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U.S. Citizenship and Immigration Services

[redacted]

JUN 29 2004

File: [redacted] 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.

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa 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 California in October 2001. It claims to be engaged in investing, consulting, and international trade. 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 petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer

On appeal, counsel for the petitioner asserts that the director failed to consider evidence in the record establishing the beneficiary's position as a multinational "executive" or "manager." Counsel also indicates the petitioner's desire to clarify the nature of the qualifying relationship between the petitioner and the foreign company. The record in this matter also contains the beneficiary's Form I-526, Immigrant Petition by Alien Entrepreneur (SRC 03 114 53465), seeking to classify the beneficiary as an alien entrepreneur pursuant to section 203(b)(5) of the Act.

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):
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> * * *
>
> (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 the beneficiary will be employed in a managerial or executive capacity.

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

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision making; and

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

The petitioner described the beneficiary's duties as:

> [The beneficiary] is in overall charge of the operations of the U.S. subsidiary, [the petitioner]. He designs and develops business plans and policies, and exercises decision-making power over the operation and management of the company. He supervises, and directs the managerial group in implementing various plans, rules and regulations of the company, and giving instructions. In addition, [the beneficiary] participates in and directs business negotiations, and executes import and export contracts. From time to time he directs shipping arrangements and details. He coordinates closely with the parent company board in the development of international business. He has decided to pursue the traditional parent company interest in real estate in China in the United States also and to this end sought out and bought a company that owns a design and consulting firm, GM Design and Associates. He will have the ultimate say in which projects go to development. A restaurant is also part of the acquisition.

The petitioner indicated that it also employed an "architect" who located real estate projects and planned, designed, and oversaw the projects. The petitioner provided a job description for a financial manager who reviewed activity reports, financial statements, and tax documents. The petitioner stated that the financial manager supervised employees in the department but did not supply descriptions, titles, or names for the other individuals employed in the financial department. The petitioner indicated that it also employed a marketing manager who was responsible for planning, contacting, and following up business leads. The petitioner indicated that the marketing manager also conducted market research, negotiated terms, placed orders, arranged shipping schedules, and collected payments. The petitioner also noted that it employed an individual who managed a restaurant and that it used a special consultant.

The petitioner provided a copy of its California Form DE-6, Employer's Quarterly Wage Report, for the quarter ending December 31, 2002, the quarter prior to the filing of the petition. The California Form DE-6 showed the employment of five individuals. Names of three of the individuals corresponded to employees' positions that the petitioner had provided: the positions of president, financial manager, and marketing manager. The positions of other individuals were not provided. The petitioner also provided a copy of the California Form DE-6 for a company purchased as the petitioner's asset or subsidiary. The subsidiary's California Form DE-6 for the quarter ending December 31, 2002 showed six employees in December 2002. Names of three of the individuals corresponded to employees' positions that the petitioner had provided: the positions of "architect," restaurant manager, and consultant.

The director determined that the petitioner had not established a reasonable need for an executive because it is an eight-employee trading business. The director determined that the petitioner's description of the beneficiary's duties paraphrased elements of the definition of executive and managerial capacity. The director determined, based on the petitioner's statements and its California Form DE-6, that the petitioner employed three full-time staff and four part-time employees. Based on the petitioner's number of employees,

the director concluded that the beneficiary would be assisting in the performance of numerous menial tasks. The director also determined that the beneficiary's position was, in essence, a first-line managerial position over non-managerial and non-professional positions. The director further determined that the beneficiary would not manage or direct a function of the petitioner but would primarily perform the petitioner's operational activities.

On appeal, counsel asserts that the beneficiary has total authority over the generalized policy of the petitioner and that he is not involved in non-qualifying menial tasks. Counsel contends that the beneficiary has professionals working for him in the positions of restaurant manager, accountant, and in real estate and design. Counsel asserts that the petitioner's marketing specialist position may also qualify as a professional position. Counsel also asserts that the director erred in not considering the petitioner's purchase of a company that does business as a restaurant and as a real estate design company and that the purchase represented a change in the complexity of the petitioner's organization. Counsel claims that there is no need for the beneficiary to perform menial tasks and references the petitioner's employee records, including those relating to the restaurant and design company. Counsel notes a district court decision relating to the proper consideration of staffing levels. Counsel also notes that neither the AAO nor the director is bound by prior decisions but asserts that when a decision is plainly inconsistent with other decisions, that a rational basis for the inconsistency must be articulated. Counsel references several federal court decisions in support of counsel's interpretation of staffing levels and understanding of the director's purported inconsistent decisions.

Counsel submits the California Forms DE-6 for the quarter in which the petition was filed to support his claims. The petitioner's California Form DE-6 for the quarter ending March 31, 2003 shows five employees. However, only two employees are identifiable by position title, the beneficiary's position as president and the marketing manager. The record does not include descriptions of duties for the three other individuals included on the California Form DE-6. The petitioner also submits the California Form DE-6 for its asset/subsidiary for the first quarter of 2003. The California Form DE-6 shows eight employees, three of the employees names correspond to the positions of "architect," restaurant manager, and consultant. The petitioner did not provide job descriptions or titles for the remaining employees listed on the California Form DE-6.

Counsel's assertions are not persuasive. When 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). As referenced above, the petitioner provided, for the most part, a general description of the beneficiary's duties borrowing liberally from the statutory definitions of executive and managerial capacity. *See* section 101(a)(44)(A)(i), (ii), and (iii) and section 101(a)(44)(B)(i), (ii), and (iii). Instead of clearly describing the duties to be performed by the beneficiary, as required by 8 C.F.R. § 204.5(j)(5), the petitioner has paraphrased the statute. 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 last two sentences of the petitioner's description highlight the beneficiary's primary responsibility. The beneficiary in this matter seeks out opportunities for investment. The position of "investor" may or may not

include actual daily duties that comport with the elements of executive or managerial capacity. Without a more specific description of this duty, the AAO cannot determine whether this aspect of the beneficiary's duties qualifies as a managerial or executive function. However, 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). The record does not clearly set forth the beneficiary's duties other than to suggest that he invests in business. As the petitioner claims that investing and consulting is the cornerstone of its business, the beneficiary's responsibility is implicitly related to providing the petitioner's fundamental service.

Counsel also contends that the beneficiary's supervisory duties satisfy the definitional requirements of managerial capacity because several of the beneficiary's subordinates are professional and managerial employees. Counsel asserts that the architect is a degreed professional and that the accountant is a professional. However, no evidence was submitted in support of this claim. 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 duties attributed to each position do not include duties that actually require advanced knowledge or learning gained by a prolonged course of specialized instruction. Whether the "architect" or the "accountant" is a degreed professional[1] is not the pertinent issue, instead the positions' complexity and daily requirements are the fundamentals that must be reviewed. The description of duties for the position of architect, accountant, and marketing manager do not suggest that the individuals in these positions perform primarily professional, supervisory, or managerial tasks rather than performing the daily operational aspects of the departments.

Moreover, even if the petitioner had established that the subordinate employees are professional, supervisory, or managerial, the record does not substantiate that the beneficiary spends the majority of his time primarily supervising these employees rather than spending the majority of his time finding investment opportunities. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel correctly notes that when a director considers staffing levels of an organization, the director must take into account the reasonable needs of the organization. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, the critical factor in determining eligibility is the actual nature of the beneficiary's

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[1] The record does not contain evidence that either individual hold advanced degrees. 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).

duties. In this matter, the petitioner has provided a general and overly broad description of the beneficiary's duties. The petitioner has not provided descriptions of the duties of all its employees and whether the employees are full-time or part-time. It is not possible to determine that the beneficiary will be relieved from performing primarily the petitioner's operational tasks. Furthermore, if CIS fails to believe the facts stated in the petition are true, then the assertion that the beneficiary performs either executive or managerial duties may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO notes counsel's understanding that a rational basis for an inconsistent decision must be articulated. However, the record in this matter does not establish the beneficiary's eligibility. As counsel indicates, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The beneficiary may be an entrepreneur in the generic sense of the term; however, a review of the totality of the record, including the beneficiary's request for classification as an alien entrepreneur, does not substantiate the beneficiary's managerial or executive assignment.

The petitioner noted that CIS approved other nonimmigrant petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the previously granted nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, despite prior approvals. *Id.* It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas 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.

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

> *Affiliate* means:
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> (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 initially stated that it was a "subsidiary" of the beneficiary's foreign employer and that the beneficiary owned 51 percent of the foreign company. As evidence that the beneficiary owns the foreign company, the petitioner submitted a letter signed jointly by the beneficiary and the beneficiary's brother, asserting that the beneficiary had originally owned 100 percent of the foreign company until January 2001, at which time he sold 49 percent of his shares to The petitioner also submitted a copy of a translated property ownership certificate, demonstrating that the foreign entity owns real estate in the People's Republic of China, and a commercial brochure. Neither of these documents address the issue of the foreign entity's ownership. The petitioner did not submit any documentary evidence in support of this claim. Again, merely 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. at 190.

Regarding the ownership of the U.S. petitioner, the petitioner's minutes of organizational meeting and a stock certificate number "1" showed that the petitioner issued 1,000,000 shares to the beneficiary, not the claimed foreign parent company, for a sum of $2,000,000. The petitioner's stock transfer ledger indicates that the beneficiary transferred ownership of those shares to the petitioner, not the claimed foreign parent company, on October 24, 2001. The petitioner also submitted copies of wire transfer receipts that demonstrate that the beneficiary and transferred funds from their personal accounts, not the account of the claimed foreign parent company. Contradicting this evidence, the petitioner's 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return showed at Schedule E that the beneficiary did not own any stock in the company and further indicated at Schedule K that the beneficiary's foreign employer owned 100 percent of the petitioner. Finally, it is noted that in the Form I-526 petition, the beneficiary claimed he was the sole owner of the petitioning company. In sum, the record contains a number of contradictions regarding the claimed ownership of the U.S. petitioner.

The director found that the petitioner had not established a qualifying relationship, after determining that the petitioner had failed to substantiate that the beneficiary's overseas employer funded the petitioner and noting that the record contained conflicting evidence regarding the petitioner's actual ownership. Accordingly, the director denied the petition.

On appeal, counsel asserts that the beneficiary owns and controls both the petitioner and the foreign entity which would qualify the two companies as "affiliates." Counsel explains that for historical reasons the companies see themselves as parent and subsidiary as the foreign entity was formed well before the petitioner. The petitioner does not address how the petitioner was funded on appeal.

Upon review, the petitioner has not sufficiently explained the inconsistencies between its conflicting claims: first, it claimed to be a wholly-owned subsidiary of the foreign entity, and second, it later claimed that it is an affiliate of the foreign entity due to the claimed common ownership of the petitioner and the foreign entity. In addition, although the petitioner now claims that the beneficiary owns 100 percent of the petitioner's issued stock, the petitioner clearly indicated on its 2001 IRS Form 1120 that the foreign company owned the corporation. 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. 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).

Moreover, the AAO notes that the petitioner has not provided adequate evidence of the actual ownership and control of the foreign entity. If the petitioner is to qualify as an affiliate of the foreign company due to common ownership and control, it is critical that the petitioner demonstrate the actual ownership of the foreign entity. The petitioner claims that the beneficiary owned the foreign entity in its entirety and then transferred a 49 percent interest to a family member. In support of this claim, the petitioner submitted a letter signed jointly by the beneficiary and his brother. The record does not include independent documentation of the ownership and subsequent transfer. By themselves, the petitioner's unsworn statements on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). It is further noted that the property ownership certificate and the commercial brochure are not probative as to the ownership of the foreign entity. Although the commercial brochure lists the "subsidiary and branch offices" of Bestsbet Property, Co. Ltd, the list does not include the U.S. petitioner. As the petitioner has not established the actual ownership of the foreign company, the petitioner has not established that a qualifying affiliate relationship exists.

In sum, the record does not establish that the petitioner and the beneficiary's overseas employer enjoy a legitimate qualifying relationship.

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.