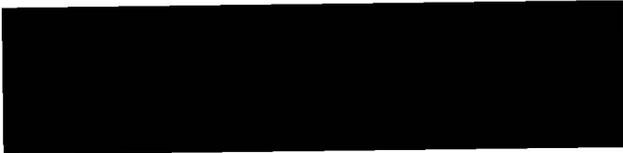




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



BU

FILE: [REDACTED]
EAC 05 142 52159

Office: VERMONT SERVICE CENTER

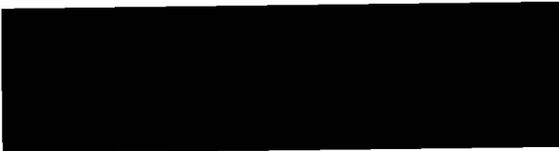
Date: **AUG 29 2006**

IN RE: Petitioner:
Beneficiary:



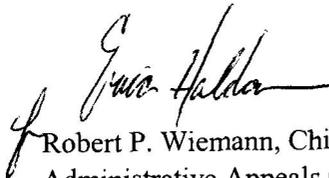
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner filed an immigrant visa petition seeking 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 limited liability company organized under the laws of the State of Delaware that is operating as a cosmetics retailer and day spa. The petitioner seeks to employ the beneficiary as its regional make-up artist.

The director denied the petition concluding that the petitioner had not demonstrated that a qualifying relationship existed between the foreign and United States entities at the time of filing the immigrant visa petition.

On appeal, counsel for the petitioner contends that the foreign and United States organizations "are related entities," and that the beneficiary qualifies for the requested immigrant visa classification. Counsel submits a brief and documentary evidence 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 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.

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 this proceeding is whether a qualifying relationship existed between the foreign and United States entities at the time of filing the immigrant visa petition.

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.

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is in the United States.

* * *

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.

The petitioner filed the instant petition on April 15, 2005. In appending documentation, including an April 1, 2005 letter from the petitioning entity, the petitioner claimed to possess an indirect qualifying relationship with the beneficiary's foreign employer, an organization located in Canada. The petitioner stated that the two entities are "related," as "[the foreign entity] is a wholly owned subsidiary of E.A. Salons, Inc., which, in-turn, is an affiliate of [the petitioning entity]."

In a notice dated July 12, 2005, the director noted that the petitioner's initial April 1, 2005 letter "is the sole supporting documentation submitted with your petition." The director asked that the petitioner submit documentary evidence to establish the existence of a qualifying relationship between the United States entity and the beneficiary's foreign employer at the time the petition was filed.

Counsel for the petitioner responded in a letter, dated October 6, 2005, stating that "[b]oth [the petitioner] and [the foreign entity] are wholly-owned subsidiaries of [REDACTED] [(EAS-Holdings)]." As evidence of the purported qualifying relationship, counsel submitted the foreign entity's articles of incorporation, articles of amendment, and an October 22, 1996 stock certificate naming EAS-Holdings as the holder of one share of the foreign entity's issued stock. Counsel also provided a copy of a "declaration" that had been submitted in connection with the L-1A nonimmigrant petition previously filed by

the petitioner on behalf of the beneficiary. In the attached declaration, the petitioner's vice-president of human resources attested to the purported existence of a qualifying relationship between the foreign and United States entities based on an understanding "that [the foreign entity] is a wholly-owned subsidiary of E.A. Salons, Inc., which, in turn is an affiliate of [the petitioner]."

The director issued a decision, dated November 23, 2005, concluding that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing. The director addressed the documentary evidence submitted by the petitioner, specifically noting that Citizenship and Immigration Services' (CIS) prior approval of an L-1A nonimmigrant petition is not "acceptable proof of a qualifying relationship." The director also noted insufficiency in the 2004 corporate income tax return for EAS-Holdings, which the petitioner had submitted in its October 6, 2005 response. The director noted that the "edited" tax return was not signed or dated, and stated "inasmuch as no supporting schedules were included, and an annual report was not provided, it is impossible to glean primary evidence of a qualifying relationship based upon what has been submitted." Consequently, the director denied the petition.

Counsel for the petitioner filed an appeal on December 27, 2005 claiming the existence of a qualifying relationship between the foreign and United States entities. In her December 23, 2005 appellate brief, counsel states that the two entities are "related," as the foreign entity, which counsel noted "has been inactive since November 1999," was owned entirely by the petitioning entity. Counsel further claims "EAS-Holdings owns 100% of [the petitioner], which owns 100% of [the foreign entity], which is now inactive."

Counsel addresses the 2004 tax return for EAS-Holdings previously submitted by petitioner, which the director claimed did not demonstrate the claimed corporate relationship, and explains that "[s]ince [the foreign entity] is currently inactive, [the foreign entity] does not appear as a subsidiary today on EAS-Holdings' Tax Return." Counsel submits copies of EAS-Holdings' 1999 payroll journals for the foreign entity, claiming they are evidence of a relationship between EAS-Holdings and the foreign entity.

Counsel also submits two organizational charts and a "list of subsidiaries" reflecting the relationship between the entities named herein. Based on the organizational chart bearing the date "02 24 05" and the "list of subsidiaries," the petitioner was established on May 5, 2000. Both organizational charts submitted on appeal reflect the beneficiary's foreign employer as a subsidiary of the petitioning entity and identify it as being "dormant." The petitioner is identified as a subsidiary of EAS-Holdings. In an appended declaration from the petitioner, the company's vice-president/controller notes his familiarity with the claimed parent-subsidary relationship between the petitioner and the foreign entity, also noting the foreign entity, while now inactive, is entirely owned by the petitioner.

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing the petition.

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 AAO first notes inconsistencies in the qualifying relationship claimed by the petitioner to exist between the foreign and United States entities. In its initial filing, the petitioner describes an indirect affiliate relationship between the foreign and United States companies, stating that the foreign entity is a wholly owned subsidiary of an affiliate of the petitioning entity, both of which are owned by EAS-Holdings. In contrast, in her October 6, 2005 letter, counsel for the petitioner stated that both the petitioner and the foreign entity "are wholly-owned subsidiaries" of EAS-Holdings, and, as evidence, submitted a stock certificate naming EAS-Holdings the owner of one share of the foreign entity's¹ issued stock. On appeal, counsel suggests yet a different qualifying relationship, stating, "EAS-Holdings owns 100% of [the petitioning entity], which owns 100% of [the foreign entity], which is now inactive." The three different scenarios presented by the petitioner with respect to the purported relationship between the foreign and United States entities inhibits the AAO's review and analysis of the instant issue as it is not clear how the petitioner is claiming to be related to the foreign entity. 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).

Nonetheless, the petitioner has not presented evidence in the form of stock certificates or stock certificate registries establishing any of the above-noted qualifying relationships. For example, with respect to the purported indirect affiliate relationship between the foreign and United States entities, the petitioner did not demonstrate through concrete documentary evidence that EAS-Holdings wholly owns the petitioning entity or E.A. Salons, Inc. Nor did the petitioner submit evidence establishing a parent-subsiary relationship between the United States company and foreign entity, as claimed by the petitioner on appeal. The petitioner's failure to provide documentary evidence of this particular scenario is especially important as the foreign entity was

¹ The stock certificate specifically names [REDACTED] as the owner of stock issued by "E.A. Salons Canada, Ltd." The record contains articles of amendment changing the original name of the foreign entity, "1033657 Ontario Limited," to [REDACTED] and finally "E.A. Salons Canada Ltd." In the April 1, 2005 letter submitted with the immigrant visa petition and on the organizational charts provided on appeal, the foreign entity is identified as [REDACTED]. The AAO notes that in both the October 6, 2005 and December 23, 2005 letters, counsel incorrectly references the foreign entity as "[REDACTED]"

established almost four years prior to the petitioner², which is claimed to be the sole shareholder of the foreign entity. The record does not reflect the manner in which the petitioner obtained its purported stock ownership in the foreign entity, such as through a transfer from a former stockholder or alternatively, directly from the foreign entity. In fact, the only stock certificate provided by the petitioner suggests that the foreign entity is owned by EAS-Holdings, thereby contradicting counsel's claim on appeal that the petitioner "owns 100% of [the foreign entity]." 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 unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The documentary evidence submitted by counsel on appeal is not sufficient to corroborate the petitioner's claim of a qualifying relationship. The two organizational charts, the list of subsidiaries, and declaration suggest that the petitioning entity wholly owns the foreign organization. As addressed above, proof of a qualifying relationship should include stock certificates, as well as the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings. As a result, the organizational charts and list of subsidiaries, which were prepared by the petitioner in connection with the instant immigration proceeding and are not any of the above-named corporate documents, are not sufficient to establish the claimed ownership. In addition, as the declaration from the petitioner's vice president-controller does not comport with the petitioner's initial claim of a qualifying relationship and is otherwise unsupported by the record, it will not be accorded any weight in this proceeding. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Finally, the fact that the foreign entity ceased doing business in November 1999 and has since been "dormant" and "inactive" precludes a finding that the two companies had a qualifying relationship as of the date of filing.

In order to establish eligibility for classification as a multinational manager or executive for immigrant visa purposes, the petitioner must establish that it maintains a qualifying relationship with the beneficiary's foreign employer; the foreign corporation or other legal entity that employed the beneficiary must continue to exist and have a qualifying relationship with the petitioner at the time the immigrant petition is filed. 8 C.F.R. § 204.5(j)(3)(i)(C). A multinational manager or executive is one 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." Section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

Although the regulations at 8 C.F.R. § 204.5(j)(3)(i)(B) reference beneficiaries who are already employed by the petitioner as nonimmigrants, the fact that the beneficiary is currently in the United States in L-1A classification does not exempt the petitioner from its burden to establish the existence of an ongoing qualifying relationship with the beneficiary's previous foreign employer as of the date the petition is filed. Rather, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) simply allows CIS to look beyond the three-year period immediately preceding the filing of the I-140 petition in order to determine whether the beneficiary has the

² The organizational chart and "list of subsidiaries" submitted by the petitioner on appeal reflect that the petitioning entity was established on May 5, 2000, whereas the foreign entity was formed on October 22, 1996.

requisite one year of qualifying employment abroad. To construe the regulation as creating an exception that allows L-1A beneficiaries to qualify as multinational managers without a qualifying relationship between the United States and foreign entities would contravene the plain language of the statute. The petitioner must establish eligibility at the time of filing the immigrant visa petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In this case, any qualifying relationship that may have existed between the petitioner and the beneficiary's foreign employer was severed when the foreign company ceased its operations in November 1999. The beneficiary's employment in the foreign entity is not considered employment with a qualifying entity for the purposes of this immigrant visa classification, and it cannot be found that the beneficiary is seeking "to continue to render services to the same employer or to a subsidiary or affiliate thereof."

Based on the foregoing discussion, the petitioner has not demonstrated that a qualifying relationship existed between the foreign and United States entities at the time of filing. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary was employed by the foreign entity or would be employed by the United States company in a primarily managerial or executive capacity.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner identified the beneficiary as holding the position of national make-up director in the foreign entity and regional make-up artist in the United States company. In her October 6, 2005 response to the director's request for evidence, counsel claimed that both positions are primarily managerial in nature.

The petitioner has not demonstrated that the beneficiary was employed by the foreign entity or would be employed by the United States company in a primarily managerial capacity.³ Specifically, the list of job duties referenced by counsel in her October 6, 2005 letter is limited, in that it does not identify the specific managerial or executive job duties performed by the beneficiary on a daily basis or those that the beneficiary would perform in his position as regional make-up artist. For example, the petitioner did not identify what "day-to-day operations of the retail, make-up and skin care treatment areas" the beneficiary managed. Nor did the petitioner explain the organizational hierarchy or operational functions of the foreign or petitioning entities or the "retail, make-up and skin-care treatment areas" so as to corroborate the petitioner's claim that the beneficiary occupied a primarily managerial or executive position with respect to these "areas." Counsel's additional statement that the beneficiary "[g]enerally oversaw the activities of subordinate managers, assistant managers, stylists, receptionists, estheticians, massage therapists, colorists and assistants" does not provide clarification of the beneficiary's purported role as a manager. Also, without a comprehensive description of the associated managerial or executive tasks, counsel's blanket statement that the beneficiary "essentially designed and set the image and style for the entire company," does not demonstrate how the beneficiary was or would be employed in a primarily managerial or executive capacity. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the petitioner has not explained why the beneficiary's responsibilities of making appearances as a guest artist and motivational guest speaker, "[l]aunching new products," and ensuring the receipt of "timelines and training materials" to regional offices should be considered managerial or executive in nature, as claimed by counsel in her October 6, 2005 letter. Furthermore, counsel's emphasizes the national and regional effect that the beneficiary had on the foreign entity as evidence that he was employed in a primarily managerial capacity. Counsel's reliance on the beneficiary's regional and national impact, however, without a detailed description of how his specific job duties satisfied the statutory definitions of managerial or executive

³ Counsel stated in her October 6, 2005 letter that the job duties associated with each position "are essentially the same." Therefore, the beneficiary's employment capacity in each position will be considered under the same discussion herein.

capacity, is not sufficient to establish the beneficiary's former employment as a manager or executive. *See* 101(a)(44)(A) and (B) of the Act. 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). As a result, the AAO cannot conclude that the beneficiary was or would be employed 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 that CIS previously approved an L-1A nonimmigrant petition filed by the petitioner on behalf of the beneficiary. 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. U.S. 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 prior nonimmigrant petition approval and denying the immigrant petition.

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.