

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 2005**
WAC 04 001 51293

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:

[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 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 that seeks to employ the beneficiary as its president. In Part 5, Item 2 of the Form I-140, the petitioner indicated that it is engaged in trading and the food and restaurant business. 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 denied the petition based on the following independent grounds: 1) the beneficiary would not be employed in a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel disputes the director's conclusions and 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 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 performing in a capacity that is managerial or executive.

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 support of the petition, the petitioner submitted a letter dated September 18, 2003, which provided the following description of the beneficiary's prospective duties and responsibilities:

Plans, develops, and establishes policies and objectives of our company in accordance with board directives and corporation charter: [sic] [c]onfers with company officials to plan business objectives, [and] to develop policies to coordinate functions and operations between divisions and departments. Reviews activity reports and financial statements to determine progress and status in attaining company development objectives and revises those objectives and plans in accordance with current conditions. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments. Plans and develops company relation policies designed to improve

company's image and relations with customers. He will also be the [c]hairman of the board of directors. In addition[,] he has authority to hire or fire managerial personnel.

On September 16, 2004 the director issued a request for additional evidence (RFE) instructing the petitioner to provide its organizational chart describing its managerial hierarchy and staffing levels as of the date the petition was filed. The petitioner was instructed 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 asked to provide a more detailed description of the beneficiary's duties. Additional documentation was also requested in the form of the petitioner's wage reports.

In response, the petitioner provided the same job description as previously provided in support of the Form I-140 petition. The petitioner also provided its organizational chart as well as quarterly wage reports, including the wage report for the third quarter of 2003, which lists the petitioner's employees at the time the petition was filed. The petitioner's organizational chart lists a total of four employees of which only three are listed in the relevant quarterly wage report. Although the quarterly wage report lists a total of nine employees, there is no indication as to where six of those employees fall within the petitioner's organizational hierarchy, as they are not listed in the organizational chart. The petitioner's organizational chart indicates that the beneficiary's subordinates include two assistant managers, who are responsible for the daily operations of the petitioner's two respective restaurants, and a consultant, whose responsibilities include implementing the set goals and policies, reporting to the beneficiary regarding the company's various problems and needs, and providing the beneficiary with data analysis regarding business related problems.

On February 18, 2005, the director denied the petition noting that the petitioner failed to provide sufficient detail to convey an adequate understanding of what the beneficiary would be doing on a daily basis. The director concluded that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

On appeal, counsel repeats the description of duties and responsibilities previously provided in support of the petition and later in response to the RFE. Counsel asserts that the petitioner's description of the beneficiary's position fits within the definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). However, 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). In the instant matter, neither counsel nor the petitioner provided additional information to supplement the previous job description, despite the director's statements notifying the petitioner that the said job description was deficient and failed to adequately convey the necessary information.

Next, counsel quotes section 101(a)(44)(C) of the Act, which states, in part, that the petitioner's staffing levels must be considered in light of its reasonable needs and stage of development. However, counsel provides no statements of his own to explain how this section of the Act specifically applies in the instant matter or how it addresses the director's findings. The AAO cannot and will not assume counsel's role by formulating legal arguments to assist the petitioner. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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). 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. In the instant matter, the beneficiary's job description is entirely too general and does not define the beneficiary's position in terms of the actual duties he would perform on a typical day-to-day basis. The actual duties themselves will 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).

In addition, the petitioner ignored the director's request for a more detailed description of the beneficiary's job duties and instead repeated the original job description, which the director has deemed deficient on two separate occasions. While the petitioner generally indicates that the beneficiary's discretionary authority fits the definition of executive capacity, this statutory definition is meant to serve only as a guideline to be applied to a specific list of duties. Where, as in the instant case, the petitioner fails to provide CIS with a specific list of duties, the AAO cannot affirmatively conclude that the beneficiary primarily performs qualifying tasks. The petitioner has provided no explanation for the duties involved in directing and coordinating the formulation of goals or planning and developing various policies; nor did the petitioner explain who actually prepares the activity reports and financial statements that the beneficiary would be reviewing. The petitioner's organizational chart does not include the names and position titles of all employees named in its wage report for the quarter during which the petition was filed. Rather, the only information provided in the chart is the names of the beneficiary's direct support staff, which includes two assistant managers, only one of whom appears on the relevant quarterly wage report, and one assistant manager/consultant, whose job duties have been described in broad terms without a meaningful explanation of their application in the context of the petitioner's business purpose, which remains unclear based on the conflicting information on record. 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 the petitioner's letter dated September 18, 2003, which was submitted in support of the petition, the petitioner stated that it would "engage in importing advanced U.S. equipments [sic], instruments and introducing advanced technology to China." However, in Part 5, Item 2 of the Form I-140, the petitioner described the nature of its business as "trading, food and restaurant[.]" Although the record contains a number of documents indicating the petitioner's involvement in the food and restaurant business via its purchase of two restaurants, there is no indication of its involvement in any trade-related business. As the assistant manager/consultant was not shown in the organizational chart to be part of the either of the petitioner's two restaurants, which appear to be its only business activity, the AAO cannot determine how this individual assists the beneficiary or what his role is within the organization. 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)).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The record lacks sufficient information about the petitioner's actual business activity and fails to provide the requisite information about the beneficiary's

specific duties and the duties of his subordinate staff. As such, the AAO cannot make an affirmative determination as to the nature of the beneficiary's proposed duties at the time the petition was filed.

The other 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 support of the claim that the petitioner is entirely owned by the beneficiary's foreign employer, the petitioner submitted a stock transfer ledger and stock certificate showing WUHU P&P Economic Development Co., Ltd. as the owner of 1,000 shares of the petitioner's stock. The director reviewed the submitted evidence and requested additional documentation to establish that the foreign entity paid for its ownership of the petitioner's stock. Namely, the RFE instructed the petitioner to provide the original money wire receipt(s) from the foreign entity to the U.S. entity showing the transfer of funds used to purchase the petitioner's stock.

In response, the petitioner acknowledged the director's request and submitted a copy of a fund transfer receipt from Sanwa Bank dated February 12, 1998. Although the document showed the petitioner as the beneficiary of a fund transfer in the amount of nearly \$400,000, the entity claimed as the parent of the U.S. petitioner is not shown as the originator of the fund transfer. Rather, "Ord Cust China Natl Machine Tool Co" appears to be the originator of the fund transfer. Furthermore, both the stock transfer ledger and the stock certificate indicate that the claimed parent entity assumed ownership on August 1, 1996. However, the fund transfer did not take place until February 1998. Therefore, even if the petitioner were able to trace the February 1998 fund transfer to the claimed parent entity, there is no evidence the 1998 fund transfer is related to the claimed 1996 stock transfer.

Additionally, counsel states that the director was incorrect in stating that Schedule L of the petitioner's tax return indicates that 300,000 shares of the petitioner's stock were issued and states that the numerical figure discussed by the director actually represents the monetary amount paid in exchange for the petitioner's stock. Counsel is correct and the director's incorrect comment is noted and withdrawn. However, the \$300,000

indicated in the petitioner's tax return is inconsistent with the petitioner's earlier claim that the foreign entity paid \$400,000 in exchange for its stock. 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).

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.

Counsel claims that the evidence provided by the petitioner establishes that the claimed parent entity paid for ownership of the petitioner's stock. However, his assertion is not supported by documentary evidence. See *Matter of Obaigbena*, 19 I&N Dec. at 534; see also *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The record lacks sufficient evidence documenting the foreign entity's purchase of the petitioner's stock.

Furthermore, the business registration certificate issued to the petitioner names the beneficiary as the owner of the business. There is no indication that the foreign entity is the petitioner's actual owner. This also is inconsistent with the petitioner's claim. The AAO notes that 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. at 591. The petitioner in the instant matter has failed to submit credible evidence of an established qualifying relationship between the petitioner and the claimed foreign parent organization. Based on this additional ground, this petition cannot be approved.

Additionally, though not addressed by the director, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year prior to filing the I-140 petition. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In the instant matter, the petitioner has submitted two business registration certificates: one for the petitioner with account no. [REDACTED] at [REDACTED] one for Peking Inn with account no. [REDACTED]. Both certificates indicate that the beneficiary owns the two businesses. However, regardless of any affiliate relationship the two businesses may have, evidence of Peking Inn doing business does not establish that the petitioner was also doing business as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The fact that the petitioner and Peking Inn have separate business registration certificates suggests that they are two separate entities. Thus, although the purchase receipts billed to Peking Inn 1 and Peking Inn 2 are a clear indication that both of the beneficiary's restaurants were doing business, they do not address the issue of whether the petitioner itself was doing business. Furthermore, even if the AAO were to accept the restaurants' purchase receipts as evidence of the petitioner doing business, the receipts do not account for the full year prior to the date the petition was filed. Therefore, the AAO cannot conclude that the petitioner met the regulatory requirement specified in 8 C.F.R. § 204.5(j)(3)(i)(D).

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 additional ground 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.