U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 265 53107 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition concluding that: (1) no qualifying relationship exists between the petitioner and the alleged foreign entity; and (2) the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the documentary evidence establishes the existence of a qualifying relationship between the U.S. and foreign entities, and that the beneficiary's role in controlling and managing a Japanese restaurant is complex.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of the Japanese entity, Inafuku & Co. Ltd.; (2) is a Japanese restaurant; and (3) employs four persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of $250 per week.

The first issue to be discussed in this proceeding is whether the petitioner and the Japanese entity, Inafuku & Co. Ltd., have a qualifying relationship.

A petitioner must establish that it and the foreign entity share a common relationship. 8 C.F.R. § 204.5(j)(3)(i)(C). When filing the petition, the petitioner claimed that it was a subsidiary of the Japanese entity because the Japanese entity paid $150,000 to obtain the petitioner's shares of outstanding stocks. As documentary evidence of the claimed relationship, the petitioner submitted, among other documents, copies of: (1) a wire transfer; (2) its Articles of Incorporation; (3) its stock certificate; and (4) a financial statement.

The director was not persuaded by the evidence submitted and, therefore, on November 8, 2002, he requested that the petitioner submit signed and certified copies of its Federal Income Tax Returns (Form 1120) for the 2001 tax year. The petitioner submitted a copy of its federal income tax returns for the 2001 tax year; however, the director found that the record still lacked persuasive evidence of a qualifying relationship between the petitioner and the Japanese entity. Therefore, the director issued a second request for evidence on February 20, 2003, requesting that the petitioner submit, among other items, proof of its stock purchase, a copy of the petitioner's Notice of Transaction Pursuant to Corporations, copies of its stock certificate(s), and a copy of its stock ledger.

The petitioner complied with the director's second request. Nevertheless, the director denied the petition, in part, because no qualifying relationship exists between the petitioner and the Japanese entity. The director noted that Schedule K of the petitioner's 2001 Form 1120 did not indicate that a foreign entity owned the petitioner. Noting the inconsistencies between the Form 1120 and the other documentary evidence, the director denied the petition on this ground.

On appeal, counsel notes the numerous documents that the petitioner submitted to establish that the Japanese entity paid $150,000 for the shares of the petitioner's stock. Regarding the Form 1120, counsel states that the petitioner's Certified Public Accountant (CPA) made an error when preparing the petitioner's 2001 tax returns. The petitioner submits a corrected copy of its Form 1120, including Schedule K, for the 2001 tax year.

Counsel's statements on appeal and the documentary evidence he has provided have not rectified the inconsistencies in the evidence regarding the Japanese entity's alleged ownership of the petitioner. The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns directly or indirectly, half of the entity and controls the entity. Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988). 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. *Id.* at 595.

It is important to note that the director requested signed and certified copies of the petitioner's 2001 federal tax returns in his November 2002 request for evidence. In response, however, the petitioner submitted only an unsigned and uncertified copy of its 2001 tax returns. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide signed and certified copies of its 2001 tax returns. The petitioner's submission of an unsigned and uncertified copy of its tax returns does not comport to the

director's request, as this copy carries no weight in establishing the essential elements of the petitioner's business, such as its ownership structure, its gross receipts, and the compensation and salaries that the petitioner paid. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). On this basis alone, the director had a sufficient basis for denying the petition, in part, on the petitioner's failure to establish that it is a subsidiary of the Japanese entity.

On appeal, counsel states that the petitioner's CPA made an error when preparing the company's 2001 federal tax returns. Although the petitioner submits an unsigned and uncertified copy of an amended return on appeal, conspicuously absent from the record is a letter from the petitioner's CPA attesting to his alleged error in preparing the returns. Counsel's statement on appeal regarding the error is not evidence and thus is 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). Accordingly, Citizenship and Immigration Services (CIS) cannot find that a qualifying relationship exists between the U.S. and Japanese entities because, although the stock certificate and stock ledger indicate that the Japanese entity owns the petitioner, the petitioner's federal income tax returns belie this information. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's simple assertion that the CPA's preparation of the tax returns was erroneous does not qualify as independent and objective evidence. As stated previously, counsel's statement will not suffice; the petitioner must submit competent objective evidence pointing to where the truth lies. The director's decision to deny the petition, in part, because no qualifying relationship exists between the U.S. and foreign entities will, therefore, not be overturned.

The second and final issue to be discussed is whether the beneficiary's proposed employment as the petitioner's president will be 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-
>
> (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.

At the time of filing the petition, the petitioner failed to provide a detailed description of the beneficiary's role as the company's president. Therefore, on November 8, 2002, the director asked the petitioner to submit an organizational chart of the U.S. entity, which was to include "a brief description of the job duties and educational level for the beneficiary and all employees under the beneficiary's supervision." In response, the petitioner submitted an organizational chart, which indicated that the beneficiary oversees and manages an investment department and a restaurant business department.

The director requested additional information about the beneficiary's proposed duties in a February 20, 2003 request for evidence. The director not only asked for a more detailed description of the beneficiary's duties, but also requested copies of the petitioner's Form DE-6, Quarterly Wage Report for the last six quarters.

In response, the petitioner submitted the DE-6 forms. When discussing the beneficiary's employment as the company president, counsel stated that the beneficiary:

> Manages, controls[, and] supervises employees in operation of restaurant, including books and records, income and expenses, cooks and kitchen helpers, cashier, waitresses, budget controls, orders all food and other supplies, scheduling employees, hours of employment, determining wages, hiring and firing employees, supervising performance in restaurant, analyzing customer orders to meet menu, deleting menu items not ordered, control inventory, checks deliver [sic] for errors, approving payments of accurate invoices, reviewing operations with C.P.A. for deposits and taxes to government agencies, improve exterior signs, prepare leaflets for distribution to local organizations to stimulate business and other important and necessary duties.

Counsel stated further that the beneficiary spent approximately 85 percent of his time supervising the restaurant operations, which includes directly supervising cooks, the assistant manager, the cashier, and the waitresses. Counsel stated that the remaining 15 percent of the beneficiary's time was spent consulting with a real estate agent for more business opportunities.

The director determined that that the proffered position was not in an executive or managerial capacity because the beneficiary is merely a first-line supervisor of nonprofessional employees, who include waitresses and cooks. The director noted that the DE-6 forms showed that the beneficiary is the only full-time employee of the company and, therefore, he would be required to perform all of the tasks associated with running a restaurant.

On appeal, counsel states that the director exhibits a lack of understanding regarding the complexity of a restaurant business. Counsel maintains that the beneficiary directs the entire management of the organization, including how the Japanese entity will invest its money in other businesses. Counsel also states that the director's reliance on the petitioner's staffing levels is misplaced because the director failed to consider the petitioner's reasonable needs in light of its organizational development.

Counsel's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. As shall be discussed, the evidence fails to establish that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of managerial or executive capacity.

As previously stated, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). When reviewing the duties, it is clear that the beneficiary primarily concerns himself with the routine tasks that are required to run a restaurant. Counsel stated clearly that 85 percent of the beneficiary's time is spent checking orders, purchasing supplies, supervising cooks and other staff, and preparing advertising materials. None of these tasks deals with either directing the management of an organization or managing an organization. All of the job duties specified are tasks that sales and first-line supervisors of nonprofessional people perform. Although counsel claims that operating a Japanese restaurant is particularly complex, counsel provides no evidence to support his assertion. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As such, CIS will not consider the beneficiary's employment to be in a managerial or executive capacity because the beneficiary provides the day-to-day services that are required to keep the restaurant operational. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition shall not be disturbed.

Beyond the director's decision, because the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a

nonimmigrant status. Although the director did not discuss this issue in his denial letter, it is a third reason why the petition may not be approved. Without a qualifying foreign entity, the beneficiary cannot have the necessary work experience as discussed in the cited regulation.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.