PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 12 2004

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

DISCUSSION: The Director, Texas Service Center denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Texas in January 2001. It manages, owns, and operates convenience stores. It seeks to employ the beneficiary as its vice-president of finance. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; (2) it had been doing business for at least one year prior to filing the petition; (3) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; or, (4) that the beneficiary had been employed in a managerial or executive capacity for the foreign entity for one year prior to entering the United States.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that it had been doing business for one year prior to filing the petition. The petition was filed March 12, 2002.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states in pertinent part:

> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> * * * *
>
> (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*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 petitioner has submitted evidence that it entered into an assignment of commercial lease for a convenience store in February 2001 and has paid sales and use tax to the State of Texas beginning in the first quarter of 2001. The petitioner has submitted sufficient evidence that it began operations in February 2001, a year prior to filing the petition in March 2002. The director's decision on this issue will be withdrawn.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

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.

The petitioner has submitted evidence that the following individuals own shares in both the United States and the foreign entity in the proportion listed next to their names:

Shareholder	Petitioner	Foreign Entity
	325	5,000
	100	2,000
	325	5,000
	100	2,000
	50	1,000
	50	1,000
	50	1,000

The petitioner has also provided evidence that it is authorized to issue 1,000 shares. The petitioner submitted an affidavit from the foreign entity's chairman of the board stating that the foreign entity is authorized to issue and has issued 20,000 shares. The chairman of the foreign entity confirms that the above listed shareholders own 85 percent of the foreign entity's outstanding shares.

The director determined that the petitioner's evidence contained omissions and that the evidence submitted did not show that the same group of individuals owned and controlled the petitioner and foreign company, each individual owning and controlling approximately the same share or proportion of each entity. The director specifically observed that two of the petitioner's stock certificates were issued after the petition was filed. The director determined that the petitioner's ownership must be determined when the petition was filed.

On appeal, counsel for the petitioner asserts that not considering the two stock certificates issued after the petition was filed still results in the following ownership and control of the two entities:

Shareholder	Petitioner	Foreign Entity
	250	5,000
	100	2,000
	250	5,000
	100	2,000

Counsel asserts that the four listed individuals own and control 70 percent of the petitioner and the foreign entity. Counsel also cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal

1990), asserting that the definition of affiliate does not require that the United States and foreign company be owned by the same individual or group of individuals.

Counsel's assertions are not persuasive. First, the petitioner must establish eligibility when the petition is filed; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the regulation and case law confirm that ownership and control are the factors that must be examined when 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 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 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.* Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

Citing *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), counsel asserts that two companies may be affiliated even though they are not owned by the exact same individuals. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the same group of individuals did not own the two claimed affiliates. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. *See* 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter seven individuals own the U.S. entity, and 10 individuals own the foreign entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same individuals control both entities. In this matter, the four individuals owning 70 percent of the United States company may or may not vote in concert to retain "*de jure*" control. Likewise, these same individuals may or may not vote in concert to retain "*de jure*" control of the foreign entity. Thus, the companies are not affiliates as the petitioner has not established that the same individuals control both companies. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

The third issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity 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 an attachment to the petition, the petitioner stated that the beneficiary would be employed as the vice-president of finance and would be responsible for duties such as:

> Reviewing feasibility reports for new locations; coordinating load process with banks and other financial institutions for new locations; directing financial activities of the firm, including overseeing of preparation of sales and financial reports; overseeing forecasting of sales activities by subordinate managers; overseeing establishments of financial goals and polices; approving annual budget; and supervising issuance of annual reports of the company.

The petitioner also provided an organizational chart showing the beneficiary as the vice-president of finance over an unnamed finance manager and unnamed support staff. The organizational chart also depicted three additional vice-presidents and the controller on the same tier as the beneficiary. The chart did not name any individuals in the managerial positions below the beneficiary's tier except a human resource manager reporting to the vice-president of administration.

The director requested: (1) a description of all duties/functions the beneficiary would perform for the United States entity; (2) evidence that the beneficiary's assignment was primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or documentation that demonstrates the beneficiary would operate at a senior level; (3) the names, titles, and educational backgrounds of all subordinate managers/supervisors or other employees who report directly to the beneficiary and a brief description of their job duties; (4) if the beneficiary does not supervise employees, a specific description of the essential function managed by the beneficiary; and, (5) copies of the 18 employees' Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement.

In response to the request for evidence, the petitioner provided the same description of the beneficiary's duties and added the amount of time the beneficiary spent on each duty as follows:

> Reviewing feasibility reports for new locations (10%); coordinating load process with banks and other financial institutions for new locations (15%); directing financial activities of the

> firm, including overseeing of preparation of sales and financial reports (25%); overseeing forecasting of sales activities by subordinate managers (15%); overseeing establishments of financial goals and polices (10%); approving annual budget (15%); and supervising issuance of annual reports of the company (10%).

The petitioner added that the beneficiary supervised the controller, an accounting manager, an inventory audit control manager and a bookkeeper. The petitioner stated that the accounting manager and the inventory audit control manager in turn each supervised an additional two employees.

The director determined that the description provided for the beneficiary's position was vague. The director observed that the petitioner had not provided position descriptions for the beneficiary's claimed subordinate employees. The director concluded that the record did not establish that the beneficiary had been or would be employed in an executive or managerial capacity for the petitioner.

On appeal, counsel for the petitioner asserts that: the beneficiary will primarily manage the financial department, component, or function of the petitioner; and will supervise and control other supervisory or professional employees including the controller and accounting manager. Counsel also provides job descriptions and experience levels for four of the beneficiary's claimed subordinate employees. Counsel asserts that the positions of controller and inventory audit control manager are professional positions. Counsel also claims that the controller supervises the accounting manager and inventory audit control manager; and the accounting manager supervises a store manager; and the inventory audit control manager supervises a purchase manager. Counsel also submits job descriptions advertised on the Internet and asserts that the job descriptions are similar to the beneficiary's job description.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the petitioner was put on notice that the director required brief descriptions of the beneficiary's subordinates' job duties, as well as their names, titles, and educational backgrounds. The petitioner was given a reasonable opportunity to provide this information for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider the job descriptions, experience, or education of the beneficiary's subordinate employees for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In addition, 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Contrary to counsel's claim on appeal that the petitioner's job description is not vague because it corresponds to Internet job descriptions, the AAO finds in this matter that the petitioner's description is vague and nonspecific. The AAO requires that the petitioner provide sufficient information to specifically and clearly demonstrate what the beneficiary does on a day-to-day 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).

In this matter the petitioner indicates the beneficiary reviews reports, coordinates with banks, oversees the establishment of financial goals and policies, and supervises issuance of annual reports. However, the petitioner does not define the goals or policies, does not explain the activities involved in coordinating "load process" with banks, and does not provide consistent evidence on who carries out such duties as preparing sales and financial reports and who performs the sales forecasting. The petitioner has not provided consistent evidence of subordinate employees who carry out the beneficiary's direction. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the petitioner has provided inconsistent evidence regarding its organizational hierarchy and the beneficiary's subordinate employees. The petitioner's initial organizational chart depicts the petitioner's controller on the same tier as the beneficiary in its organizational hierarchy. Furthermore, the organizational chart includes only a "finance manager" and "support staff" subordinate to the beneficiary's position. The petitioner adds managerial positions and names and moves the controller to a position subordinate to the beneficiary's position in response to the director's request for evidence. However, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original evidence, but rather added managerial and professional titled positions under the beneficiary's direction. 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).

In sum, the record contains insufficient evidence to demonstrate that the beneficiary's assignment in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing

non-qualifying duties. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

The last issue in this proceeding is whether the beneficiary's overseas assignment was in a managerial or executive capacity. The petitioner indicated that the beneficiary had been employed as the finance manager of its foreign affiliate for several years. In response to a request for evidence, the petitioner added that the beneficiary's overseas duties included:

> Directing financial activities of firm, including overseeing perpetration of sales and financial reports (35%); overseeing forecasting of sales activities by subordinate managers (25%); overseeing establishment of financial goals and policies (15%); approving annual expense budget (15%); and supervising issuance of annual reports of the company (10%).

The petitioner added that the beneficiary supervised an assistant finance manager, a chief accountant, and an accounts manager.

The director determined that: the description of the beneficiary's duties for the overseas entity was vague; the petitioner had not provided the job duties of the beneficiary's claimed three subordinates; and, the petitioner had not provided an organizational chart or other information establishing the number of employees with the foreign entity. The director concluded that the petitioner had not established that the beneficiary's employment with the foreign company met all four criteria for either a manager or an executive.

On appeal, counsel for the petitioner re-states the above description and asserts that the foreign entity employs more than 60 people. Counsel also asserts that the beneficiary received only general supervision and direction from the board of directors and he used wide latitude and discretion in his day-to-day activities. Counsel also provides brief job descriptions for three employees subordinate to the beneficiary. Counsel submits the foreign entity's organizational chart showing the beneficiary over an assistant finance manager, a chief accountant, and an accounts manager. The chart also shows that the account's manager is over 11 unnamed support staff.

Counsel's assertions are not persuasive. Again the AAO will not consider the job descriptions of the beneficiary's subordinate employees for any purpose, as this evidence was specifically requested by the director and not provided. *Matter of Soriano, supra.* The appeal will be adjudicated based on the record of proceeding before the director. Again, the AAO will not consider the assertions of counsel evidence. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.* Additionally, the petitioner has not provided documentary evidence establishing the foreign entity's claimed organizational structure. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's duties for the foreign entity are managerial or executive.

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.