

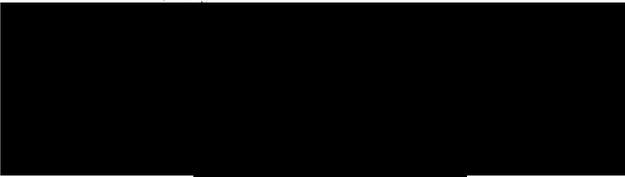
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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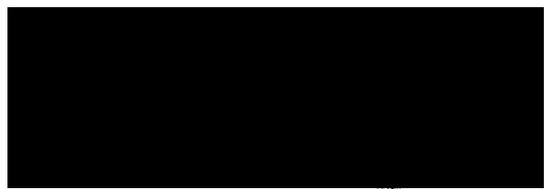
Office: VERMONT SERVICE CENTER

Date: OCT 17 2005

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

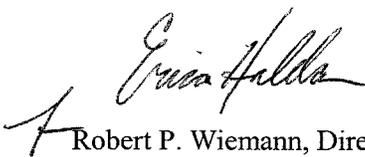
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 California in May 1998. It is also authorized to conduct business in the State of New York using the fictitious name [REDACTED] since October 2001. It seeks 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 determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits additional information and requests the petition be approved.

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 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 an April 19, 2002 letter appended to the petition, the petitioner listed the beneficiary's duties as:

1. Formulate, supplement, and maintain the company's policies on personnel, marketing, accounting, finance and business development;
2. Supervise the company's General Manager and Treasurer who, in turn, will hire, train, and supervise the three administrative, inventory and marketing manager[s] who will have eleven staff members reporting to them;
3. Review reports on implementation of marketing/cost control/investment policies;
4. Maintain business relationships with the Board of Directors, retailers in the U.S., suppliers in China, employees/independent contractors/agents in the North American market; and
5. Exercise overall responsibility for profit and loss of the company.

The petitioner also provided its organizational chart showing the beneficiary in the position of president over a general manager and a chief financial officer. The chart also listed individuals in the positions of: (1) sewing department director over four sewers; (2) sales department director over two salespersons and a warehouse service clerk; and (3) label and button department director over four personnel.

On June 29, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a detailed description of the beneficiary's proposed duties, including a breakdown of the number of hours devoted to each of the duties; additional evidence showing the management and personnel structure including the positions the beneficiary would manage; and, Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to employees in 2002. The director noted that providing information on the beneficiary's subordinate supervisors, the job titles and job duties of the employees managed, the time the beneficiary spent on managerial and executive duties and on non-managerial and non-executive duties, and the beneficiary's discretionary authority in day-to-day operations would assist the petitioner in preparing its response.

In a September 20, 2004 letter submitted in response to the request for evidence, the petitioner provided the same job description previously provided; stated that the beneficiary would manage three subordinate supervisors including the manager of the San Francisco branch office, the chief financial officer of the San Francisco branch office, and a manager of the New York branch office; indicated that the beneficiary spent 100 percent of his time on managerial/executive duties; and, indicated the beneficiary had full discretionary authority in day-to-day operations.

The petitioner also provided brief job descriptions for the manager of the San Francisco branch office, the chief financial officer of the San Francisco branch office, and the manager of the New York branch office. The petitioner indicated that the San Francisco branch manager would maintain the "joint venture's" policies on personnel, marketing, accounting, finance, and business development, and "[s]upervise the company's [t]reasurer who, in turn, will hire, train, and supervise the three administrative, inventory and marketing managers who will have nine staff members reporting to them," as well as, maintain business relationships with U.S. retailers, Chinese suppliers, and employees/independent contractors/agents in the North American market.

The petitioner also indicated that the San Francisco chief financial officer would direct the petitioner's financial goals and preparation of financial reports, oversee the investment of funds, manage associated risks, supervise cash management, execute strategies to expand, and advise the president and board of directors on investments and loans for short and long-range financial plans. The petitioner further indicated that the New York branch manager would formulate, supplement, and maintain the "joint venture's" policies on personnel, marketing, accounting, finance, and business development, supervise the company's sales staff, and maintain business relationships with U.S. retailers, Chinese suppliers, and employees/independent contractors/agents in the North American market.

The petitioner submitted a revised organizational chart. The organizational chart continued to show the beneficiary in the position of president over a general manager and a chief financial officer, as well as individuals in the positions of: (1) sewing department director over four sewers and (2) label and button department director over four personnel. The chart added an inspecting department director and one additional staff member based in San Francisco and a New York branch manager over three sales personnel. The petitioner also provided copies of IRS Forms W-2 issued to employees for the 2002 year. The compensation listed on the 59 Forms W-2 suggested that 57 of the petitioner's 2002 employees worked a limited number of hours for the petitioner during the year. All of the employees were employed in California.

The director observed that the petitioner had not provided well-defined job descriptions for the 18 individuals listed on the petitioner's organizational chart and further that the salaries paid to the petitioner's two full-time employees were not commensurate with a managerial or executive position. The director determined that the record did not clearly show the number of people the petitioner employed and called into question the employees' titles and job positions. The director also determined that the description of the beneficiary's job duties was vague, identified general management functions, and did not specify managerial or executive duties in the context of the petitioner's staffing arrangement. The director noted that the job descriptions of the petitioner's staff that had been provided did not suggest that these individuals held managerial or executive positions. The director observed that the record did not provide sufficient information regarding who performed the petitioner's services and concluded that the beneficiary would be primarily engaged in providing the petitioner's sales and services rather than directing the organization.

On appeal, counsel for the petitioner notes that the director's June 29, 2004 request for evidence only requested position descriptions for those individuals reporting directly to the beneficiary. Counsel submits job descriptions for ten employees working in the petitioner's San Francisco branch office (the sewing factory) and job descriptions for each of the five employees working in the petitioner's New York branch office. Counsel notes that two managers report to the beneficiary; (1) the San Francisco branch office manager who supervises the work of three directors, and (2) the New York branch office manager who supervises three sales officers.

Counsel asserts that the record clearly establishes that the beneficiary performs managerial/executive duties by overseeing the work of two managers who, in turn, supervise employees in the sales, real estate, sewing, and labeling/buttons departments. Counsel contends that the salaries of the individuals subordinate to the beneficiary are not determinative and that the petitioner employs a sufficient number of individuals to perform the general tasks of customer and product development. Counsel asserts that the beneficiary is left

with the overall responsibility for the profit and success of the petitioner that can only be achieved if the beneficiary effectively directs the managers and directors that work for him. Counsel also notes that beneficiary manages and oversees a corporation that is affiliated with the petitioner.

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). The petitioner does not clarify whether the beneficiary would 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 may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner in this matter provides almost identical job descriptions for the beneficiary's position of president and that of the San Francisco and New York branch managers. The petitioner indicates that all three individuals will "[f]ormulate, supplement, and maintain the company's policies on personnel, marketing, accounting, finance and business development," and "[m]aintain business relationships with the Board of Directors, retailers in the U.S., suppliers in China, employees/independent contractors/agents in the North American market." This obvious generic description and overlap of duties casts doubt on the actual duties the beneficiary and the two subordinate managers will perform. Moreover, the petitioner does not define the tasks the beneficiary performs to formulate, supplement, or maintain the company's policies and maintain business relationships. 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. *Id.*

The petitioner's indication that the beneficiary will supervise a general manager and a treasurer who, in turn, supervise an administrative, inventory, and marketing manager is not substantiated in the record. 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 organizational charts submitted do not identify individuals in the positions of administrative, inventory, or marketing manager, rather the charts identify employees of a sewing factory and individuals employed to sell the petitioner's products. The description of duties for the sewing factory employees, supplied on appeal, is insufficient to establish that any of the ten employees are employed in managerial or professional positions. Again, the description of the sewing factory's general manager's duties is general as well as referencing the supervision of an administrative, an inventory, and a marketing manager, employees not designated on the organizational chart or identified as employees on appeal. 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).

In addition, the petitioner's description of duties for individuals employed in the petitioner's New York office is for employees not hired until after 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). The petitioner has provided no evidence that its New York office was staffed at the time the petition was filed.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. Citizenship and Immigration Services (CIS) is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title.

It is not possible to determine from the record that the beneficiary performs primarily managerial or executive duties rather than duties that are more closely associated with the petitioner's daily operations. 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 Dec. 593, 604 (Comm. 1988). The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Counsel's assertion on appeal that the beneficiary directs the managers and manages and oversees a separate affiliate entity is not persuasive. 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). Further, the creation of the claimed affiliate entity and the beneficiary's purported involvement with the affiliate do not establish that the beneficiary performs primarily managerial or executive duties for the petitioner. The AAO notes further that the beneficiary did not begin his involvement with the affiliated entity until sometime after the petition was filed.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include primarily executive or managerial duties. For this reason, the appeal will be dismissed.

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.

The petitioner in this matter has presented inconsistent evidence to support its claim that the beneficiary's foreign employer owns and controls a majority interest in the petitioner. The petitioner provides copies of its stock certificates numbers "1" through "16" and an accompanying stock ledger. The stock certificates and stock ledger show a myriad number of transactions, missing stock certificates, and cancelled stock certificates. The AAO observes that several of the "cancelled" stock certificates appear to have an erasure of the word "cancelled" from the face of the document. The petitioner's stock ledger shows the following stock certificates purportedly in effect:

Stock certificate number "10" issued November 1, 1999 to Hunan Wallshine Imp. & Exp. (Group), Kingstar Corp. in the amount of 28,560 shares;

Stock certificate number "14" issued April 1, 2001 to Hunan Wallshine Imp. & Exp. (Group) Kingstar Corp. in the amount of 9,520 shares;

Stock certificate number "15" issued April 19, 2001 to Hunan Wallshine Imp. & Exp. (Group) Kingstar Corp. in the amount of 8,960 shares; and

Stock certificate number "16" issued December 19, 2001 to Hunan Wallshine Imp. & Exp. (Group) Kingstar Corp. in the amount of 47,040 shares.

On November 12, 2002, counsel for the petitioner claimed that the beneficiary's foreign employer was Hunan Gold Hope Economic & Trade Co., Ltd. and that it and Hunan Wallshine Imp. & Exp. (Group) Kingstar Corp. each owned 47,040 of the petitioner's outstanding shares. On September 17, 2004, counsel for the petitioner claimed that the beneficiary's foreign employer was Hunan Gold Hope Economic & Trade Co., Ltd. but had originally been called China Hunan Golden Globe Import & Export Kingstar Corporation. Counsel also provided a translated document that indicates China Hunan Golden Globe Imp. & Exp. Kingstar Corporation had changed into Hunan Wall Shine Imp. & Exp. (Group) Kingstar Corporation on November 29, 1996. The document indicated further that Hunan Wall Shine Imp. & Exp. (Group) Kingstar Corporation had changed into Hunan Goldhope Economic & Trade Co., Ltd on August 4, 1999. The petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 1999 through 2002 all indicate that Hunan Wall Shine Imp. & Exp. (Group) Kingstar Corporation owns 51 percent of the petitioner, and show that the petitioner has three shareholders.

The inconsistencies in the record regarding the petitioner's ownership and control casts doubt on the legitimacy of the petitioner's ownership and control. Again, 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 record in this matter does not establish that the petitioner and the beneficiary's foreign employer enjoy a qualifying relationship. 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.