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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 0 2 2005
WAC 03 172 50336

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, 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 Arizona that is operating as an employment agency. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not demonstrated that the United States entity is a subsidiary or affiliate of the foreign employer as required in the Act at section 203(b)(1)(C).

On appeal, counsel submits documentation, including the petitioner's stock transfer ledger and a letter from the foreign company's vice-president of operations in support of the claim that the United States entity is a subsidiary of the foreign company. Counsel also submits a brief 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):
>
> * * *
>
> (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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the United States entity is a subsidiary or affiliate of the foreign corporation.

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 employment-based petition on May 15, 2003. The petitioner did not specifically address its relationship with the foreign entity, however, Schedules E and K of the petitioner's 2001 and 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, identified "Armando Cabrera" as the owner of 82% of the common stock issued by the petitioning organization. A second individual, [redacted] was noted as the owner of 17% of the petitioner's common stock.[1]

The director issued a Notice of Action, dated December 22, 2003, requesting that the petitioner submit the following evidence establishing a qualifying relationship between the foreign and United States entities: (1) original bank wire transfers clearly reflecting monies transferred by the foreign entity to an account held by the petitioner organization as consideration for the stock received; (2) bank statements for the petitioning entity confirming the claimed funds transfers from the foreign company; (3) the petitioner's Notice of Transaction Pursuant to Corporations Code § 25102(f) identifying the total amounts offered in establishing the company; (4) the most recent copy of the petitioner's Form 10-K, Annual Report, reflecting the petitioner's subsidiaries and its percentage of ownership; (5) the minutes from the petitioner's stockholders meetings, which identify the number of shareholders in the organization and the percentage of shares owned; (6) copies of all stock certificates issued by the petitioning organization clearly identifying the name of each shareholder; (7) the petitioner's stock transfer ledger reflecting all stock certificates issued to the present date including those shares sold, the names of shareholders and the purchase prices; (8) the petitioner's articles of incorporation; and (9) any documentation related to the petitioner's registration as a sole proprietorship or in association with a franchise agreement between the petitioner and the franchisor.

Counsel responded in a letter dated March 11, 2004, providing the petitioner's articles of incorporation, dated February 2, 2000, wherein the company is authorized to issue 100,000 shares of common stock. Counsel also submitted the petitioner's qualification to do business in the State of Maryland. In addition, counsel provided copies of six stock certificates. Two stock certificates were issued by the petitioning organization to [redacted] and [redacted] for 10,000 and 20,000 shares, respectively. The issued stock certificates were numbered one and three; stock certificate number two was not provided. The additional four stock certificates provided by counsel in response to the director's request for evidence were issued by a company

[1] The petitioner did not account for the remaining 1% of stock ownership.

with the same name as the petitioning organization, but organized under the laws of the State of California.[2] The four stock certificates, issued in September 1997 and March 2000, and numbered four through six, reflected the following ownership interests: [redacted] 10,000 shares, [redacted] (the beneficiary), 9,000 shares [redacted] 5,000 shares, and [redacted] 5,000 shares. The AAO notes that two of the stock certificates were identified as number five.

As additional evidence, counsel provided a copy of the July 9, 1999 letter submitted with the petitioner's prior request to extend the beneficiary's nonimmigrant petition. In the letter, the president of the petitioning organization explained:

> The Arizona corporation hasa [sic] issued a total of 100,000 shares, 51,000 of which (51%) are owned by Arms Productions Training and Development Center, Inc., the Filipino company, while the remaining 49% is divided between the founders of the of the [sic] California corporation, [redacted] who holds 48% of the stocks, and, [the beneficiary] holds 10% of the stocks.

Counsel again submitted copies of the petitioner's 2001 and 2002 federal tax returns and a bank statement for a corporate account for the month of January 2004. The additional bank statements submitted by counsel pertained to account transactions in 2002 and 2003 for an account titled in the beneficiary's name. Counsel also submitted copies of the beneficiary's years 2002 and 2003 personal income tax returns.

In a decision dated March 30, 2004, the director determined that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. The director noted the stock certificates submitted by the petitioner and stated that the petitioner has not shown that the foreign entity owns the petitioning organization. The director also noted that no additional stock certificates or the requested stock ledger was provided. The director further addressed the inconsistency reflected in the petitioner's corporate tax return, which identifies [redacted] as the owner of 82% of the petitioner's stock. The director stated "[t]he petitioner does not provide unerring and concise evidence to substantiate the claim of qualifying foreign company ownership [of] the U.S. entity," and concluded that a parent-subsidiary relationship did not exist. Consequently, the director denied the petition.

In an appeal filed on April 28, 2004, counsel claims the existence of a parent-subsidiary relationship between the foreign and United States entities. Counsel states:

> The majority of the stock of [the petitioning organization] is owned and controlled by [the foreign entity] (Parent company). Specifically, 51% of the total shares of [the petitioning organization]. Based on the records, including the stock ledger, both companies, [the petitioning organization] and [the foreign entity] are majority controlled by [redacted] he President and CEO of [the petitioning organization] [redacted] as the founder and CEO of the parent company . . . currently hold[s] 65% of the stock corporation with the remaining 35% of the stock divided among several investors.

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[2] The vice-president of the foreign entity's operations explains in a letter submitted on appeal that the petitioning organization was originally established under the laws of the State of California on October 19, 1993, and subsequently "re-organized and incorporated on [September] 22, 1994 under the laws of the State of Arizona."

> The stock transfer ledger and the distributed shares of [the petitioning organization] as reorganized in Phoenix, AZ and currently doing business in Lanham, MD, shows that [the foreign entity] owns 51% of the shares of [the petitioning organization]. Hence, ownership and control which are the determining factors for establishing a qualifying relationship between [the petitioning organization] (Subsidiary) herein petitioner and [the foreign entity] (Parent) control exists. . . The Stock Transfer Ledger of [the petitioning organization] which reorganized and incorporated on September 22, 1994 under the laws of the state of Arizona as a subsidiary company of [the foreign entity] shows that since September 22, 1994 up to present, the parent company, Arms Production, Training and Development Co. was originally issued 51,000 shares (51%) and this ownership remains the same up to the present.

Counsel submits a letter from the foreign entity's vice-president of operations, dated April 16, 2004, wherein he stated that "[b]oth companies are majority controlled by Armando Cabrera." The company's vice-president provided the following outline of the stock ownership in the petitioning organization, and noted that of the company's 1,000,000 authorized shares, it has issued 110,000 or 110%:

Arms Production, Training and Development Co. [the foreign entity]	51% = 51,000 shares
[redacted]	20% = 20,000 shares
	10% = 10,000 shares
	5% = 5,000 shares
	5% = 5,000 shares
	5% = 5,000 shares
	9% = 9,000 shares

Counsel also submits copies of four stock transfer ledger pages, three of which are identified as pertaining to the petitioning organization, and one that identifies the stock transfers of the California company. According to the petitioner's stock transfer ledger, the petitioner has issued 110,000 shares in the same manner as outlined above.

Upon review, the petitioner has not demonstrated that it is a subsidiary or affiliate of the foreign entity as required in the Act at § 203(b)(1)(C).

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.

Here, the petitioner failed to provide clear and consistent evidence substantiating its claim that the petitioning organization is a subsidiary of the foreign entity. As noted previously, four of the six stock certificates provided by the petitioner identify issuances of stock in a California corporation, not the petitioning entity, which is organized under the laws of Arizona. The two stock certificates that identify the petitioner as the issuing corporation account for only 30,000 of the claimed 110,000 shares of issued stock and are numbered one and three. Stock certificate number two was not provided for the record. Additionally, neither of the two stock certificates identifies the foreign entity as a shareholder, but rather reflect two individual owners. 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's stock transfer ledger also fails to clarify the petitioner's shareholders and the actual number of shares issued. The AAO notes that although specifically requested by the director, the petitioner did not submit copies of its stock transfer ledger until its appeal. The regulation states that when adjudicating an employment-based petition, the director may request appropriate additional evidence. 8 C.F.R. § 204.5(j)(3)(ii). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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 need 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).

Even if the AAO were to consider on appeal the petitioner's stock transfer ledgers, the petitioner has not provided stock certificates confirming the stockholders identified in the ledgers. The petitioner's stock ledger reflects an original issuance of 51,000 shares of stock to the foreign entity on September 22, 1994. The petitioner bases its claim of a parent-subsidiary relationship on this transaction. However, as previously noted, the petitioner has not provided a stock certificate corroborating the foreign entity's claimed ownership. 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). Moreover, the date of the recorded stock issuance is questionable. The petitioner's stock ledger identifies the date of issuance as September 1994, whereas the petitioner's articles of incorporation indicate

that the company was not established in Arizona until February 2000. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, as properly noted by the director, Schedules E and K and appended Statement 5 of the petitioner's 2001 and 2002 federal tax returns identify the majority shareholder in the petitioning organization as [redacted] not the foreign entity as claimed by the petitioner. While addressed by the director in his decision, counsel neglected to clarify this inconsistency on appeal. Instead, counsel repeatedly relies on the petitioner's uncorroborated stock transfer ledger as evidence of the claim that the foreign entity owns and controls 51% of the petitioning organization. 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 at 591-92.

The record contains additional inconsistencies on appeal, which do not directly influence the existence of a qualifying relationship yet shed doubt on the claimed parent-subsidiary relationship. These inconsistencies include the percentage of stock claimed to be issued by the petitioner and the amount of stock authorized. The foreign entity's vice-president noted on appeal that the ownership interests in the petitioning organization amounted to 110%. Based on these representations, it is unclear how a company can issue stock to shareholders for a cumulative ownership interest of 110% in the company. The petitioner's exact number of authorized shares is also questionable. The vice-president states on appeal that the company "issued" 1,000,000 shares of common stock and "subscribed" 110,000 shares, while the petitioner's articles of incorporation authorize the petitioner to issue 100,000 shares. Despite the petitioner's terminology in describing its authorized shares as "issued," the record does not contain amended articles of incorporation authorizing an increase in the amount of stock issued. Based on the information contained in the petitioner's stock transfer ledgers, the petitioner issued 10,000 shares of stock that were not authorized by the organization's articles of incorporation. 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 at 591.

There is also insufficient evidence in the record to demonstrate an affiliate relationship between the foreign and United States entities. It is unclear whether on appeal counsel is claiming an affiliate relationship through his statement that "both companies . . . are majority controlled by [redacted] the President and CEO of [the petitioning organization]." Regardless, the record is devoid of documentary evidence establishing the claimed shareholder interests in the foreign entity. While counsel states that [redacted] owns 65% of the foreign entity's stock, counsel did not submit a stock certificate, stock transfer ledger, or corporate documents confirming [redacted] ownership of 65% of the foreign entity. Absent additional evidence related to the shareholder interests in both entities, the AAO cannot conclude that an affiliate relationship exists between the foreign and United States entities. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the foregoing discussion, the petitioner has not demonstrated that the petitioning entity is a subsidiary or an affiliate of the foreign entity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary had been employed abroad and is employed in the United States in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. §§ 204.5(j)(3)(i)(C) and (j)(5). The petitioner does not identify the position in which the beneficiary was employed by the foreign entity or the job duties performed by the beneficiary overseas. Absent this relevant information, the AAO cannot conclude that the beneficiary was employed by the foreign corporation in a primarily managerial or executive capacity.

Additionally, the petitioner's broad restatement of the definitions "managerial capacity" and "executive capacity" is insufficient to establish the beneficiary's employment as a manager or an executive in the United States entity. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner's claims that the beneficiary would establish company policies, oversee and manage business operations, develop sales and marketing plans, manage the company's finances, and hire and fire staff do not address the specific job duties performed by the beneficiary in his capacity as general manager of the United States company. Although specifically requested by the director, the petitioner neglected to provide a detailed description of the beneficiary's "typical" daily job duties. The 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). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

As the record does not contain sufficient documentary evidence, the AAO cannot conclude that the beneficiary was employed abroad and is employed in the United States in a primarily managerial or executive capacity. 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). For these additional reasons, 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.