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U.S. Citizenship and Immigration Services

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FILE: WAC 03 182 51879 Office: CALIFORNIA SERVICE CENTER Date: AUG 08 2005

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, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of California in February 1998. It designs and develops software. It seeks to employ the beneficiary as its business development 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 director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits additional documentation and asserts this evidence clearly resolves any inconsistencies.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The 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:
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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 record contains the petitioner's: (1) Articles of Incorporation filed in the State of California on February 13, 1998, under the name Digital Yantra, Inc., authorizing the issuance of 100,000 shares; (2) a Certificate of Amendment of Articles of Incorporation filed in the State of California on September 25, 1998 increasing the authorized number of shares to 500,000 shares; (3) a Certificate of Amendment of Articles of Incorporation filed in the State of California on June 3, 1999, changing the name of the corporation to E-Infochips, Inc.; (4) the initially submitted corporate stock ledger showing stock certificates 1 through 5 had been issued as follows:

> Number 1 issuing 100,000 shares to Solution Machines Pvt. Ltd. on September 23, 1998, for $5,000,
> Number 2 as cancelled,
> Number 3 issuing 100,000 shares to Solution Machines Pvt. Ltd. on September 30, 1998, for $5,000,
> Number 4 issuing 200,000 shares to Solution Machines Pvt. Ltd. on November 30, 1998, for $10,000,
> Number 5 issuing 2,000,000 shares to (now eInfochips Ltd.) and lacking a date on the ledger, for $100,000;

(5) Stock certificates 1 through 5 corresponding to the corporate stock ledger except stock certificate number 3 was dated September 23, 1998 and stock certificate number 5 was dated October 20, 2000 and was issued to e-Infochips Ltd.; and (6) California Form Notice of Transaction filed September 25, 1998 showing the petitioner's total offering to be $25,000 in money.

The record also contains the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for the 1999, 2000, 2001, 2002, and 2003 years. The 1999 IRS Form 1120, on Schedule L, Line 22(b) shows the petitioner's stock valued at $20,000 at the end of the year; the 2000, 2001, and 2002 IRS Forms 1120, on Schedule L, Line 22(b) shows the petitioner's stock valued at $120,000 at the end of each of the years; and the 2003 IRS Form 1120, on Schedule L, Line 22(b) shows the petitioner's stock valued at $450,000 at the end of the year.

The record further contains the petitioner's bank statement for the November 21 through December 23, 1998 time period showing a deposit of $10,000 on November 24 and a deposit of $20,000 on December 11, 1998. The petitioner also provides a check drawn on a foreign bank to the petitioner, dated November 13, 1998 in the amount of $10,000. The memo area of the check indicates the check was for "Solution Machines Pvt. Ltd."

On December 16, 2004, the director denied the petition determining that the petitioner's 2003 IRS Form 1120, on Schedule L, Line 22(b) showed an increase in capital but the record did not contain evidence to show that there were any stock transactions in 2003. The director also observed that the June 30, 2004 request for evidence had specifically requested original wire transfers from the parent company to the U.S. company to show that the foreign entity had in fact paid for its interest in the U.S. entity. The director noted that the petitioner had not provided this specific evidence in response to the request for evidence. The director concluded that the evidence failed to establish that the petitioner and the foreign entity had a qualifying relationship.

On appeal, the petitioner notes that the par value of the petitioner's stock is $.05 per share rather than $1.00 per share as stated by the director. The petitioner claims that in April 2003, the petitioner issued stock certificate number 6 in the amount of 6,600,000 shares for $330,000 and submits a copy of stock certificate number 6 on appeal. The petitioner acknowledges that when it responded to the request for evidence (on September 16, 2004), the information on the $330,000 was not submitted and states that the stock certificate was not sent to the U.S. company. The petitioner submits an amended stock certificate ledger to show the April 24, 2003 transfer. The petitioner also encloses debit slips with a bank statement from UTI Bank Ltd, showing debits from the foreign entity's account in the amounts of $5,000 on May 12, 1998, $5,000 on September 3, 1998, $10,000 on November 13, 1998, $100,000 on October 16, 2000, and a foreign bill transfer advice dated April 25, 2003 in the amount of $330,000. The petitioner also notes, while acknowledging that it is not determinative, that Citizenship and Immigration Services (CIS) has approved approximately 59 L nonimmigrant applications, including applications under a blanket L petition. The petitioner notes, based on the past approvals, its impression that the issue of qualifying relationship had been established.

The evidence submitted on appeal is not persuasive. First, the petitioner has not provided evidence that it is authorized to issue 9,000,000 shares. The record contains the petitioner's certificate of amendment increasing

its authorized shares to only 500,000. The record does not contain subsequent amendments showing that the petitioner had increased its authorization to issue more than 500,000 shares. The petitioner's most recent stock certificate issued on May 15, 2003 for 6,600,000 shares indicates on its face that the company is authorized to issue only 400,000 shares.

Second, the record contains inconsistencies. The petitioner filed a California Notice of Transaction showing its initial capitalization to be $25,000 in money. However, the petitioner's stock ledger showed from September 23, 1998 to November 30, 1998 it received only $20,000 in capital funds. Further, neither the petitioner's stock certificates or the Articles of Incorporation support the petitioner's claim that the stock has a par value of $0.05. Moreover, the petitioner does not offer an adequate explanation for its failure to produce stock certificate number 6 and the amended stock certificate ledger. 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). It is not clear why the U.S. company would not have a copy of its own issued stock certificates.

Third, the petitioner did not provide the documentary evidence requested by the director but belatedly submits a form of the requested documentation on appeal. However, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Although the petitioner asserts that it has submitted a number of L-1A petitions that were previously approved, this is a separate Form I-140 proceeding. It must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Moreover, on the issue of qualifying relationship, the AAO recognizes the ease with which stock certificates and stock ledgers can be manipulated. It requires close scrutiny of all relevant 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.*, 19 I&N Dec. at 595. Without full disclosure of all relevant documents, CIS is unable to determine the complete elements of ownership and control. 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 petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this reason the petition will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary is or will be employed in a primarily 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;
>
> 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 this matter, the petitioner stated that:

> [The beneficiary] will manage and direct business development efforts on behalf of the company, which includes creating new alliances with prospective partners. He will be responsible for revenue generation for eInfochips as per the sales plan of the company. He will be involved in defining sales and customer strategies and develop account plans, including revenues and services improvement for the company. He will also be providing quarterly and monthly sales forecast and client relationships. He will manage negotiations of any revisions to new contracts.

The petitioner added that:

> [The beneficiary's duties] will also include analysis of the U.S. software market; development of international software business plans and analysis of future trends and requirements in the software industry; meeting prospective clients, meeting with corporate associations, identifying potential customers, new products, and representing the company at seminars and association meetings. Finally, [the beneficiary] will lead and manage a team of professionals to ensure effective compliance with project objectives.

In a September 16, 2004 response to the director's request for evidence the petitioner noted that the beneficiary (1) would focus on partnerships, coordinating with the partner and the offshore engineering team; (2) would attend conferences interacting with customers and generating leads and partnerships; (3) is responsible for 25 to 30 percent of the company's revenues, managing two big accounts, selling the company's designs and services, and bringing in new sales; and (4) is responsible for project execution which includes building relationships with the customer, account mining, and coordination with the offshore team to ensure successful execution of the project. The petitioner also provided its organizational chart depicting its organization when the petition was filed. The organizational chart showed that beneficiary had four subordinates identified as hardware engineers who designed functionality of chip architecture, coordinated with the development center in India, tailored testing standards, policies, and procedures into existing applications, and provided simulation and verification of hardware design.

The petitioner's description of the beneficiary's duties portrays the position as primarily involved in sales, marketing, and customer service. Although the petitioner's products and services may involve complex technology, the complexity of selling the petitioner's products and services do not elevate the beneficiary's position to that of a manager or an executive. 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 does not establish that the beneficiary's job is to primarily supervise subordinates nor does the petitioner establish that the beneficiary's subordinates' positions are primarily professional positions rather than sales positions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record does not sufficiently establish that the beneficiary will perform primarily managerial or executive duties. For this additional reason, the petition will not be approved.

The record also fails to establish that the beneficiary's position for the foreign entity comprised primarily managerial or executive duties. The petitioner has not provided an organizational chart or other documents to substantiate the claim that the beneficiary "managed the sales team." For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.