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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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MAY 06 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 96 148 52178

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, California Service Center, initially approved the employment-based petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in January 1995. It imports, exports, and sells health products and medical equipment. It seeks to employ the beneficiary as its general manager. 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 petitioner filed Form I-140, Immigrant Petition for Alien Worker on April 26, 1996. The director approved the petition on May 15, 1996. In June 1996, the beneficiary filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On May 15, 2002, the director issued a notice of intent to revoke observing that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity; or (2) a qualifying relationship with the beneficiary's foreign employer.

On June 13, 2002, the petitioner issued a statement listing a series of events describing his treatment by various legacy Immigration and Naturalization Service (INS) officers. Neither counsel nor the petitioner addressed the issues raised in the notice of intent to revoke. On September 4, 2002, the director determined that the petitioner had not overcome the grounds of revocation.

Counsel for the petitioner submitted Form I-290B, Notice of Appeal stating that a brief or other evidence would be submitted with in 30 days. The Form I-290B was timely filed. On November 20, 2003, the AAO issued a summary dismissal, noting that the record did not contain a brief or other evidence in support of the appeal.

On motion, counsel for the petitioner provides evidence that a four-page brief, the petitioner's 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, several 2001 California Forms DE-6, Employer's Quarterly Report, and IRS Forms W-2, Wage and Tax Statements, as well as other documents had been timely submitted. The AAO also observes that the record now contains a brief date stamped October 17, 2002. The brief also contains the notation "Action Completed, Approved for Filing-November 24, 2004.

Counsel's motion to reopen is granted and the appeal will be considered.

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).

Section 205 of the Act, 8 U.S.C. 1155 (2005), states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The first issue in this proceeding is whether 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 a March 20, 1996 letter appended to the petition, the petitioner stated that the beneficiary has performed and will continue to perform the following duties:

> To set up policies in order to further push forward and promote the development of traditional Chinese medicine aboard [sic];
>
> To be responsible for providing leadership in area of business management;
>
> To be in charge of personnel and office administration, contract negotiation and execution and joint ventures;
>
> To determine addition and deletion of business lines depending on the company's financial strength and profit;
>
> To direct the operation, employee's performance and communication between the US subsidiary and the foreign company;
>
> To organize and attended [sic] business conventions;
>
> To perform all other necessary duties to assure the company's healthy operation; [sic]

The petitioner also provided its California Forms DE-3, Employer's Quarterly Report, for the 1995 year. The 1995 fourth quarter Form DE-3 showed the petitioner had paid the beneficiary and three other individuals in the quarter. The petitioner also provided a copy of its payroll list for January and February 1996 listing the same four individuals.

On the basis of this information, the director approved the petition on May 15, 1996, three weeks after the petition was filed.

On May 15, 2002, the director issued a notice of intent to revoke. The director observed that the petitioner had been doing business as a medical equipment exporter and had been selling a herb/vitamin capsule. The director noted that the names of the beneficiary and other individuals listed on the petitioner's California Forms DE-6 (previously identified as Forms DE-3) appeared on the sales receipts and invoices. The director determined that the beneficiary and the other individuals in the petitioner's employ were salespersons. The director concluded that the evidence in the record did not demonstrate that the beneficiary had been or would be employed in the capacity of a manager or executive.

In rebuttal, counsel for the petitioner reiterated his support for the beneficiary and attached a letter written by the beneficiary. The beneficiary's June 12, 2002 letter indicated that legacy INS officers had interviewed the beneficiary in conjunction with the beneficiary's Form I-485. The beneficiary stated that he had made numerous inquiries regarding the status of his case over the previous five to six years and had been given different answers by various INS officers in response. The beneficiary noted his belief that the personal

attitude of one particular officer negatively influenced his case. The beneficiary concluded by requesting fair consideration of this matter.

The director determined that neither counsel nor the beneficiary's letters addressed the issues raised in the notice of intent to revoke. The director concluded that the petitioner had not overcome the grounds of revocation.

On appeal, counsel for the petitioner asserts that the beneficiary's job description satisfies the definition of executive capacity. Counsel claims that: "[t]o set up policies in order to further push forward and promote the development of traditional Chinese medicine aboard [sic]," and "[t]o be responsible for providing leadership in area of business management," satisfy section 101(a)(44)(B)(ii) of the Act; and that: "[t]o be in charge of personnel and office administration, contract negotiation and execution an joint ventures," and "[t]o organize and attended [sic] business conventions," satisfy section 101(a)(44)(B)(i) of the Act; and that: "[t]o determine addition and deletion of business lines depending on the company's financial strength and profit" satisfies section 101(a)(44)(B)(iii) of the Act; and that: "[t]o direct the operation, employee's performance and communication between the US subsidiary and the foreign company," and "[t]o perform all other necessary duties to assure the company's healthy operation; [sic]" satisfies section 101(a)(44)(B)(iv) of the Act. Counsel concludes that the beneficiary is an executive and not a common employee.

Counsel also attaches copies of the beneficiary's recognitions for community service and education awards received by the beneficiary's son, 2001 California Forms DE-6, and a video tape describing the petitioner's business.

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 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.*

On review, the petitioner's description of the beneficiary's duties is vague, nonspecific and fails to demonstrate the beneficiary's day-to-day duties. The petitioner does not define the petitioner's organizational goals and policies or clarify who carries out the petitioner's operational and administrative tasks. 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). 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 addition, the petitioner's general statements paraphrase the statutory definition rather than providing a specific description of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp.at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner has not provided evidence that when the petition was filed, the beneficiary's duties comprised primarily managerial or executive duties. 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 director observed that the record shows that the beneficiary participated in the petitioner's sales activities. 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 petitioner has not provided evidence that the beneficiary is relieved from performing the petitioner's sales tasks. Counsel's assertion that the beneficiary is not a commonplace employee is not sufficient. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, the petitioner has not detailed the beneficiary's actual daily duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp.at 1108. Moreover, the petitioner has not provided evidence that the beneficiary is relieved from performing the petitioner's operational, administrative, and sales tasks.

The record does not contain sufficient evidence to establish that the beneficiary's job duties comprise primarily managerial or executive duties. The petitioner has not provided evidence to overcome the director's determination on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. 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:
>
> (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 claims it is a wholly owned subsidiary of the General Company of Science and Technology of Shangdong College of Traditional Chinese Medicine. The petitioner provides its Articles of Incorporation authorizing it to issue 200,000 shares. In addition, the record contains the petitioner's stock certificate number 1 showing that 100,000 of the petitioner's shares have been issued to the General Company of Science and Technology of Shangdong College of Traditional Chinese Medicine. The record also contains the petitioner's initial IRS Form 1120, showing at Schedule L, Line 22(b) the petitioner's outstanding stock is valued at $20,000.

In the notice of intent to revoke, the director observed that the record did not contain evidence that the foreign entity had provided the capital to fund the petitioner. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer, as the record did not contain documentation that the foreign entity had paid for the petitioner.

As noted above, neither counsel nor the petitioner addressed this issue in rebuttal.

On appeal, counsel for the petitioner explains that the foreign entity is a university in China and that it is a government owned institution. Counsel claims that when the petitioner was established the management of foreign currency was such that the parent company could not wire money from China to the United States. Counsel states that the foreign entity gave $5,000 to five different individuals and requested that those individuals travel to the United States to use the funds to establish the petitioner. Counsel indicates that the beneficiary was one of the individuals and that the four other persons returned to China.

Counsel's claims are not persuasive. The regulation and case law confirm that 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 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 claimed 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, CIS is unable to determine the elements of ownership and control.

In this matter, neither counsel nor the petitioner has provided any independent documentation establishing a connection between the petitioner and the foreign entity. Stock certificates are easily manipulated, thus evidence beyond the issuance of paper stock certificates into the means by which stock ownership was acquired is often necessary to establish that a qualifying relationship actually exists. Counsel's explanation that individuals carried funds into the United States is not sufficient. First, the statements of counsel on appeal or in a motion 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). Second, 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 at 190. Finally, in immigration proceedings, the law of a foreign country is a question of fact that must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Counsel's claim that China's management of foreign currency prohibited wire transfers to the United States is not substantiated.

The petitioner in this matter has not overcome the grounds of revocation. The director's decision on this issue will be affirmed.

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.