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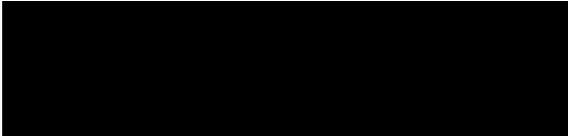
Petitioner:



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, Chief
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 AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of California that is engaged in real estate investment and the fabrication of marble products. The petitioner seeks to employ the beneficiary as its president.

The director denied the immigrant petition concluding that the petitioner had not established a qualifying relationship between the foreign and United States entities. Specifically, the director determined that the petitioner had not provided sufficient documentary evidence to substantiate its claim that the foreign entity owns and controls the United States corporation.

On appeal, counsel for the petitioner contends that the petitioner presented "clear and convincing evidence" of the foreign entity's ownership and control of the United States corporation, thereby establishing a parent-subsidary relationship. In a subsequently submitted appellate brief, counsel explains the difficulty incurred by the foreign Chinese company in transferring money directly from China to a United States corporation. Counsel states that in order to overcome the obstacles imposed by the Chinese government, the petitioning entity was funded with monies transferred from "customers" or "business partners"¹ of the foreign entity. Counsel submits a brief in support of the claims on 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 or 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.

¹ As will be discussed further herein, documentation from the petitioner references the transferors as "customers," while counsel refers to them as the petitioner's "business partners."

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 issue in the instant proceeding is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign and United States entities as required in section 203(b)(1)(C) of the Act.

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;

* * *

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.

The petitioner filed the instant petition on May 5, 2004. In an appended letter, dated April 26, 2004, the petitioner noted the existence of a parent-subsidiary relationship between the foreign and United States entities, stating:

[The petitioner] is a California company created by the parent company[']s Board of Directors in 2001. Formation of the wholly owned U.S. subsidiary was effortlessly accomplished through procedures of incorporation established by the State of California. However, transferring investment capital from the parent company to the newly formed U.S. subsidiary was a more difficult task because of the restricted movement of cash imposed by the Chinese government.

Despite the difficulties of moving funds out of China, the parent company was able to provide working capital necessary for the initial and ongoing success of their U.S. subsidiary. The parent devised fund transfers of investment capital through business partners in Hong Kong in the amount of \$100,000 by the attached money wire certifications and company bank statements.

The attached wire transfer receipts referenced by the petitioner reflected two wire transfers during the month of February 2001, the month during which the petitioner issued 10,000 shares of stock to the foreign

corporation, in the amounts of \$49,982 and \$49,980. The wire transfer receipts indicated that the funds were transferred from two separate individuals, [REDACTED] and were received by the petitioner's financial institution in the United States. The February 13, 2001 receipt contained a notation from the originator, stating:

This sum of money is owned by [the foreign entity] and we entrusted [sic] to wire it to its branch company [the petitioner]

In support of the parent-subsidary relationship, the petitioner also submitted the following documentary evidence: (1) the minutes from its February 20, 2000 board of directors' meeting identifying the company's intent to issue 10,000 shares of stock to the foreign entity in exchange for \$100,000; (2) a stock certificate dated February 20, 2001 identifying the foreign entity as the owner of 10,000 shares of stock; (3) a stock transfer ledger indicating that the foreign entity, as the sole stockholder in the United States entity, furnished \$100,000 in exchange for its stock ownership; and (4) the State of California Notice of Transaction Pursuant to Corporation Code Section 25102(f) reflecting a "total offering" of \$100,000 in exchange for the petitioner's stock. The petitioner also submitted a copy of its 2003 income tax return and financial statements.

The director issued a request for evidence dated February 17, 2005, noting the transfer of monies from individuals to the United States company. The director asked that the petitioner "explain why the money was sent by an individual(s) instead of the foreign company to the U.S. company." The director also requested that the petitioner provide documentary evidence of the policies held by the Chinese government restricting businesses in China from investing in overseas companies.

Counsel responded in a letter dated May 9, 2005, again noting difficulty in transferring funds directly from the parent company in China to the United States entity as a result of restrictions imposed by the Chinese government. Counsel stated that as the restrictions are not codified, the petitioner could not provide documentary evidence of the Chinese government policy. Counsel stated:

[B]efore the [World Trade Organization] took effect it was very difficult to transfer funds out of China. Despite the difficulties of sending the money, the parent company was legally and legitimately able to make wire fund transfers of investment capital through business partners in Hong Kong [REDACTED] in the amount of \$100,000 as evidenced by the previously attached money wire certifications and company bank statements.

It is important to note that there was no transfer of ownership interests to [REDACTED] because they simply acted as a vehicle for the capital investment transfer. As stated, the transactions were completely legal and legitimate. The arrangement was necessary in order to transfer the required capital from the parent company to the U.S. subsidiary. [Citizenship and Immigration Services (CIS)] attempts to discredit the transactions and disregard the previously submitted evidence which logically support the transfers.

Counsel referenced an attached letter from the petitioner, dated April 15, 2005, in which the petitioner explained that in order for the Chinese company to fund the United States corporation, the company "resolved to have one of our Hong Kong customers: [REDACTED] to provide the U.S. Dollars by crediting against our merchandise inventory." Counsel provided copies of the petitioner's 2003 and 2004

federal income returns, which, the AAO notes, reference the purported ownership of the petitioner by the foreign corporation on schedules incorporated in the tax returns.

In a decision dated June 15, 2005, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Specifically, the director noted that none of the monies transferred to the United States entity originated with the foreign corporation. The director questioned the petitioner's credibility, stating "the integrity of the submitted evidence is not enhanced by the claim that the wire transfers were effected through an 'accommodator' in Hong Kong so that the company could circumvent the currency transfer laws of the People's Republic of China." The director stated that the petitioner had not provided independent objective evidence "that the foreign entity has an ownership interest in the petitioner." Consequently, the director denied the petition.

Counsel filed a timely appeal on July 14, 2005 claiming that CIS' "arbitrary [and] capricious" decision failed to consider the "clear and convincing" documentary evidence submitted by the petitioner in support of the parent-subsidiary relationship. Counsel subsequently submitted an appellate brief, dated August 11, 2005, addressing the documentary evidence submitted in support of the qualifying relationship, including the minutes from the petitioner's board of directors' meeting, wire transfer certifications, stock certificate, stock transfer ledger, and Notice of Transaction. Counsel claims that by refusing to consider the above-mentioned evidence, CIS is attempting "[to] confuse the administration of the wire transfer process." Counsel references the petitioner's April 15, 2005 letter, and again stresses the difficulty in transferring funds directly from a Chinese business to a United States company prior to the formation of the World Trade Organization. Counsel states "the parent company was legally and legitimately able to make initial wire fund transfers of investment capital through business partners in Hong Kong [REDACTED] in the amount of \$100,000 as evidenced by the previously attached money wire certifications and company bank statements. Counsel challenges the director's suggestion that the petitioner is illegally attempting to circumvent Chinese currency transfer laws, stating, that while "it [was] very difficult, if not impossible, to make wire transfers out of China," it was not against the law.

Upon review, the petitioner has not established the existence of a qualifying relationship between the foreign and United States entities.

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.

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 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). 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. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In the instant case, the record does not contain sufficient documentary evidence that the foreign entity owns the petitioner as a result of consideration furnished by the foreign corporation in exchange for the petitioner's stock. The AAO recognizes that the petitioner's stock certificate and stock transfer ledger, as well as the minutes from the board of directors' meeting and California Notice of Transaction suggest ownership of the petitioner on the part of the foreign entity. However, as noted previously, the concept of ownership entails demonstrating how, as well as the form in which the stock was acquired. Here, that critical element remains unresolved.

The two wire transfer certifications² dated in February 2001, the month during which the petitioner's stock was issued, are not sufficient to establish that the foreign company furnished consideration in exchange for its purported stock ownership. Specifically, the petitioner has failed to clarify the relationship between the foreign corporation and the transferors, [REDACTED]. The petitioner stated in its April 15, 2005 letter that [REDACTED] were customers of the foreign entity who transferred funds to the United States in exchange for merchandise received from the foreign company. Counsel, conversely, identified [REDACTED] as "business partners" of the foreign company who are based in Hong Kong, thereby allowing for an easier transfer of monies. 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). An accurate account of the relationship between the transferors and the foreign entity is necessary in order to establish the foreign corporation's ownership of the petitioner's stock, in particular, that the monies transferred originated with the foreign entity.

In addition to this inconsistency, the petitioner has not documented either relationship. [REDACTED] [REDACTED] are customers or "business partners" of the foreign corporation, the petitioner has not offered documentary evidence of the claimed relationships. Such relevant evidence would include invoices identifying the foreign entity as the seller or supplier of merchandise [REDACTED] as well as a balance or cumulative charges in the amount of \$99,962 due to the foreign entity. In the alternative, the petitioner should have submitted contractual agreements or documentary evidence establishing the

² The AAO notes that the petitioner submitted an additional six wire transfer receipts dated in the years 2002 and 2003. These documents are not applicable to the instant question of whether the foreign entity furnished consideration for stock purportedly received in February 2001.

claimed business relationship if, in fact, [REDACTED] are partners of the foreign corporation. This information is relevant to determining whether funds belonging to the foreign entity were actually used in the purchase of the petitioner's stock, thereby satisfying the essential element of ownership. Counsel's blanket claims on appeal that [REDACTED] were mere "vehicle[s]" to transfer funds of the foreign entity are simply not sufficient to demonstrate that the foreign entity furnished consideration in exchange for its purported stock interest in the petitioner. 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).

Absent additional documentary evidence clearly demonstrating a relationship between [REDACTED] and the foreign entity, and confirming that the monies transferred to the petitioner were in fact provided by the foreign entity, the AAO cannot conclude ownership of the United States company by the foreign corporation. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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 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 stated in its April 26, 2004 letter that the beneficiary would be employed in the United States as the company's president, during which he would perform "senior level managerial duties with executive type decision-making authority." While the petitioner provided in both its April 2004 letter and its response to the director's request for evidence a list of the beneficiary's related job duties, the petitioner has not documented the specific managerial or executive tasks to be performed by the beneficiary or whether the beneficiary would be *primarily* employed as a manager or executive. The job description offered by the petitioner, while lengthy, essentially restates the statutory definitions of "managerial capacity" and "executive capacity," and replicates job duties already outlined by the petitioner. See sections 101(a)(44)(A) and (B) of the Act. Specifically, the beneficiary "determines company's policies and establishes business goals," "determines and formulates the company's policies," "sets forth the company's business goals," directs subordinate management," exercises authority to promote or terminate managerial authority, and determines the company's policies with regard to its products, pricing, distribution, promotion, finances and human resources. The AAO recognizes that the petitioner offered additional tasks to be performed by the beneficiary, however, the job description does not account for the beneficiary's specific managerial or executive job duties or, equally important, the amount of time the beneficiary would spend on each task. 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). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

Despite the director's request for an allocation of the time the beneficiary would devote to his responsibilities, a "more detailed description" of the beneficiary's typical day, as well as the job duties to be performed by the beneficiary's subordinates, the petitioner failed to supply this additional evidence. In its May 9, 2005 response to the director's request for evidence, the petitioner provided the same list of job duties for the beneficiary as that previously outlined in its April 26, 2004 letter, yet in a different format. Additionally, the organizational chart submitted in response to the director's request for evidence differs from that originally submitted by the petitioner in that it identifies additional lower-level management and employees whose positions and job duties have not been addressed by the petitioner. Moreover, it is unclear why the petitioner's "chief financial officer and sales manager," who is represented on the organizational chart as subordinate to the beneficiary and the petitioner's general manager, would receive an annual salary that is approximately \$13,000 more than the general manager or \$2,000 more than the beneficiary. Based on the petitioner's state wage report for the quarter ending March 31, 2004, the petitioner's production manager, who the petitioner identified as subordinate to the general manager, is also receiving a larger salary than the general manager. The AAO questions the authenticity of the claimed lower-level management as a result of these discrepancies. Furthermore, the lack of evidence provided by the petitioner precludes a finding that the beneficiary would be primarily employed in the United States in a position managerial or executive in nature. The AAO notes the petitioner's 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). Accordingly, the petition will be denied for this additional reason.

An additional issue not addressed by the director is whether the beneficiary was employed overseas in a primarily managerial or executive capacity. The petitioner identified the beneficiary's overseas position as general manager, during which he "directed the commercial affairs and interests of the company," formulated policies and business goals, "[d]irected the subordinate management," "reviewed schedules and plans submitted by managers, and marketing and financial documents," "[e]xercised authority to screen, hire, discharge, promote and delegate tasks," "[e]xercised discretion over the day-to-day operations, reviewing and ratifying business documents and funding plans," "[n]egotiated final agreements and contracts," and communicated with bank and tax officials. Again, this job description fails to detail the specific managerial or executive tasks related to the beneficiary's position as general manager. The foreign entity's limited organizational chart, which identified the beneficiary as supervising four managers, does not contribute to determining the employment capacity in which the beneficiary was employed overseas. 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? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner has not demonstrated that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

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 AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petition. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions.

See, e.g., Q Data Consulting, Inc. v. INS, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the previous nonimmigrant petition approvals and denying the immigrant petition.

The AAO notes its authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.