 to the U.S. entity as prepayment for goods to be delivered from China, and asserts that such money was designated as the foreign entity's initial investment in the petitioning organization. The petitioner submits invoices and bills of lading showing that the customer received goods valued at more than \$100,000 from the petitioner, originating from the foreign entity, between November 2000 and March 2001. However, it is not clear how these documents support the petitioner's claims. Based on the record, this particular customer regularly did business with the petitioner during its first year of operations. The record contains approximately 17 wire transfers and checks paid to the petitioner from the same customer, ranging from a few thousand to over eighty thousand dollars each. The petitioner has failed to distinguish the \$100,000 payment from any other sales transaction the U.S. company completed with this customer. Further, the petitioner has not submitted any evidence on motion to overcome the AAO's finding that the record contains no evidence that the foreign entity actually transferred \$100,000 to the petitioner. The foreign company's March 26, 2000 board resolution, in which it states its intention to transfer the funds to the petitioner, is insufficient. 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)).

After careful consideration of the evidence, the AAO concludes that the petitioner has not established that a qualifying relationship exists between the United States and foreign entities. For this reason, the petition will not be approved.

The second issue in this proceeding is whether the beneficiary will be primarily performing executive or managerial duties for the United States entity. 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 a letter submitted with the Form I-129, the petitioner described the beneficiary's U.S. duties as the following:

- General responsibility for the overall operations of the company;
- Specific authority to bind the company to contracts;
- Formulate necessary policies and see they are implemented;
- Build the company's customer base;
- Hire and Fire personnel as needed;
- Coordinate activities between the parent company and its US subsidiary;

- Report to the board of directors of [the foreign entity].

In addition, the petitioner submitted an organizational chart describing the beneficiary's duties as plan, direct, and manage the overall operation of the company; develop corporate policies with the board of directors; oversee different aspects of the company's operations; and, supervise and assign work among departments, and the parent and U.S. corporations. The chart also indicated that the beneficiary will supervise four subordinates. These subordinates include managers of the sales and marketing department, accounting department, administrative department, and transportation department.

In a Notice of Intent to Deny the petition, the director requested additional evidence that would establish that the beneficiary will be primarily performing managerial or executive duties.

In response, the petitioner claimed that the beneficiary had the requisite knowledge, that the majority of the beneficiary's duties related to operational or policy management, and that the beneficiary does not supervise lower-level employees.

On March 15, 2002, the director determined that the petitioner failed to establish that the beneficiary's duties will be primarily managerial or executive. The director noted that, based on the petitioner's organizational structure, the beneficiary acts as a first-line supervisor of non-professional personnel, since none of her subordinates had been shown to supervise or manage personnel. Consequently, the director denied the petition.

The petitioner appealed the denial to the AAO. On February 5, 2004, the AAO affirmed the denial. In turn, the petitioner submitted a motion to reopen. On motion counsel asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Counsel submits the following description of the beneficiary's duties to establish that the beneficiary will be performing duties in an "executive/managerial capacity"

She has executive responsibilities of planning, directing, and managing overall business operations of the U.S. company. She makes the final decisions on the operation and personal issues, makes strategic plans for the company's development, and keeps [her] finger on the money pulse of the company. Her position involves: 1) the establishment and implementation of the company's operation policies and business plans, 2) macro-management decision making regarding the overall operation and management of the corporation, and 3) serving as key link between the parent company's board of director's and the U.S. subsidiary through fully authorized representation of the parent company's executives and by enabling the strategic objectives set by the foreign headquarters. The beneficiary manages all activities at the U.S. branch of the China-based company, and directs the company's operations through professional and managerial subordinate personnel. Her position also qualifies as a managerial position 40% of the time These duties include: 1) senior level supervisory management of the business operations of the organization, which includes authority to hire, fire and make all necessary personnel decisions; 2)

exercise direction over the day-to-day operations of the organization; and 3) provide management training to prepare lower-level managerial employees for anticipated growth in both sales and workforce.

In addition, counsel provides a list of the beneficiary's daily activities that include meeting with subordinates to ascertain progress, making extensive analysis of market information and capital management, visiting key account clients, and advising on solutions to internal issues. Counsel also claims that the beneficiary's subordinates are professionals and submits copies of their educational documents.

In 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. § 214.2(l)(3)(ii). On review, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity. The initial description of the beneficiary's duties was vague and did not establish exactly what the beneficiary's primary role will be at the U.S. company. For example, the petitioner described the beneficiary as being involved in building the company's customer base and binding the company to contracts. Yet, without further explanation, these duties cannot be distinguished from routine marketing and sales tasks. The remainder of the job description was presented in vague terms such as "general responsibility for the overall operation of the company," "formulate necessary policies," and "coordinate activities." However, the petitioner failed to define the beneficiary's policies or describe any specific efforts the beneficiary would undertake to "coordinate" activities or any particular duties encompassed within her "general responsibility" for the company. 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).

The job description submitted by counsel on motion generally paraphrases the statutory definition of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101 (a)(44)(A) and (B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily perform on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of

endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. Although the petitioner has submitted evidence that some of the beneficiary’s subordinates have completed a degree, the possession of a bachelor’s degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that a bachelor’s degree is actually necessary, for example, to perform the sales and marketing work of the manager of this department, who is among the beneficiary’s subordinates.

In addition, the petitioner has not established that the beneficiary’s subordinates supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. The petitioner claims that it has sales representative and submits Forms 1099 yet it does not identify the duties the subordinates perform. Without a description of the subordinates’ duties, it is difficult to ascertain exactly how the subordinates perform managerial, supervisory, or professional duties. Again, 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. at 165. Thus, the petitioner has not shown that the beneficiary’s subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Moreover, the term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). In the petitioner’s response letter to the director’s intent to deny the petition, it claimed that the beneficiary is “primarily engaged in managing and directing the development of US business, which is an essential function of the petitioner.” The term “essential function” is not defined by statute or regulation. 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. § 214.2(l)(3)(ii). Here, the petitioner has not specifically identified the function that the beneficiary will perform. It is unclear what type of development the beneficiary will manage. 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 this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

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 decision of the AAO dated February 5, 2004, is affirmed.