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

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 08 2005
WAC 03 024 54735

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 Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in manufacturing of dye chemicals. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not demonstrated that existence of a qualifying relationship between the foreign and United States entities.

Counsel for the petitioner filed a motion to reconsider. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel acknowledges the director's notation of inconsistencies in the record, and explains that they were due to an "initial misunderstanding and miscalculations" by the petitioner's president. Counsel submits affidavits and provides an explanation of the funding of the United States entity.

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 or 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, which 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.

The issue in this proceeding is whether a qualifying relationship exists between the foreign and United States entities.

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;
>
> * * *
>
> *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 filed the instant petition on October 25, 2002. In an attached letter, dated October 15, 2002, the petitioner indicated that the United States entity was the subsidiary of the foreign company. As evidence of the parent-subsidiary relationship, the petitioner provided: (1) a stock certificate, dated September 4, 1997, identifying the foreign entity as the owner of 10,000 shares in the petitioning entity; (2) a stock transfer ledger confirming the issuance of stock on September 4, 1997 to the foreign entity; (3) its Statement by Domestic Stock Corporation; and (4) a "Verification of Existence of US Subsidiary" indicating approval by the Korean government on April 3, 2000 of the petitioning entity as a wholly owned subsidiary of the foreign company. Schedule K of the petitioner's 2001 U.S. Corporation Income Tax Return also identified the foreign entity as the owner of 100% of the petitioner's issued stock.

The director issued a request for evidence, dated April 29, 2003, asking that the petitioner submit the following documentation relating to the proposed parent-subsidiary relationship: (1) original wire transfer vouchers, cancelled checks, and deposit receipts representing consideration given by the foreign entity in exchange for stock ownership in the petitioning company; (2) an account of where the money transferred to the petitioner originated, and if transferred from somewhere other than the foreign entity, an explanation of the source's relationship to the foreign entity; (3) the names of all account holders depositing funds into the petitioner company and their affiliation to the foreign entity; and (4) its Notice of Transaction Pursuant to Corporations Code Section 25102(f) reflecting the value for which the petitioner's stock would be sold.

The petitioner responded in a letter dated July 18, 2003, noting that the petitioning entity was funded with $10,000 transferred from the foreign entity in three separate transactions on May 23, 1997, June 4, 1997 and June 23, 1997. The petitioner noted that in exchange, it issued 10,000 shares of stock to the foreign entity. As evidence of the wire transfers, the petitioner provided an "[i]ncoming wire receipt copy" signed by the assistant vice-president and assistant manager of Pacific Union Bank, in which she documented three wire transfers into the petitioner's account in the amounts of $2,225, $4,995, and $4,995. The petitioner also provided copies of the three wire transfer vouchers. Two vouchers reflected funds transferred from "Shin Seung Deok" to "K Y Woo/Trigen Int'l Co." while the third transfer originated with "Yoo Eun Hee" and was received by "K Y Woo/Trigen Int'l Co." The petitioner stated:

> Please note that because the Korean foreign exchange laws prohibited corporate fund transfer to another foreign company unless that company is a foreign branch office, the funds had been wire-transferred by Seung Deok Shin, who had been the parent company's general manager for International Business Department and Eun Hee Yoo, manager of the International Business Department.

The petitioner enclosed two "verifications" from the foreign entity's president that "Seung Deok Shin" and "Yoo Eun Hee" were employees of the foreign company at the time of the transfers.

In addition, the petitioner enclosed copies of its May and June 1997 bank statements, which reflected the three above-mentioned deposits. The petitioner also submitted the requested Notice of Transaction reflecting its total offering in the amount of $10,000.

The petitioner further noted in its letter that that the foreign entity also shipped products valued at $147,203 to the United States company as part of its "initial operational funds." The petitioner provided copies of its "Certificate of Export Declaration" for the products shipped to the petitioning entity.

In a decision dated October 13, 2003, the director determined that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities. The director noted the absence of evidence in the record, other than the declaration by the foreign entity's president, that Seung Deok Shin and Yoo Eun Hee were employees of the foreign organization, that they were authorized to transfer funds for the foreign entity, or that the money transferred was in fact funds originating from the foreign entity. The director further noted that the petitioner had not previously addressed its inability to directly transfer money to the United States in its October 15, 2002 letter submitted with the petition. In addition, the director determined that there was insufficient evidence to establish that the money reflected in the wire transfer vouchers was received in exchange for stock ownership in the petitioning entity. The director also addressed discrepancies in the stock ledger submitted by the petitioner with the instant petition and its earlier stock ledger submitted with the petitioner's prior petition.[1]

The director also noted that the petitioner had not provided a copy of the Korean law governing the government's regulation of financial transactions. The director stated, "assuming the petitioner's statement is true, that it was necessary to bypass Korean law to provide money to the subsidiary, it shows the foreign entity has no reservations about evading its own country's regulations." The director questioned "the veracity of the documentation and statements" presented by the petitioner. Consequently, the director denied the petition.

In an appeal filed on November 17, 2003 and in an attached letter, dated November 12, 2003, counsel acknowledges inconsistencies addressed by the director, but states that neither he nor the petitioner intended to mislead Citizenship and Immigration Services. Counsel notes that the discrepancies in the two stock ledgers are a result of the misunderstanding and miscalculation by the petitioner's president. Counsel explains:

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[1] The record indicates that the petitioner filed an employment-based visa petition on June 13, 2001 requesting to employ the instant beneficiary as its general manager. The petition was denied for failure to demonstrate the existence of a qualifying relationship.

> When the U.S. subsidiary company was incorporated in September of 1997, to start up the business, the foreign parent company transferred $100,000 from Korea to the U.S. subsidiary via a line of credit. However, of that $100,000 line of credit amount, only a little more than 10% of it was wire-transferred in cash, as capital. The other 90% of the amount was funded through the goods and products that the parent company sent to fund the subsidiary. Hence, the evidence of the wire-transfers were [sic] submitted to document the fact that the U.S. subsidiary received a total of $12,215.00 in cash. From the capital cash amount that it received from the parent company via wire-transfers, the U.S. subsidiary, in turn, issued the stock certificate of 10,000 shares to the parent company to document the stock purchase from the parent company.

Counsel explains that the petitioner's president mistakenly listed the stock purchase price on its initial stock transfer ledger as $100,000, rather than the $10,000 received in cash.

Counsel also addresses the director's suggestion that the funds received by the petitioner were not from the foreign entity. Counsel explains that the two employees who originated the transfers were not identified on the foreign entity's organizational chart because they had terminated their employment with the company prior to the filing of the instant petition. Counsel submits a November 12, 2003 declaration from the foreign company's president in which he attests to the employment of [redacted] during the time when the petitioning organization was established. In his affidavit, the company's president states that he authorized [redacted] both of whom were employed in managerial and supervisory positions, to transfer approximately $12,000 in cash to the petitioner. As additional evidence of their employment, counsel submits certificates of tax payment for the employees' earned income issued by the Korea Tax office. Counsel further states:

> [U]nlike the United States, the use of checks is *not* an accepted form for any financial transactions in Korea, therefore, the only way for the parent company to make wire-transfers to the petitioning entity was to have its personnel in managerial and supervisory positions make the wire-transfers using their own names but with [the] company's funds. As such, this was the reason why [redacted] names appeared in the 'source' of the wire transfers to the U.S. subsidiary rather than the parent company's name. But the monies used in the wire-transfers were from the foreign parent company's funds.

(emphasis in original).

With regard to Korea's regulation of corporate funds transferred by a Korean company to a foreign organization, counsel states that "although the Korean foreign exchange laws do not encourage the practice, it is not against the Korean foreign exchange laws for a Korean based company to fund its foreign subsidiary through using the wire-transfers method as explained above." Counsel claims that the foreign entity's course of action in funding the petitioning entity was not done in a way as to bypass Korean law or regulations.

Upon review, the petitioner has not established the existence of a qualifying relationship between the foreign and United States companies.

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 the 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.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). 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. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

While counsel addresses on appeal the inconsistencies raised by the director in his decision, the record contains a relevant discrepancy in the foreign entity's ownership, which the petitioner failed to explain. Specifically, each of the three wire transfer vouchers identify the recipient of the monies sent from the foreign entity as "K Y Woo/Trigen Int'l Co." Neither counsel nor the petitioner address "K Y Woo" or explain the relationship he or she has with the foreign and United States entities. "K Y Woo" is not identified as an employee on the petitioner's quarterly employee statements or on its organizational chart. Despite the director's request to name all account holders depositing funds into the petitioner company and their affiliation to the foreign entity, the petitioner failed to address the individual "K Y Woo." Absent this relevant evidence, the petitioner has failed to clearly demonstrate the manner in which the foreign entity acquired its alleged stock ownership. The petitioner's 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). Also, 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)).

Additionally, upon careful examination of the vouchers, it is clear that the petitioner's name, "Trigen Int'l Co.," was not part the original voucher and was subsequently typed on the form as a recipient. The altered documents cast doubt on the authenticity of the evidence presented in support of the claimed parent-subsidiary relationship. Moreover, at the time of the transfer, May 23, 1997, the petitioning entity was operating under the name of "Yu Shin Dyeing Corporation." Based on the petitioner's amended articles of

incorporation, the petitioner's name was not changed to "Trigen International, Inc." until November 11, 1998. If authentic, the wire transfer receipt would reference "Yu Shin Dyeing 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Moreover, the petitioner did not furnish the foreign entity's bank statements confirming the claim that the monies transferred to the United States entity were, in fact, funds from the overseas company. Counsel claims in his brief on appeal that the funds transferred, although identified as originating with two employees of the foreign entity, were monies belonging to the foreign entity. Counsel, however, does not provide the foreign entity's bank statements confirming the withdrawals. As a result, the petitioner has not provided conclusive evidence that the foreign entity's funds were furnished as consideration for stock ownership. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Furthermore, the petitioner has not presented evidence in support of counsel's claim on appeal that the Korean foreign exchange laws allow a Korean-based company to directly transfer and invest funds in an overseas company. Nor has counsel explained why the petitioner stated in its July 18, 2003 letter that "Korean foreign exchange laws prohibited corporate fund transfer to another foreign company" if such transactions are indeed authorized under Korean law. In his brief on appeal, counsel states that the funding of overseas companies, while not encouraged by the Korean government, is permitted. Counsel challenges the director's finding that the foreign entity attempted to evade Korean foreign exchange laws through its use of a third party. However, counsel does not provide on appeal a copy of the referenced Korean law evidencing authorization by the Korean government for local businesses to invest foreign companies. In immigration proceedings, the law of a foreign country is a question of fact which 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). Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

Based on the foregoing discussion, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States companies. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed abroad or would be employed in the United States in a primarily managerial or executive capacity.

The regulation at 8 C.F.R. § 204.5(3)(B) notes that if a beneficiary is already employed in the United States, the petitioner is required to provide evidence that in the three years preceding the beneficiary's entrance into the United States as a nonimmigrant, the beneficiary was employed overseas for at least one year in a managerial or executive capacity. Here, the petitioner merely states in its October 15, 2002 letter that since May 1995 the beneficiary worked as the foreign entity's director of production management. Counsel provides an equally brief statement in his October 16, 2002 letter that "the beneficiary has been employed abroad by the parent for more than seven (7) years in [a] managerial position." Neither counsel nor the petitioner provided a description of the beneficiary's overseas' job duties evidencing that the beneficiary was previously employed as a manager or an executive. 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)). Consequently, the petition will be denied for this additional reason.

In addition, the petitioner has not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In its October 15, 2002 letter the petitioner provided a vague description of the beneficiary's proposed job duties, which was essentially a restatement of the definition of "managerial capacity." *See* Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). 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).

Following the director's request for additional evidence, the petitioner submitted a more detailed job description for the beneficiary, yet noted such non-managerial and non-executive tasks as researching market trends, planning the company's marketing strategy, coordinating customer communication, and visiting customers and vendors. 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). Here, the petitioner did not provide sufficient evidence that the beneficiary would spend his time performing in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.