

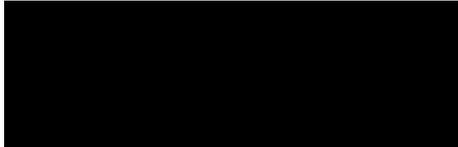
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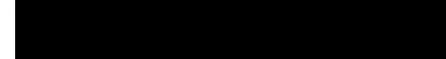
**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 03 161 53231 Office: CALIFORNIA SERVICE CENTER Date: AUG 26 2005

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation engaged in the orchid farm business. It seeks to employ the beneficiary as its chief executive officer (CEO). 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 failed to establish two essential factors: 1) that beneficiary would be employed in a managerial or executive capacity; or that 2) that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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

The first issue in this proceeding is whether the beneficiary would be employed in a 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) 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.

In Part 6 of the petition, the petitioner provided the following non-technical description of the beneficiary's proposed position: "Determines business policies, invests from [sic] Korea, provides the overall direction of the company, plans and directs operational activities at the highest level of management with the help of [sic.]" The petitioner provided no additional information regarding the beneficiary's prospective job duties.

On June 12, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to provide its organizational chart describing the company's managerial hierarchy and staffing levels as of the date the petition was filed. The petitioner was asked to clearly identify the beneficiary's position in the chart, his subordinates' names and job titles, as well as their job duties and educational levels. The petitioner was also instructed to provide a detailed description of the beneficiary's typical day on the job. Additionally, the petitioner was asked to submit its quarterly wage reports for the second, third, and four quarters of 2003 and the first quarter of 2004.

In response, the petitioner provided the requested organizational chart, which named five employees, including the beneficiary, and indicated that the petitioner also hires 20-30 seasonal field workers. The chart indicates that the beneficiary's immediate subordinates included a chemical analyst/agricultural engineer, a vice president/secretary, and a corporate administrator, who supervises a sales and marketing employee. The chart further states that plans are in place to hire two additional sales people.

The petitioner also submitted the requested wage report for the second quarter of 2003, which names the five employees shown in the organizational chart. It is noted that the salary of the petitioner's sales and marketing employee suggests that she was not employed on a full-time basis. The wage report also names six additional employees none of whom are named in the organizational chart. Although it is likely that the six individuals were employed as the petitioner's seasonal part-time workers, this fact is not confirmed by any of the evidence on record.

In regard to the beneficiary's job description, the petitioner provided the following statement:

In a typical day, [the beneficiary] starts his work early in the morning[,] around 6:00 AM. He routinely walks around the farm and greenhouses to physically check the status of equipments and quality of flowers. [At] [a]round 7:00 AM he checks emails and faxes, and briefly reviews documents prepared by his subordinate executives, including [v]ice [p]resident Hyun Sook Han and Cheston Sumpter, and [e]xecutive [d]irector Sung Joong Kim. He then has a meeting with them at 8:00 AM, discussing the current status of ongoing projects, business performance, and any issues related to operations. In the meeting[,] he ensures that operations are promptly being carried out as planned.

For the rest of [the] day, [the beneficiary] reviews documents prepared by his subordinate executives, and makes final decisions. He frequently calls and discusses with [sic] subordinate executives regarding operations. In addition, [the beneficiary] deals with local media, government agencies and business partners for carrying out the company'[s] educational and cultural projects In the permitting process of these projects, [the beneficiary] plans and reviews proposals to the city, county, and state government agencies, and frequently holds meetings with local media, government agents, business partners, and the company's board of directors. In [sic] overall[,] his typical day of work is to ensure that the company's operations are being carried out [in] accordance with the corporate policies and to provide strategies that can ensure that the company's objectives are met. . . .

On December 9, 2004, the director denied the petition noting that the four full-time employees that comprised the petitioner's organizational hierarchy at the time the petition was filed would not relieve the beneficiary from performing nonqualifying duties. The director also stated that the description of the beneficiary's duties lacked sufficient detail to enable a determination regarding the beneficiary's employment capacity.

On appeal, counsel asserts that the beneficiary would be employed at the top level of the petitioner's hierarchy overseeing the implementation of the company's goals and objectives. Counsel discusses the beneficiary's many attributes as an experienced orchid farmer and entrepreneur with plans for further expanding the petitioner's business. However, in examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, the only details the petitioner provided were in regard to the first

two to three hours of the beneficiary's day. According to the petitioner's job description, the remainder of the beneficiary's day would be spent reviewing documents, making executive decisions, and planning and reviewing proposals to obtain permits for the petitioner's various projects. While these statements provide a broad overview of the beneficiary's daily responsibilities, they do not adequately illustrate the actual duties that comprise the beneficiary's typical day of work. The petitioner did not specify the types of documents the beneficiary reviews, who prepares the documents, how often the beneficiary meets with government personnel, and the length and subject matter of such meetings. As previously pointed out by the director, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Counsel also disputes the director's finding that checking e-mails and faxes and reviewing documents are duties that do not fall within the definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). While counsel is correct in disputing the director's comment, the fact remains that the petitioner has not offered CIS sufficient detail regarding the beneficiary's job duties. Although the director specified that the beneficiary's job description should provide CIS with an adequate understanding of the activities that comprise the beneficiary's day, the petitioner provided no specifics in regard to a majority of the beneficiary's workday.

Counsel furthers his argument by naming the employees who he claims actually perform the petitioner's daily operational tasks implying that the petitioner is adequately staffed to relieve the beneficiary from having to perform the nonqualifying tasks. However, based on the petitioner's wage report for the second quarter of 2003, only one of the eight employees named and discussed by counsel was actually employed by the petitioner at the time the petition was filed. As previously stated in the director's decision, at the time the petition was filed, the petitioner had a total of four full-time employees including the beneficiary. It is unclear which of the four employees drafted business documents and ordered technical supplies, which of the employees answered phones and ordered office supplies, and who was actually in charge of sales in light of the fact that the petitioner's only sales and marketing employee appears to have been employed on a part-time basis at the time the petition was filed. While it is possible that the petitioner has experienced growth in its organizational structure, 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). Thus, any additions to the petitioner's staff and events that may have taken place after the filing of the petition are irrelevant for the purpose of determining the beneficiary's eligibility at the time of the filing of the petition.

On review, the record as presently constituted is not persuasive in demonstrating that the petitioner would have employed the beneficiary in a primarily managerial or executive capacity at the time the petition was filed. As previously stated, the record lacks sufficient details regarding the beneficiary's day-to-day duties and fails to support the finding that the petitioner's organizational structure at the time the petition was filed was sufficiently complex to support a primarily executive position. Based on the evidence furnished, it cannot be found that the petitioner was ready and able to employ the beneficiary in a primarily qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

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.

In the statement appended to the petition, the petitioner stated that the U.S. and foreign entities are affiliates by virtue of having a common single owner owning and controlling both entities. The petitioner also provided the following documentation regarding the ownership of each entity:

1. A list of shareholders, which indicates that the beneficiary and his wife each own 50% of the petitioner's outstanding stock.
2. Stock transfer ledger, which indicates that the beneficiary's foreign employer initially owned a total of 600,000 shares of the petitioner's stock and that such shares were transferred to the beneficiary and his wife in August of 2002 giving each individual 300,000 shares. The ledger indicates that the initial 600,000 shares were issued on stock certificate nos. 4 and 5 and that stock certificate nos. 6 and 7 were subsequently used to reissue the 600,000 shares to the beneficiary and his wife.
3. Stock certificate no. 6 showing that 300,000 shares were issued to the beneficiary, and stock certificate no. 7 showing that the same amount was issued to the beneficiary's wife. It is noted that both stock certificates indicated that only 300,000 shares are authorized to be issued.
4. Statement breaking down the ownership of the foreign entity. The breakdown indicates that the beneficiary owns 30,250 out of 55,000 shares giving the beneficiary 55% of the foreign entity's shares.

In the response to the RFE, the petitioner submitted a revised stock transfer ledger claiming that the stock transfer ledger submitted initially was erroneously prepared by one of the petitioner's employees. The revised ledger shows that stock certificate nos. 4 and 5, which were initially issued to the foreign entity, were

surrendered and that stock certificate nos. 6 and 7 were subsequently issued to the beneficiary and his wife. There is no indication that any consideration was paid in exchange for the transferred stock. The petitioner further states that the beneficiary's 55% ownership of the foreign entity and 50% ownership of the U.S. entity suggest common ownership and control sufficient to establish that a qualifying relationship exists between the two entities.

The director disagreed with the petitioner's assertion and concluded that even though some degree of common ownership exists between the two entities, the record does not establish that the companies are commonly controlled.

Although the director properly concluded that the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, the director's analysis in reaching this conclusion is flawed.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, if properly supported, the claim that the beneficiary owns 50% of the U.S. entity and 55% of the foreign entity does suggest that a qualifying relationship exists. However, 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)).

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In the instant matter, the director specifically requested documentation establishing who paid for the petitioner's outstanding stock. The petitioner has maintained the claim that the initial ownership belonged to the foreign entity, which subsequently surrendered that ownership to the beneficiary and his wife. While this information is provided within the petitioner's internally generated stock transfer ledger, there is no contemporaneous evidence either of the initial purchase transaction between the U.S. and foreign entities or of the subsequent transaction between the foreign entity and the beneficiary and his wife. Furthermore, the stock transfer ledger does not indicate that the beneficiary and his wife made any financial contribution in exchange for obtaining the petitioner's stock.

On appeal, counsel discusses the beneficiary's legal right of possession and the control that comes with that legal right. However, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the petitioner has failed to establish that the U.S. and foreign entity are similarly owned and controlled.

Beyond the decision of the director, 8 C.F.R. § 204.5(j)(3)(B) requires that the petitioner establish that the beneficiary was employed abroad for at least one year in the three years prior to his nonimmigrant entry into the United States in a qualifying managerial or executive capacity. In the instant matter, the petitioner has failed to provide any specific information regarding the beneficiary's duties abroad. The actual duties themselves reveal the true nature of the employment. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. As such, the AAO cannot determine whether the beneficiary was employed abroad in a qualifying 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). Therefore, based on the third factor of ineligibility as discussed above, this petition cannot be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.