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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 1 4 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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Director, California Service Center, initially approved the employment-based petition. Upon subsequent review, the director determined that the petition had been approved in error and revoked the approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation originally organized in the State of California in July 1994. It initially claimed to engage in import, export, and trading. Subsequently, the petitioner claimed to provide customer service, market planning, and market data gathering. It seeks to employ the beneficiary as its vice-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 petition was filed on February 6, 1998 and approved on July 22, 1998. On or about October 25, 2002, the director reviewed the petition when adjudicating the beneficiary's application for adjustment to permanent resident status. At that time, the director determined that the petition had been approved in error, noting that the petitioner had not established: (1) that the beneficiary would be employed in a managerial or executive capacity for the United States entity; (2) a qualifying relationship with the beneficiary's foreign employer; (3) its ability to pay the beneficiary the proffered wage; or, (4) that it was doing business in the United States. The director issued a notice of intent to revoke and provided the petitioner an opportunity to rebut the proposed revocation.

On March 28, 2003, the director revoked the approval after reviewing the petitioner's rebuttal evidence. The petitioner appealed the revocation decision to the AAO. On appeal, counsel for the petitioner asserts that the director's decision is incorrect. Counsel contends that the petitioner has established that the beneficiary is an executive; that the petitioner was legally funded by the foreign entity creating a qualifying subsidiary relationship; and, that the petitioner reports significant gross sales establishing that it is doing business.

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 would be employed in a managerial or executive capacity for the petitioner.

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

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 January 28, 1997 letter appended to the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated the beneficiary's duties as:

(1) To establish goals and policies of US subsidiary;
(2) To exercise wide latitude in discretionary decision-making;
(3) To direct and control import/export operation of US subsidiary;
(4) To exercise administrative authority to hire, fire and train subordinate personnel; [and]
(5) To make recommendations and report to President periodically.

The petitioner also provided its organizational chart showing the beneficiary in the position of vice-president directly reporting to the president. The chart also depicted an international trade manager, a domestic trade manager, and an accounting/office manager reporting directly to the beneficiary. The chart included an international trade vice-manager reporting to the manager of the international trade department. The petitioner's California Form DE-6, Employer's Quarterly Wage Statement, for the quarter ending September 30, 1997 confirmed the employment of individuals in these positions.

The director approved the petition based on this limited information.

In conjunction with the beneficiary's application to adjust status, the petitioner provided copies of its 1998 California Forms DE-6. The California Form DE-6 for the first quarter of 1998, the quarter in which the petition was filed, depicted the same six employees identified on the petitioner's previously submitted organizational chart. The California Forms DE-6 for the remaining quarters of 1998 showed the employment of only four individuals.

In the October 25, 2002 notice of intent to revoke, the director observed that the petitioner had not established its need for six managers/executives and concluded that the beneficiary would be assisting in day-to-day non-supervisory duties. The director also observed that the petitioner had not established that the beneficiary's subordinates were professional employees and concluded that the beneficiary would be a first-line supervisor of non-professional employees. The director further observed that the beneficiary appeared to be involved in the petitioner's routine operational activities and concluded that the beneficiary would not be managing a function. The director requested that the petitioner provide additional evidence in any rebuttal to the notice of intent to revoke including a more detailed description of the beneficiary's duties.

In rebuttal, the petitioner notified the director that its initial plans to engage in shipping and export activities had changed. The petitioner indicated that it now provided marketing planning, sales, customer service and market data gathering. Consequently, the petitioner noted that the beneficiary was no longer responsible for import/export activity. The petitioner provided a lengthy description of the beneficiary's duties including:

> Assisting the president by retaining outside professionals, representing the petitioner in legal actions, and conducting company meetings;
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> Reviewing market research and price analysis reports prepared by outsourced market research analysts and consultants;
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> Reviewing monthly business reports;
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> Setting business targets to develop long-term and short-term projects by preparing reports for the China parent company and the Shanghai branch office, meeting with executives in mainland China, and after receiving instruction from Chinese executives implementing the business targets and projects;
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> Participating in major buying/selling and contract negotiations;
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> Hiring, firing, and reviewing executive personnel performance and assigning proper jobs and duties; and,
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> Reporting to the Board of Directors.

The director noted the petitioner's lengthy description of the beneficiary's current duties as well as a decrease in the number of the petitioner's employees. The director determined that the record contained insufficient information to conclude that the beneficiary's proposed duties would be managerial or executive.

On appeal, counsel for the petitioner asserts that all of the petitioner's employees in the United States subsidiary are sales engineers and the beneficiary is responsible for supervising the entire sales and customer service staff. Counsel contends that because the petitioner is engaged in the distribution of machinery tools, every sales representative is required to have an engineering degree. Counsel concludes that the beneficiary supervises professionals.

Counsel's assertions are not persuasive. 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 initial description of the beneficiary's duties primarily paraphrased elements of the definition of executive capacity. Section 101(a)(44)(B)(ii), (iii), and (iv) of the Act. The petitioner added that the beneficiary also had responsibility to hire, fire, and train personnel, an element contained in the definition of managerial capacity. Section 101(a)(44)(A)(iii) of the Act. The petitioner's position description is general and does not convey an understanding of the beneficiary's daily duties. 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).

Moreover, the petitioner did not provide job descriptions for any of the individuals subordinate to the beneficiary's position. The petitioner did not provide an understanding of the beneficiary's actual role in its organizational hierarchy. Upon review, it is apparent that the director erred when approving the petition as the director failed to inquire beyond the petitioner's wholly inadequate position description for the beneficiary and lack of position descriptions for the beneficiary's subordinates. Accordingly, pursuant to section 205 of the Act, 8 U.S.C. § 1155, the director had good and sufficient cause to revoke the approval of the petition.

The petitioner's subsequent material change in both the nature of its business and the beneficiary's claimed role in the business is not pertinent to this proceeding. It must be emphasized that the critical question is the nature of the beneficiary's duties at the time of filing. A petitioner must establish eligibility at the time of filing; 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). The petition was filed on February 6, 1998, and any subsequent change in the beneficiary's duties or position title is irrelevant to the beneficiary's claimed managerial or executive capacity. *Cf. Calexico Warehouse, Inc. v. Neufeld*, 259 F. Supp. 2d 1067, 10799-80 (S.D. Cal. 2002).

Even if the AAO considered the petitioner's material changes, the AAO observes that the petitioner provided disparate descriptions of the beneficiary's new role in rebuttal and on appeal. In rebuttal, the petitioner focused on the beneficiary's purported executive duties; on appeal, counsel focuses on the beneficiary's purported supervisory duties of professional employees. 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). Furthermore, the petitioner failed to support either claim with independent documentary evidence. 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).

In sum, the petitioner has not provided evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether a qualifying relationship exists between the petitioner and the claimed parent company, as required by statute and defined at 8 C.F.R. section 204.5(j)(2). The visa classification that the petitioner seeks is intended for multinational executives and managers. The language of the statute specifically limits this visa classification to those executives and managers who have previously worked abroad for at least one year in the preceding three for the foreign entity, and are coming to the Untied States to work for the same entity, or its affiliate or subsidiary. In order to qualify for this visa classification, the petitioner must establish that there is a qualifying relationship 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* 8 C.F.R. § 204.5(j)(3)(i)(C).

The petitioner initially claimed to be a wholly owned subsidiary of Jilin Province Machinery Imp. & Exp. Corporation. The petitioner provided a copy of stock certificate number "1" showing that it had issued 105,062 shares to Jilian Province Machinery Imp./Exp. Corporation on September 16, 1994. The petitioner's stock ledger confirmed that the petitioner had issued these shares. The petitioner's California Notice of Transaction indicated that the total offering for the petitioner's 105,062 shares was $105,062 in money. The petitioner's 1996 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return indicated on the statement accompanying Schedule K that Jilin Province Machinery Imp. & Exp. Corporation owned 100 percent of the petitioner. However, the IRS Form 1120 at Schedule L, Line 22(b) listed the value of the shares issued at $10,000.

The director failed to question this inconsistency and approved the petition.

Upon subsequent review of the record, the director observed the above-described discrepancy as well as other discrepancies regarding the petitioner's actual ownership and control. In the notice of intent to revoke, the director noted that the petitioner had not submitted any evidence to show that the foreign entity had actually contributed funds to purchase the petitioner's stock in 1994. The director requested copies of the original wire transfers from the claimed parent company to the petitioner and the United States bank statements corroborating the transfer of funds.

In rebuttal, counsel for the petitioner explained the discrepancy on its IRS Forms 1120, Schedule L by indicating that the petitioner also had a loan liability from its stockholder as noted on Line 18 in the amount of $104,020. The petitioner submitted a completely different stock ledger showing that on September 16, 1994, it had issued two stock certificates, each for 500,000 shares for the amount of $52,531, to Jilan Machinery Import & Export Corporation. In a December 20, 2002 letter, the petitioner explained that because of Chinese government regulations controlling the outflow of foreign currency, the parent company re-directed three payments of $100,000 from the parent company's clients to the petitioner as the petitioner's start up costs.

The petitioner also attached the claimed parent company's unaudited accounting report dated December 11, 1998. The report referenced the petitioner and stated that the petitioner was managed by the claimed parent company's Shanghai branch. The report indicated further "the subsidiary [the petitioner] received three payments of $100,000 US (converted to approximately 89,870 RMB) from clients. The funds were left in the United States as a startup fund for the satellite office."

The director observed that the petitioner had not provided copies of the Chinese government's regulations evidencing strict control of the transfer of funds. The director also noted his reluctance to recognize the evasion of the Chinese government's regulations to substantiate that the claimed parent company had actually purchased the petitioner's stock. The director also referenced an additional inconsistency on the petitioner's IRS Forms 1120 Schedule K. The director did not accept the petitioner's explanation that the claimed parent company's outstanding loan could be used as evidence of payment for issued stock. The director determined that the record continued to contain inconsistencies and that the record lacked evidence supporting the petitioner's claim that the foreign entity had supplied capital in exchange for stock.

On appeal, counsel takes issue with the director's characterization of the transfer of funds from the claimed parent company's clients to the petitioner. Counsel states that Chinese regulations make the transfer of large sums from China to the United States difficult; however counsel observes that the petitioner did not state that transferring funds was illegal.

Counsel asserts that the petitioner's start up funds were transferred from the claimed parent company's customers to the petitioner; counsel argues that as long as the source of funds is legal and the funds belong to the parent company, the funding requirement is met. Counsel contends that the transactions were reported to the Chinese government as income received abroad and to the United States government by reporting the received funds to the IRS. Counsel also asserts that the director should not require the claimed parent company to subject itself to a heavy procedural burden in obtaining approval to transfer funds. Finally, counsel reiterates that as long as the claimed parent company is entitled to funds, it may direct the payment of those funds as it chooses; and directing payment to the petitioner is indicative of a parent-subsidiary relationship.

Counsel also acknowledges the petitioner's failure to mark Line 4, Schedule K of its IRS Forms 1120 indicating that it was part of a parent-subsidiary group but notes that the remainder of the IRS Forms 1120 reflect that the claimed parent company owned 100 percent of the petitioner.

Counsel's assertions are not persuasive. The petitioner has not provided adequate explanations resolving the discrepancies between the two disparate stock ledgers and the failure to list the actual value of the common stock the foreign entity allegedly purchased. Moreover, as ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

The petitioner has not provided evidence that the claimed parent company paid for the stock issued. The petitioner has not provided evidence that corroborates its claim that the claimed parent company was entitled to funds that were re-directed to the petitioner in payment of stock. The petitioner has not provided copies of the invoices or other documentation establishing that the foreign entity was due certain funds when the petitioner allegedly issued its stock. Further, the petitioner has not provided evidence that the claimed parent company reported to the Chinese government that it received or was due to receive funds from the United States. The record does not provide sufficient evidence to establish a paper trail from the claimed parent company to its United States customers and ultimately to the petitioner. 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.

The petitioner has not provided sufficient evidence to overcome the director's decision on this issue.

The third issue in this proceeding is whether the petitioner is doing business, thus maintaining its multinational classification.

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 initially submitted 1995, 1996, and 1997 invoices that identified the petitioner as the entity selling products. The latest invoice identifying the petitioner on its face was dated April 12, 1997. The petitioner also submitted invoices sent to unrelated parties o The petitioner did not provide further evidence of its ongoing business.

Upon close review of the submitted invoices, the director observed that some of the invoices appeared to have been altered, deleting the consignee's name and address, and others were in house shipping orders, packing lists, or commercial invoices. The director also observed that two invoices submitted in conjunction with the beneficiary's application for permanent residence were orders from Jilin Machinery (Shanghai) Co Ltd to Denmark and to Australia.

The director also referenced an overseas investigation conducted in July 2001 in connection with the beneficiary's application for permanent residence. The investigation revealed that that the foreign entity sold products to the petitioner and the petitioner sold products to purchasers in the United States and kept any profit made on the sales.[1]

In rebuttal to the director's observations, the petitioner provided a corporate organizational chart and indicated that the claimed parent company's Shanghai Branch Office (operating under the name shipped goods directly to overseas clients. The United States clients than paid the petitioner. The petitioner stated that the petitioner served as a liaison office to facilitate communications between the client and the Shanghai branch office.

Upon review of the record, the director found the record unclear regarding the petitioner's type of business and its purpose in the United States. The director determined that the record did not substantiate that the petitioner was actually conducting business as defined in the immigration regulations.

On appeal, counsel for the petitioner asserts that the regulations do not require a petitioner to engage in a specific type of business. Counsel contends that the petitioner provides a marketing and sales function and reported gross income of $5.6 million in 2001. Counsel claims that the petitioner has participated in trade shows and that its sales engineers travel throughout the United States "to update on market conditions." Counsel also notes that the petitioner is listed on several websites and has been mentioned in the Federal Register.

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[1] The investigator also noted that the beneficiary had returned to China in 1998 and had been working for an unrelated company since that time.

Counsel's claims are not persuasive. As stated previously the petitioner's subsequent material change in the nature of its business is not pertinent to this proceeding. Again, the critical question is the nature of the business when the petition was filed and whether the petitioner substantiated that it was doing business at that time. A petitioner must establish eligibility at the time of filing; 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. at 49.

In this matter, the petitioner has not provided any information on when it changed the nature of its business from import and export to acting as a liaison office to facilitate communications between United States customers and Chinese businesses. When the petition was filed the petitioner claimed to be in the import and export business but it did not present any contemporaneous invoices or other evidence of doing business. 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.

In addition, the petitioner has not provided any evidence of its sales activities or marketing functions. The record does not contain information regarding the petitioner's sales engineers. The petitioner's submission of documents relating to websites and to trade conferences are documents relating to the petitioner's claimed parent company and not to the petitioner. The petitioner's 1998 IRS Form 1120 shows $3,188,466 in gross receipts, $3,161,733 in the cost of goods, $0 in the cost of labor, $21,600 in compensation to the president as an officer, and $36,800 paid in salaries. This information accompanied by the petitioner's claim that it served as a liaison office to facilitate communications between customers and Chinese customers is indicative of a company that may be acting as a broker. However, the AAO will not speculate on the petitioner's actual current business, if any. The record does not substantiate that the petitioner was actually doing business as defined by the regulations when the petition was filed.

The petitioner has not provided evidence to overcome the director's decision on this issue.

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.