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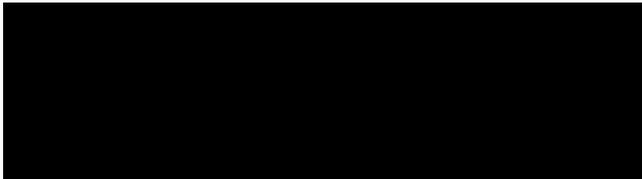
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
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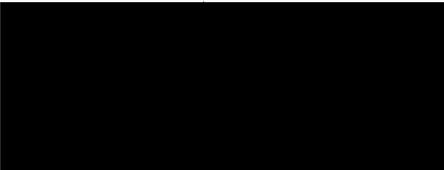
Office: NEBRASKA SERVICE CENTER

Date: JUL 11 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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, Nebraska Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation initially organized in the State of Oregon in May 1994. It exports commodity items to the Russian Far East. 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 director determined that the petitioner had not established: (1) a qualifying relationship between the petitioner and the foreign entity; or (2) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts: (1) that it is a 50-50 joint venture and that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer; and (2) that the director erred when determining that the beneficiary would not be employed in a primarily managerial or executive capacity for 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 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 to be considered in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. 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. See section 203(b)(1)(C) of the Act.

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 averred in support of its qualifying relationship with the beneficiary's foreign employer that it is the subsidiary of both Too [REDACTED] and [REDACTED] and that each of the two companies own an equal 50 percent of the petitioner's stock and have equal control of the petitioner. The petitioner initially submitted: (1) its undated stock certificate number 3 issued to Too [REDACTED] for 100 shares; (2) its undated stock certificate number 4 issued to Too [REDACTED] for 100 shares; and, (3) evidence that the beneficiary had been employed by Too [REDACTED] prior to his entry into the United States.

On September 11, 2003, the director requested evidence clarifying the petitioner's status and relationship with the beneficiary's foreign employer. The director specifically requested: (1) documentation pertaining to the petitioner's involuntary dissolution in July 1999 and application for reinstatement submitted in June 2003; (2) documentation to evidence a qualifying relationship that could include annual reports, statements from the organization's president or corporate secretary, financial statements, and ownership of all outstanding stock; (3) articles of incorporation showing the authorized number of shares and evidence of the number of outstanding shares; (4) an explanation for the undated stock certificates; (5) stock certificates number 1 and

number 2; and (6) the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Tax Return, for the 2002 year.

In a December 2, 2003 response, the petitioner provided: (1) its articles of incorporation showing the corporation had authority to issue 1,000 shares; (2) stock certificates number 3 and number 4 amended to include the date of issuance as March 1, 1999; (3) stock certificate number 1 issued to Igor Surits and stock certificate number 2 issued to [REDACTED] (4) a letter signed by the petitioner's secretary attesting that the petitioner had only 200 outstanding shares as evidenced by stock certificates 3 and 4; and (5) its 2002 IRS Form 1120 for the period covering June 1, 2002 through May 31, 2003 showing that Too [REDACTED] and Too [REDACTED] each owned a 50 percent interest in the petitioner.

Counsel also offered the following explanations: (1) that the petitioner did not receive a corporate renewal notice due to the petitioner's move to a new address in February 1999 resulting in its involuntary dissolution and that when the petitioner learned of its corporate status in June 2003, it took the necessary steps to resolve the involuntary dissolution and is in good standing with the Oregon Secretary of State; (2) stock certificates number 3 and number 4 were undated due to corporate oversight and have been amended to reflect the date of issuance, March 1, 1999; and, (3) that stock certificates number 1 and number 2 had been voided and cancelled when the interest of Igor Surits and Sergey Kiselow had been transferred to Too [REDACTED] and Too [REDACTED] respectively, on March 1, 1999.

On April 27, 2004, the director determined that the petitioner had not provided evidence that the beneficiary's foreign employer controlled the United States entity. The director, citing *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982), stated that control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. The director observed that evidence of control includes, but is not limited to, 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. The director concluded that without such evidence, Citizenship and Immigration Services (CIS) could not find that a qualifying relationship existed.

On appeal, counsel asserts that the director erred when determining that control of an entity can be categorized only as "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. Counsel argues that this definition excludes the joint venture concept that contemplates that an owner of a fifty percent interest in a 50-50 ownership relationship, absent any other agreement, has the ability to exercise negative control by its right to vote its fifty percent of shares. Counsel cites an unpublished decision in support of his argument. Counsel also provides the petitioner's by-laws, subscription agreements, and resolutions that relate to the voting of the petitioner's shares, management, and direction.

Counsel's assertions and documentation are not persuasive. The regulations and applicable precedent¹ decisions 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. 8 C.F.R. § 204.5(j)(2); *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter, the petitioner has provided documentation to establish that the beneficiary's foreign employer owns a 50 percent interest in the petitioner. The petitioner has provided evidence that its two owners each voted their corporate shares for the petitioner's directors and officers in March 1999. However, the petitioner has not supplied evidence that either stockholder has agreed to relinquish his control, such that if the two equal stockholders disagreed, the petitioner could continue operations. The petitioner has not provided evidence that it is a joint venture, but only that it has two stockholders, each holding a 50 percent interest.

Without evidence that one or the other of the stockholders exercises control of the petitioner, the petitioner has not established a qualifying relationship. In this matter, the question of actual control still remains. The record does not include any evidence of voting proxies or other agreements showing that one of the stockholders has relinquished control. The definition of a subsidiary includes a provision for a parent company that owns 50 percent of a 50-50 joint venture. There are no provisions in statute, regulation, or case law that allow for the recognition of veto power of negative control in other than a 50-50 joint venture.

For this reason, the petition will not be approved and the director's decision must be affirmed

The second 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;

¹ Counsel's citation to an unpublished decision is not probative in this matter. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

- 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.

The petitioner, on the Form I-140, Immigrant Petition for Alien Worker, filed March 27, 2003 stated that it employed seven people. In a March 19, 2003 letter appended to the petition, the petitioner stated:

As Vice President, [the beneficiary,] will be responsible for negotiating settlements between foreign and domestic shippers, negotiating with domestic customers as intermediaries for foreign customers to resolve problems and arrive at mutual arrangements, and negotiating with foreign shipping interests to contract for reciprocal freight-handling agreements. He will plan and direct the flow of air and surface traffic moving to overseas designations and supervise workers engaged in receiving and shipping the freight, documentation, waybilling, assessing charges, and collecting fees for shipments. [The beneficiary] will also be responsible for budgeting and financial planning. Due to the countries to which the products are shipped to, this position requires an individual who is bilingual in Russian and English.

The petitioner also provided its organizational chart showing its president associated with tasks relating to sales, purchasing, and personnel; the beneficiary in the position of vice-president/controller involved in

logistics, accounting, and finance; an individual involved in logistics and cargo booking, a receptionist who assisted with purchasing and sales, a website designer/administrator; two sub-contractors involved with quality control; and several individuals located in various cities in Russia involved in sales, logistics, inspection, custom clearance, and quality assurance.

On September 11, 2003, the director requested: (1) evidence establishing that the beneficiary satisfied all four criteria contained in the definition of manager or executive; (2) evidence that the petitioner employed seven individuals, by IRS Forms W-2, Wage and Tax Statement, issued to the employees or pay vouchers issued to each employee since the commencement of their employment; (3) a detailed job description for each of the seven employees; (4) examples of how the beneficiary exercised discretion in the petitioner's day-to-day operations; and, (5) evidence that the beneficiary would plan, organize, direct and control the petitioner's operations through other individuals.

In response, counsel for the petitioner asserted that the beneficiary satisfied the criteria set out in the definition of managerial capacity. Counsel claimed that the beneficiary managed the petitioner's logistical and financial components and supervised five employees. Counsel contended that the employees under the beneficiary's supervision were professional employees who performed essential functions. The petitioner provided payroll statements for the month beginning February 16, 2003 and ending March 15, 2003 and for the month beginning March 16, 2003 and ending April 15, 2003. The payroll statements indicated the individual employed in the position of international traffic/logistics manager, the logistics specialist (previously identified as the receptionist), and the website designer were employed part-time. The petitioner provided checks issued to the two individuals identified as sub-contractors in the total amount of \$125 for the month of January 2003, \$310 in the month of February 2003, \$264 in the month of April 2003, and \$210 in the month of October 2003. The petitioner's 2002 IRS Form 1120 for the period beginning June 1, 2002 and ending May 31, 2003 showed \$107,481 issued to the beneficiary and the individual in the position of president as officers of the corporation and \$11,471 issued as salaries and wages.

The director determined that the description of the job duties of the beneficiary's claimed subordinates did not show that the subordinate positions were professional positions and did not indicate that the subordinates supervised other individuals. The director also determined that the beneficiary's job description was indicative of an individual performing the petitioner's functions rather than managing them. The director concluded that the petitioner's organizational structure and the job descriptions of the petitioner's employees would not support a primarily managerial or executive position.

On appeal, counsel claims that the beneficiary's duties fulfill the criteria detailed in the definition of executive capacity. Counsel contends that the petitioner's contracts with major shipping lines set the tone for the petitioner's long-term goals and plans and requires that top-level management negotiate the contracts. Counsel also asserts that the beneficiary supervises five subordinates who are professionals as evidenced by their educational degrees. Counsel notes the increased complexity of the organization and asserts that the beneficiary qualifies as an executive or manager because he not only directs major components of the organization; he also supervises "numerous" employees of the organization. Counsel also observes that the small size of a company does not exclude it from petitioning for individuals to fill managerial or executive positions.

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). Counsel, in response to the director's request for evidence, claimed that the beneficiary fulfilled the criteria set out under section 101(a)(44)(A) of the Act. On appeal, counsel claims that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

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 provided evidence to demonstrate that the beneficiary performs high-level responsibilities, rather than performing the day-to-day operational tasks associated with exporting commodities to Russia. The petitioner's job description indicates that the beneficiary is primarily responsible for negotiating contracts for shipping and providing the customer services necessary to move the commodities from one location to another. 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's negotiation of contracts is a primarily executive duty, rather than the necessary task to enable the petitioner to operate its business.

The petitioner's description of the beneficiary's duties also indicates that the beneficiary is responsible for planning the flow of air and surface traffic associated with moving the petitioner's commodities overseas. Although the petitioner states that the beneficiary supervises workers engaged in receiving and shipping the freight, the record does not substantiate that the petitioner employs sufficient personnel to relieve the beneficiary from primarily performing these duties daily. 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)).

When the petition was filed in March 2003, the petitioner employed the individuals allegedly subordinate to the beneficiary part-time. The record reflects that for the first six months of 2003, the petitioner paid salaries of only \$11,471 to all individuals subordinate to the beneficiary. Moreover, the petitioner paid its two sub-contractors less than \$500 for the first quarter of 2003. In this matter, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not substantiated that the petitioner employs sufficient personnel so that the beneficiary does not spend the majority of his time on day-to-day functions.

Counsel's claim that the beneficiary's subordinates are professional employees is not specifically relevant to the matter at hand. First, as noted above, the record does not substantiate that the beneficiary's subordinates relieve the beneficiary from performing primarily operational tasks; and, second, when evaluating whether the beneficiary manages professional employees, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In this matter, the descriptions of the duties of the petitioner's part-time employees do not persuade that the positions require knowledge or learning beyond that of a skill in the logistics of moving cargo from place to place.

The petitioner also fails to quantify the time the beneficiary spends on his various duties. This failure of documentation is important because providing first-line supervisory duties to part-time non-professional employees and negotiating contracts do not fall directly under traditional managerial or executive duties as defined in the statute. For this additional reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of an executive or a manager. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel correctly observes that the small size of a company does not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. However, in the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. As observed above, 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. at 165. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties.

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.