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U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 09 2005
WAC 04 064 51279

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, California 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 claims it is a corporation organized in the State of California in 2002. It sells lamps and lighting fixtures. 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 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 that the evidence establishes that the beneficiary qualifies as an executive, that the director failed to consider that the beneficiary is the petitioner's chief financial officer, and that the director improperly focused on the beneficiary's managerial qualifications when the petitioner claimed only that the beneficiary qualified as an executive.

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

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive

capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will be employed in a primarily executive capacity for the United States entity. The petitioner does not claim that the beneficiary's duties will encompass managerial duties.

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 initially submitted Form ETA 750, Application For Alien Employment Certification. The Form ETA 750 described the beneficiary's proposed duties as:

Responsible for overall directions of corporate management, including administrative functions, warehousing, distribution, marketing and sales, and working with the corporation's Board of Directors and President to establish corporate goals and policies.

On February 23, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a more detailed description of the beneficiary's duties including a detailed "typical day" job description; an organizational chart describing the petitioner's managerial hierarchy and staffing levels and listing all employees under the beneficiary's supervision by name and job title, and a brief description of their job duties; and the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for all four quarters of 2003.

In an undated response, the petitioner provided a list of the beneficiary's job duties:

1. Set company financial planning, audit and control company finance (30%)
2. Set up company operation process and working system (10%)

3. Monitor and supervise the overall corporate management, including administrative function, warehouse operation, distribution, customer service and marketing for direct import account (40%)
4. Communication [between] U.S. company and manufacturer in China especially on new product development production follow up (10%)
5. Develop product purchasing plan for [the petitioner] (5%)
6. Being supervisor of personnel division, evaluate the performance of all employees. (5%)
7. Reporting the operation of U.S. company to the chairman of headquarter [sic] overseas (5%)

The petitioner also provided its organizational chart showing the beneficiary's position as chief financial officer on the same tier as the president/chief executive officer's position. The petitioner identified the "management" department and the "R&D" department subordinate to the beneficiary's position. The sales/marketing department and the warehouse manager were listed under the president's position. The petitioner listed one employee, a designer, in the "R&D" department and an office manager, accounting controller, accounting clerk, receptionist, and cleaning lady in the "management" department. The office manager, who also performed the duties of a merchandising employee, also reported to the president. In addition to the merchandising employee, seven more employees reported to the president's position.

The petitioner provided brief job descriptions for most of its employees. The job descriptions for positions subordinate to the beneficiary's position included: (1) the designer, who designed prototype lamps; (2) the office manager who maintained office daily operation, inventory and shipping affairs control; (3) the accounting controller who handled monthly financial statements, payroll and reconciling bank accounts; (4) the accounting clerk, who handled payment and collection for the company and checked credit of new buyers; and, (5) the part-time cleaning lady who maintained the office's appearance. The petitioner did not include a job description for its receptionist. The petitioner's California Form DE-6 for the fourth quarter of 2003 confirmed the full-time or part-time employment of the individuals listed on the petitioner's organizational chart.

On December 22, 2004, the director denied the petition determining that the beneficiary's job description did not establish that the beneficiary's position would be primarily executive. The director observed that it was reasonable to believe that with the petitioner's organizational structure the beneficiary would be assisting with the day-to-day non-supervisory duties and that the performance of menial tasks precluded the beneficiary from being considered an executive. The director found that the petitioner had not established the nature of its business would require two manager/executives.

The director also determined that the beneficiary's position would be, at most, a first-line manager position over subordinate non-managerial and non-professional employees. The director also noted that the beneficiary could not be deemed a "functional" manager because it appeared the beneficiary was involved in performing routine operational activities rather than managing a function of the business.

On appeal, counsel asserts that the beneficiary's job duties are primarily executive. Counsel asserts that the director did not consider the beneficiary's duties as chief financial officer, but limited his review to the

beneficiary's position as vice-president. Counsel contends that the beneficiary: (1) is the officer solely in charge of the financial functions of the petitioner and monitors and supervises each of the other functions of the company and that these two duties are the beneficiary's primary duties; (2) is primarily responsible for setting the petitioner's financial policies and goals and that the organizational chart makes it clear that the beneficiary has primary authority over the non-sales activities of the business; (3) will exercise maximum discretion in decision-making with respect to the financial function of the business; and (4) given his position in the company, maintains autonomy and authority over the non-sales activities. Counsel contends that the director's analysis regarding the beneficiary's capacity as a manager is not relevant as the beneficiary primarily performs executive duties. Counsel asserts that the director's analysis of the managerial capacity has resulted in an adverse and negative impact on the director's analysis of the beneficiary's executive capacity. Counsel claims that the petitioner's organizational chart shows that the beneficiary is not performing day-to-day menial tasks as the petitioner has identified other lower-level managers on the organizational chart.

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 for the petitioner asserts that the beneficiary qualifies as an executive under section 101(a)(44)(B) of the Act. 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).

The petitioner's initial description was vague and non-specific and did not convey an understanding of the beneficiary's general job duties. It is not sufficient to state that the beneficiary is "responsible for overall directions of corporate management, including administrative functions, warehousing, distribution, marketing and sales, and working with the corporation's Board of Directors and President to establish corporate goals and policies," without detailing what the beneficiary does on a daily basis. The actual duties themselves will reveal the true nature of the employment. 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.).

The petitioner's second iteration of the beneficiary's duties again, lists broadly-cast business objectives, such as, "[s]et[ting] company financial planning, audit and control[ling] company finance and "[m]onitor[ing] and supervise[ing] the overall corporate management, including administrative function, warehouse operation, distribution, customer service and marketing for direct import account." The petitioner indicates that the beneficiary spends respectively 30 percent and 40 percent of his time on these two generally stated responsibilities. Moreover, the petitioner's indication that the beneficiary spends 40 percent of his time monitoring warehouse operation, distribution, customer service and marketing overlaps with the president's duties as depicted on the petitioner's organizational chart. It is the generality of the description and the overlapping duties that casts doubt on the legitimacy of the petitioner's corporate structure. 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).

The record does not sufficiently detail the beneficiary's executive functions that the beneficiary allegedly provides in his position as chief financial officer or vice-president. The petitioner does not provide sufficient information demonstrating that the beneficiary will perform executive functions rather than spending a majority of his time on the day-to-day functions of supervising lower-level employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner's failure to provide more information is especially revealing in light of the director's specific request for a description of the beneficiary's typical daily duties. 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).

Counsel's insinuation that the beneficiary directs the organization's functions rather than directing the management or a major component of the organization, is also not persuasive. Merely identifying a function, such as financial operations, is not sufficient. The petitioner must demonstrate that the beneficiary *directs* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). The AAO acknowledges the petitioner's claim that the beneficiary spends the majority of his time overseeing corporate management and financing and that the petitioner has identified other lower-level employees in the organization. However, the petitioner's failure to detail the beneficiary's daily activities and the lack of a distinct demarcation between the beneficiary's duties and those of the president undermine the petitioner's implication that the beneficiary is relieved of performing primarily non-qualifying duties.

Counsel's assertion that the director's analysis of the beneficiary's managerial capacity adversely impacted the director's conclusion regarding the beneficiary's executive capacity is also not persuasive. Neither the petitioner nor counsel adequately restricted the beneficiary's duties to those solely of an executive. The director simply provided a complete analysis of the beneficiary's duties including the failure of the petitioner to adequately demonstrate that the beneficiary's duties were qualifying. The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Beyond the decision of the director, the petitioner has not 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 petitioner has provided three stock certificates and its stock ledger showing that: (1) on March 6, 2001, the petitioner issued 1,000,000 shares to [REDACTED] Taiwan; (2) on March 6, 2001, the petitioner issued 250,000 shares to [REDACTED] and (3) on May 6, 2004, the petitioner issued 738,000 shares to [REDACTED] Taiwan. The petitioner has provided a California Notice of Transaction,

indicating that the petitioner has offered securities valued at \$1,250,000 on May 2, 2002 and a second California Notice of Transaction indicating that the petitioner has offered securities valued at \$1,550,000 on May 6, 2004. The petitioner has also provided its 2002 and 2003 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return. The petitioner's IRS Form 2002 shows on Schedule L, Line 22(b) that the petitioner began the year with common stock valued at \$1,250,000 and ended the year with common stock valued at \$2,800,000. The petitioner's IRS Form 2003 on Schedule L, Line 22(b) shows that the petitioner began the year with common stock valued at \$1,988,000 and ended the year with stock valued at \$1,988,000.

The petitioner also provides a May 17, 2002 statement from a banking account representative that suggests that the petitioner initially began business under the name "Georgetown Collection's" but had changed names in April 2002. The record also contains a number of wire transfer notifications showing as the originator as follows:

1. In July 2001 to George-Town Collection in the amount of \$200,000
2. In June 2002 to the petitioner in the amount of \$200,000
3. In July 2002 to the petitioner in the amount of \$100,000
4. In September 2002 to the petitioner in the amount of \$100,000
5. On October 3, 2002 to the petitioner in the amount of \$100,000
6. On October 28, 2002 to the petitioner in the amount of \$100,000
7. In November 2002 to the petitioner in the amount of \$100,000

The record also contains a number of wire transfer notifications showing New Asia International Ltd as the originator as follows:

1. In September 2001 to Georgetown Collection in the amount of \$200,000
2. In December 2001 to Georgetown Collection in the amount of \$200,000
3. In February 2002 to Georgetown Collection in the amount of \$200,000
4. In March 2002 to Georgetown in the amount of \$200,000
5. In May 2002 to Georgetown in the amount of \$150,000

The record also contains a number of wire transfer notifications showing Watfeld Management Ltd as the originator as follows:

1. In May 2001 to Georgetown Collection in the amount of \$150,000
2. In August 2001 to Georgetown Collection in the amount of \$200,000
3. In November 2001 to Georgetown Collection in the amount of \$200,000
4. In April 2002 to Georgetown Collection in the amount of \$200,000

The record does not contain the petitioner's Articles of Incorporation filed with the California Secretary of State. The record does not contain amended Articles of Incorporation changing the petitioner's name. The current record does not contain sufficient consistent evidence to substantiate that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. The record does not adequately

demonstrate that the beneficiary's foreign employer provided the funds to purchase the shares allegedly issued by stock certificates numbers 1 and 3. The information in the record is incomplete and inconsistent. 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. at 591-92. The myriad numbers of wire transfers from different companies suggest that these companies are funding or are paying for the petitioner's goods or services. Based on the record, it is not possible to conclude that the beneficiary's foreign employer provided sufficient funds to own and control a majority interest in the petitioner. Likewise, the record does not substantiate that the beneficiary's foreign employer and one individual own all of the petitioner's outstanding shares.

The petitioner should note that 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. 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 Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition will not be approved.

Also beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity were primarily managerial or executive. The petitioner has indicated that the beneficiary spent 50 percent of his time managing the daily operations of the foreign entity's sales department and directing sales specialists to achieve sales goals. These are the duties of a supervisor. The petitioner has not provided sufficient detail to demonstrate that the beneficiary's foreign position required the services of a manager or executive as defined by CIS regulations. The AAO observes that the beneficiary's duties for the foreign entity also indicated that 20 percent of the beneficiary's time was spent on market research and strategy. These duties, again, are not duties that are traditionally managerial or executive. As the record lacks sufficient evidence establishing the beneficiary's managerial or executive capacity for the foreign entity, for this additional reason the petition will not be approved.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.