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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 0 2 2005
SRC 03 064 50605

IN RE: Petitioner:
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:

[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, Texas 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 is a corporation located in the State of Florida that is doing business as a hair salon. It filed this immigrant petition seeking to employ the beneficiary as its 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 denied the petition concluding that the petitioner did not establish: (1) that a qualifying relationship exists between the foreign entity and the petitioning organization; or (2) that the beneficiary would be employed by the United States company in a primarily managerial or executive capacity.

On appeal, counsel claims that the petitioner is a subsidiary of the foreign entity, located in Colombia. Counsel also contends that the beneficiary's "primary assignment [in the United States] will be directing the management of the organization," and performing tasks associated with the export of American products to the Colombian company. Counsel submits a letter in support of the appeal.

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):
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> * * *
>
> (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 in this proceeding is whether a qualifying relationship exists between the foreign entity and the petitioning organization as required in 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:
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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;
>
> * * *
>
> *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 employment-based petition on December 30, 2002. In an attached letter, dated November 26, 2002, the petitioner explained that the foreign company, Comercial BETA, Ltd., was established in September 1983 in Colombia. Counsel stated that since that time, the beneficiary and [redacted] have each owned 50% of the shares issued by the organization. The petitioner also noted that 100% of the United States entity is owned by the beneficiary, and stated "[s]ince he is the owner of 50% of our parent company, effective control is therefore established by him, meeting the requirements of [Citizenship and Immigration Services (CIS)] regulations."

As evidence of the ownership interests in the foreign entity, the petitioner referenced a commercial registration of the foreign entity. This document, dated May 29, 2000, confirmed the petitioner's claim that the 90,000 shares of stock issued by "Comercial Beta Ltd." were divided evenly between the beneficiary and his partner. The petitioner also submitted a copy of a stock certificate, dated September 26, 2000, identifying the beneficiary as the owner of 1,000 shares of stock in the United States corporation.

The director issued a request for evidence dated September 16, 2003, asking that the petitioner submit documentary evidence of ownership and control of the foreign entity. The director noted that pertinent evidence may include stock certificates, copies of the corporation's bylaws clearly outlining stock ownership, certified affidavits from corporate officials, or copies of the company's annual report identifying any subsidiaries or affiliates of the foreign organization. The director also requested that the petitioner provide

documentary evidence, such as invoices, bills of sale and product brochures pertaining to the operations of the foreign business.

Former counsel for the beneficiary responded in a letter dated December 3, 2003, noting that the foreign entity was owned equally among three shareholders: the beneficiary, [redacted] and [redacted] Counsel stated that each owned 5,000 shares of the 15,000 shares of stock issued by the foreign entity. Counsel referenced the "latest update from the Chamber of Commerce [of Bogota] dated October 15, 2003," as evidence of "the [foreign entity's] ownership structure." The attached certificate from the Bogota Chamber of Commerce indicated that the company "Servicio Tecnico Beta Ltda. Beta Service" issued 15,000 shares, which were split equally among the above-named shareholders.

In a decision dated December 13, 2003, the director determined that the petitioner did not demonstrate that a qualifying relationship exists between the petitioning organization and the Colombian company. The director noted discrepancies between the two registration certificates submitted for the foreign entity, including different corporate names and tax identification numbers. The director stated "[i]t is unclear if these companies are one and the same," and concluded that the petitioner did not establish an affiliate relationship between the foreign and United States organizations. Consequently, the director denied the petition.

The petitioner's new counsel submitted an appeal on January 23, 2004, stating that the petitioning organization is the subsidiary of the foreign company, Comercial Beta Ltda. Counsel subsequently submitted a letter in support of the appeal, dated February 17, 2004, again claiming the existence of a parent-subsidiary relationship. Counsel referenced an attached document, dated January 24, 2004 and signed by the foreign entity's three shareholders, stating:

> On Octuber [sic] 12th 2002 Daniel Sanchez, [the beneficiary] [redacted] in a meeting decided and approved to distribute the shares of [redacted] INC. [i]n this way[:]
>
> 40% t[redacted]
> 40% t[redacted]
> 20% t[redacted]

Upon review, the petitioner has not demonstrated that a qualifying relationship exists between the foreign and United States entities.

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.*, 19 I&N at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (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.

In the instant matter, the record contains conflicting documentation and inconsistent claims regarding the relationship between the petitioning organization and the foreign entity, Comercial Beta Ltda. In its November 26, 2002 letter, the petitioner initially described the United States organization as an affiliate of the foreign entity, claiming that the beneficiary owned and controlled a majority of the shares issued by each organization. In response to the director's request for clarification of the foreign entity's ownership, counsel provided a description of the foreign entity's ownership interests different from that previously provided by the petitioner, and referenced a corporate certificate identifying a company other than that of the foreign entity. When given the opportunity to clarify the qualifying relationship on appeal, the petitioner's new counsel provided a third corporate relationship, claiming that the petitioning organization is the subsidiary of the foreign entity, Comercial Beta Ltda. Counsel also provided a different description of ownership interests in the petitioning organization, stating that the beneficiary now holds 40% of the organization rather than the 100% originally claimed by the petitioner. Counsel did not provide any stock certificates or other relevant documentation confirming this ownership distribution, nor did counsel address the obvious discrepancies in the ownership of the foreign entity.

Clearly, the record is deficient in establishing ownership and control of either organization. The petitioner failed to clearly identify the shareholders of the petitioning organization or to provide documentation establishing the claimed shareholders' interests. 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). The petitioner also failed to clarify the inconsistencies in the ownership of the foreign organization, Comercial Beta Ltda., even after the discrepancies were specifically addressed by the director in her decision. 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). The petitioner has provided no reliable basis for the AAO to conclude that a qualifying relationship exists between the petitioning organization and the foreign entity. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary would be employed by the United States entity 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-
>
> (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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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-
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> (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 noted on the immigrant petition that the beneficiary would be employed in the United States company as its president and would oversee the corporation's operations. In an attached letter, dated November 26, 2003, the petitioner described the beneficiary's position in the petitioning organization as president and general manager, and provided the following job description:

> In this position, [the beneficiary] plans and coordinates the policies, goals, and marketing strategies of the company. He also oversees [and] implements the marketing programs, both short and long range as developed by the Office Manager.
>
> He supervises the company's production and research activities, [and] develops pricing strategy for the company which results in the greatest share of the market utilizing the promotional materials as created.

The petitioner further stated:

> [The beneficiary], although in the U.S. now overseeing the subsidiary company, still oversees and directs the corporate goals, and technology goals [of the foreign entity]. [The beneficiary] has over 10 years of experience in this field. The company considers him an asset to their success, and now to the U.S. company as well. He has clearly presented himself as a competent person and one with determination to make the expansion reach the expectations of the parent company.

The petitioner noted that it employed three full-time workers and four independent contractors – a store manager/personnel officer, a customer service representative, and five hair stylists – and provided job descriptions for each.

The director subsequently issued a request for evidence, dated September 16, 2003, asking that the petitioner provide Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, and Forms 1099 for all employees and workers in the year 2002.

In his December 3, 2003 response, counsel provided Forms W-2 for its store manager, customer service representative, a hair stylist, and an employee not previously identified by the petitioner. The petitioner did not submit any requested Forms 1099 for its independent workers.

In her December 23, 2003 decision, the director determined that the petitioner did not demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director stated that the description of the beneficiary's job duties was "vague and general in scope" and "[did] not adequately detail the beneficiary's day to day duties." The director noted that in a company the size of the petitioning organization "it becomes questionable as to whether the beneficiary is acting primarily in a managerial or executive function." The director concluded that the beneficiary would perform many daily

functions associated with running the petitioner's business, and that the time devoted to these functions would exceed that spent working in a primarily managerial or executive capacity. The director further noted that the beneficiary's "primary assignment" would not be directing the management of the organization or directing or supervising a subordinate staff of supervisory, professional or managerial employees who would relieve him from performing the business' non-qualifying functions. Consequently, the director denied the petition.

On appeal, counsel states that the beneficiary is presently employed in the United States as the company's executive manager, "who is primarily in charge of the functions of the US Company and exports all the necessary products to the foreign parent company." Counsel further states that the beneficiary makes all managerial and executive decisions related to the operations of the petitioning organization, and also continues to "actively" work with the foreign company.

Upon review, the petitioner has failed to demonstrate that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. 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 record fails to specifically identify the position in which the beneficiary would be employed in the United States organization. In its November 26, 2002 letter, the petitioner initially identified the beneficiary's position as president and general manager, yet subsequently noted on appeal that the beneficiary would be employed as the petitioner's executive manager. Based on the inconsistent job titles given to the beneficiary, it is unclear whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *See* 8 C.F.R. § 204.5(j)(5). The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity, or both, if the petitioner is claiming to employ the beneficiary in both capacities. The discrepancies in the record prevents the AAO from determining whether the petitioner proposes to employ the beneficiary in a primarily managerial or executive capacity.

The job description offered by the petitioner also failed to support the beneficiary's claim that the beneficiary would be employed in a primarily qualifying capacity. As properly noted by the director, the description of the beneficiary's job duties is vague and does not clearly identify the daily managerial or executive tasks to be performed by the beneficiary. Specifically, the petitioner provided only brief statements that the beneficiary would plan and coordinate the company's policies and goals and supervise its production and research activities. Moreover, it is unclear from the record what specific managerial or executive tasks are involved in supervising the "production and research activities" of a hair salon. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. at 1108.

Furthermore, the record does not support a finding that the petitioner employs a staff adequate to relieve the beneficiary from performing the non-qualifying operations of the organization.

The regulation at § 204.5(j)(4)(ii) states:

> If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the reasonable needs of the organization, component, or function, in light of the overall purpose and stage of development of the organization, component, or function shall be taken into account. An individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In the instant matter, the petitioner has accounted for the employment of a store manager/personnel officer, a customer service representative and a hair stylist. The AAO notes that although the beneficiary is currently employed by the petitioner as an L-1A nonimmigrant intracompany transferee, the petitioner's quarterly tax return for the quarter ending June 2002 does not identify the beneficiary as an employee. Regardless, it does not appear that the reasonable needs of the organization might plausibly be met by the employment of the beneficiary, a store manager, customer service representative and hair stylist. For instance, based on the petitioner's representations in its November 26, 2002 letter, the beneficiary, himself, is responsible for planning the marketing strategies of the company and overseeing the implementation of these plans. While the petitioner stated that the store manager/personnel officer is also responsible for the "administrative" marketing function of the company, it does not seem realistic that the marketing operations of a company could be deemed "administrative" and performed entirely by the store manager considering the petitioner's claim that the beneficiary is also responsible for this function. 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. 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 193. Further, 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 at 604.

Moreover, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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.