B4

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

DEC 13 2004

FILE: WAC 03 022 50896 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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, Director
Administrative Appeals Office

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation claiming to be operating as a multi-facility car-care service provider. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the beneficiary would not be employed in a managerial or executive capacity. He also concluded that the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel disputes the director's conclusions 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 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 performing in a capacity that is managerial or executive.

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

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

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

- Review and develop favorable franchise agreements and terms with the goals of expanding [the petitioner's] ownership and control to four facilities. This includes negotiating and approving franchise agreements that allow [the petitioner] flexibility to pursue other competitive arrangements. . . .

- Develop policies regarding the maintenance of franchise agreements. . . . As CEO, [the beneficiary] will be required to identify the franchise agreement parameters and develop policies and goals that operate within the parameters to [the petitioner's] advantage.

- Develop general human resource policies. [The beneficiary] will be required to identify general human resource issues and develop policies for her subordinate human resource manager to follow. . . . Any benefits program and the extent of benefits to be provided will be determined by the [beneficiary]. She sill [sic] be required to weigh the benefits offered with incentives and labor costs.

- Coordinate and develop the company's 1, 3, and 5 year [sic] strategies and goals. [The beneficiary] must apply her executive skills in devising goals to help [the petitioner] reach its objective of 4 separate facilities. She will also be required to weigh the desirability of expanding beyond the carwash/lube/has station filed. [The beneficiary] will be required to exercise sound judgment and flexibility to change [the petitioner's] course of direction . . . .

- [The beneficiary] will be required to determine what are acceptable losses for the company. She will be required to develop contingency plans and goals that will help minimize losses. . . .

- [The beneficiary] will be required to determine what risks the company may undertake and will exercise wide latitude and discretion in the same. She will receive no supervision in this matter and has the sole authority to commit [the petitioner] to major financial obligations.

- The CEO will be required to direct the activities of each facilities' [sic] managers (present 2 to grow to 4 or more). The managers in turn will direct the operations of each facility with staffs of 20 or more per facility. Managers will be required to ensure compliance with corporate goals, especially those related to franchise agreements.

- [The beneficiary] will also be required to develop general budgetary guidelines for subordinates to follow. She will be required to determine accounting systems and methods and ensure that her choices are implemented.

- [The beneficiary] will be responsible for choosing the [petitoner's] legal and financial representatives. . . .

- [The beneficiary] will also choose the company's indemnity and liability providers. . . .

- [The beneficiary] will review all major contracts with suppliers and service providers to determine acceptable terms. She will exercise wide latitude and discretion in modifying or terminating existing contractual obligations.

- Develop marketing and advertising strategies and analysis to better grow [the petitioner].

In a notice, dated April 7, 2003, the director requested that the petitioner submit additional information. The request included instructions to provide the petitioner's organizational chart describing its managerial hierarchy and staffing levels as of the date the petition was filed in November 2002. The petitioner was also instructed to clearly identify the beneficiary's position in the chart, her subordinates' names and job titles, as well as their job duties and educational levels. Additional documentation was also requested in the form of the petitioner's wage reports for the last quarter of 2002 and the first quarter of 2003.

The petitioner complied with the director's requests pointing out that the beneficiary is at the very top of the company's organizational hierarchy and had two executive subordinates at the time the petition was filed. A review of the organizational chart indicates that the beneficiary's subordinates, at the time the petition was filed, consisted of two general managers of the petitioner's two service stations. The petitioner claimed that an additional two executive positions, also direct subordinates of the beneficiary, were hired after the petition was filed.

The director denied the petition noting that "[e]ven if the organizational chart shows other lower-level managers, such managers cannot be considered managers, for immigration purposes, because *they* are not managing professional employees." (Emphasis added in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to her subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. In the present matter, the organization is structured so that the second tier, first-line supervisor relieves the beneficiary from supervising non-professional employees. Consequently, the beneficiary may not be disqualified based on the conclusion that she does not manage managerial employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees. The director's comment in this regard, therefore, is withdrawn. Nevertheless, the director properly concluded that the evidence of record does not establish that the beneficiary would primarily perform qualifying duties.

On appeal, counsel asserts that the director rendered the above conclusion without considering the description of the beneficiary's duties as provided in the statement submitted initially in support of the petition. While the director chose not to repeat the previously provided description of the beneficiary's duties as the AAO has done in the present decision, there is no evidence to suggest that the director failed to consider that description prior to making his conclusion. Rather, the director expressly acknowledged the petitioner's "lengthy job description" and concluded that despite its length it simply does not establish that the beneficiary will be primarily performing managerial or executive duties. In addition to the beneficiary's duties, the director clearly considered the petitioner's staffing structure and noted that nearly all of its employees work on a part-time basis, including one of the general managers who is one of the beneficiary's two direct subordinates.

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant case the description of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis and how much of her time would be spent on qualifying tasks versus the non-qualifying ones. For instance, the description of duties indicates that a great deal of the beneficiary's time would be spent developing policies and strategies. However, the petitioner does not clarify with sufficient detail what the beneficiary would actually be doing in her effort to develop policies and strategies. There is also no explanation for the petitioner's need to have the beneficiary involved in micromanagement by performing human resource-related duties when the petitioner employs two general managers in its organization. Furthermore, the petitioner indicated that the beneficiary would review all major service and supplier contracts and develop marketing and advertising strategies, none of which can be deemed as qualifying duties. Since the petitioner must establish that the beneficiary would *primarily* perform qualifying duties, it must be determined that the beneficiary would not spend a majority of her time performing these non-

qualifying duties. It is noted that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant case, the record lacks sufficient information to indicate what specific duties the beneficiary would primarily be performing. As such, the AAO cannot affirmatively conclude that the beneficiary would primarily perform managerial or executive duties.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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 the statement appended to the petition the petitioner stated that the U.S. and foreign entities are affiliates by virtue of having a common single owner owning more than half of each company's issued shares. In support of this claim the petitioner submitted a stock transfer ledger showing that after the issuance of an additional 16,000 shares in 2001, the beneficiary became the owner of approximately 51% of the petitioner's shares while her sister owned the remaining 49%. The petitioner also submitted the two stock certificates, one dated 1998, giving the beneficiary 5,000 shares, and another certificate dated 2001, which gave the beneficiary the remaining 16,000 shares, for a total of 21,000 out of 40,000 issued shares. The petitioner's claim regarding ownership of its issued shares is further corroborated in the petitioner's 2002 tax return, which was submitted with its response to the request for additional evidence. The petitioner also stated, and provided a translated foreign document indicating that the beneficiary owns 80% of Xinma Pharmaceutical, located in China.

In response to the director's request for additional evidence, the petitioner provided additional documentation, including the foreign entity's Articles of Association (both the original and the translation) identifying the beneficiary as the owner of 80% of the foreign entity's shares.

In the denial, the director determined that the petitioner submitted conflicting information regarding the issuance of the U.S. entity's shares and concluded that due to the petitioner's failure to reconcile the inconsistency it could not be determined that the petitioner had successfully establish that it has a qualifying relationship with a foreign entity.

Counsel disputes this conclusion in the appellate brief and states that the director's erroneous analysis of the petitioner's stock ledger lead to an incorrect conclusion regarding the petitioner's qualifying relationship with a foreign entity. Based on a thorough review of the stock transfer ledger, as well as the other evidence on record, the AAO finds that the director's conclusion was inaccurate, as it was not based on the number of shares indicated in the "balance shares held" column of the transfer ledger. Therefore, the petitioner has overcome this portion of the director's denial. Nevertheless, based on the petitioner's inability to establish that the beneficiary would perform primarily managerial or executive duties, the petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.