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FILE: EAC 03 217 52578 Office: VERMONT SERVICE CENTER Date: JUN 13 2005

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a corporation organized in the State of New York in January 1999. It is engaged in real estate and construction. It seeks to employ the beneficiary as its president and chief executive officer. 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 managerial or executive capacity for the United States entity. The director also referenced a perceived inconsistency in the petitioner's ownership.

On appeal, counsel for the petitioner asserts that the director's decision was erroneous on several facts and was arbitrary, capricious, and contrary to the evidence submitted.

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 petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- 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 a June 3, 2003 letter appended to the petition, the petitioner stated that the beneficiary's position would be executive and his primary responsibility would be to oversee all investments. The petitioner indicated: "[the beneficiary] will continue to have broad discretionary power to establish policy and delegate authority and duties as necessary in the course of business. He will continue to direct, manage, supervise, procure and market all aspects of the company." The petitioner added that:

[The beneficiary] is responsible for deciding when to acquire real estate and directs his manager to handle negotiations with the owners of the properties. [The beneficiary] exercises wide latitude in discretionary decision-making by evaluating the financial viability of potential new properties as well as negotiating financing of funding for new projects. He is responsible for the overall management direction and general operations of the company through his subordinate managerial personnel. His corporate management duties include continued collaboration with the corporate accountant, analysis of financial statements, long-term planning, cash flow control and projections, monthly and quarterly reports, and year-end financials.

As President and CEO, [the beneficiary] will continue to be the key manager/executive of our U.S. community development company. He will continue to have broad discretionary power to establish policy and delegate authority and duties as necessary in the course of business. The responsibilities continue to be executive in nature. He will continue to direct, manage, supervise, procure and market all aspects of the company. He will be dividing his time between the U.S. operation and the Bangladesh operation. His annual salary will be \$69,000.

The petitioner also noted that a business manager reported directly to the beneficiary. The petitioner indicated that the business manager "works directly with clients for real estate development, networks with home owners and real estate brokers," works closely with architects and is responsible for project cost analysis including materials and supplies, subcontractors and all other related costs. The petitioner noted that it also employed a part-time accountant.

The petitioner's organizational chart identified the beneficiary as president, the beneficiary's wife as vice-president, an individual identified as Itrat Sayeed as "vice-president and co. secretary," an operations manager, and a general contractor, an architect, soil surveyor, insurance, real estate brokers, and building department and other local authority subordinate to the position of the operations manager.

On December 19, 2003, the director noted that the petitioner had indicated on the petition that it had three employees. The director also noted her belief that this was a self-petition with the beneficiary's spouse signing the Form I-140. The director noted the petitioner's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, which indicates that only \$4,000 had been paid to employees.

In a March 9, 2004 response to the director's observations, the petitioner indicated that since October 2002, it had employed a "construction manager" who was a professional engineer. The petitioner referenced the construction manager's description of his duties which included supervising construction of residential buildings, working with architects, maintaining close contacts with the building department, lawyers,

insurance companies, and other authorities and networking with homeowners and real estate brokers. The petitioner also indicated that it utilized the services of architects, consulting engineers, attorneys, accounting services, construction management firms, and surveyors and referenced attached contracts and invoices for services rendered through these providers. The petitioner attached copies of invoices addressed to Itrat Sayeed and contracts signed by Itrat Sayeed. The AAO observes that the signature of Itrat Sayeed is on the line designated for the owner's signature and that the signer has sometimes written in "on behalf of" owner or "secretary" of petitioner.

On June 28, 2004, the director denied the petition. The director determined that the petitioner's description of the beneficiary's duties resembled portions of the definitions of managerial and executive capacity. The director also stated that the petitioner had indicated that it had only one employee and a part-time technical assistant. The director concluded that the beneficiary's duties and the petitioner's staffing arrangement did not demonstrate that the preponderance of the beneficiary's duties would be managerial.

On appeal, counsel for the petitioner notes that the petitioner had stated that it employed one full-time employee and over 12 subcontractors and professional support staff. Counsel asserts that the beneficiary supervises a substantial work force of professional and contracted employees. Counsel claims that the beneficiary "was clearly defined as managing the organization of the U.S. operation, which included controlling the work of his sales and marketing managers," and "had the authority to hire and fire all employees of the company as well as retaining or dismissing independent contractors." Counsel also contends that the beneficiary "clearly meets the following definition requirements for an executive and manager because (1) he directs management of the company, (2) he establishes the goals and policies of the company, and (3) he exercises wide latitude in the discretionary decision making as President."

Counsel's assertions and claims 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). The description of the beneficiary's duties does not demonstrate that the beneficiary will perform primarily managerial or executive duties. The petitioner does not clarify 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 cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's duties is general and does not evidence the beneficiary's daily activities. As the director observed, the description of the beneficiary's duties paraphrases the definitions of managerial and executive capacity. *See* sections 101(a)(44)(A)(i)(ii), and (iv) and 101(a)(44)(B)(i), (ii), and (iii). The description of the beneficiary's duties include the general oversight exercised by an owner of a business and does not include evidence that the beneficiary will perform primarily managerial or executive duties for the petitioner.

Moreover, the AAO observes that the petitioner has not substantiated the employment of its only acknowledged employee, the construction or business manager. The AAO acknowledges that the petitioner entered into a contract with the claimed construction or business manager in October 2002 and paid this

individual \$4,000 in 2002. However, the employment contract may be terminated with a two-week notice. The petitioner has not provided substantive evidence that it continued to employ this individual when the petition was filed. Further, the petitioner's description of duties for this position is general and is not sufficient to conclude that this position is primarily managerial, supervisory, or professional. 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)).

In addition as referenced above, an individual who is identified on the petitioner's organizational chart as the petitioner's vice-president and secretary has entered into various contracts and has received invoices issued to the petitioner from outside parties. The petitioner has not explained this individual's duties or otherwise accounted for the role this individual plays in the petitioner's organizational hierarchy. The AAO questions whether the duties of this individual overlap or otherwise diminish the beneficiary's role in the petitioner's hierarchy. The failure of the petitioner to provide information regarding this individual's duties for the petitioner casts doubt on the role to be played by the beneficiary. 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).

Counsel's assertion that the beneficiary supervises a substantial workforce of professional and contracted employees is not supported in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). The petitioner has not provided evidence of payment to any of the claimed contractors and as noted above has not provided evidence that it employed any individuals when the petition was filed. 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).

Counsel's claim that the beneficiary controls the work of a sales and marketing manager does not comport with the petitioner's organizational chart and counsel's re-statement of the first three elements of the definition of executive capacity are also insufficient to satisfy the petitioner's burden of proof. The record is insufficient to overcome the director's determination on this issue.

The AAO also notes the director's reference to a perceived inconsistency in the petitioner's ownership. The petitioner states that the beneficiary and his wife each own a 50 percent interest in the petitioner. The petitioner's stock certificates also show that the beneficiary and his wife each own a 50 percent interest in the petitioner. However, 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 Dec. at 595. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control. Further, 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. In this matter, the director did not require that evidence be submitted to establish the actual purchase of the petitioner's shares; however, because of the petitioner's small size, the absence of employees who would perform the non-managerial or non-executive operations of the company, and the perception that the petitioner is a shell company organized to enable the beneficiary to permanently transfer to the United States, the petitioner must adequately demonstrate the qualifying relationship between the petitioner and the foreign entity. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has not done so in this matter.

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.