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FILE: [REDACTED]
WAC 05 076 52722

Office: CALIFORNIA SERVICE CENTER

Date: SEP 08 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

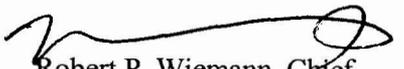
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Chief
Administrative Appeals Office
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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 sustained.

The petitioner is a California corporation engaged in the business of exporting scrap metals, plastics, and waste paper. 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.

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.

On January 16, 2006, the director issued a decision denying the petition based on two grounds of ineligibility without issuing a request for additional evidence. *See* 8 C.F.R. § 103.2(b)(8). First, the director concluded that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. This conclusion was based, in part, on the beneficiary's list of proposed duties and responsibilities (provided in support of the Form I-140), which indicated that the beneficiary would negotiate contracts and visit major suppliers and customers for public relations purposes, duties that the director deemed to be of a non-qualifying nature. Second, the director determined that the petitioner failed to provide sufficient documentation to establish that it has a qualifying relationship with the beneficiary's foreign employer.

With regard to the first issue, counsel addresses the director's observation by providing a percentage breakdown of the list of duties provided by the petitioner in support of the appeal. Counsel's breakdown suggests that the two sets of duties determined by the director to be of a non-qualifying nature cumulatively comprise only 10% of the beneficiary's time. As such, counsel asserts that the beneficiary cannot be deemed as someone that primarily performs non-qualifying tasks. Counsel's assertions are correct. As properly noted by counsel, the director did not have sufficient information to affirmatively conclude that the beneficiary would primarily perform duties of a non-qualifying nature.

The director also comments on the petitioner's failure to submit a 2005 first quarterly wage report naming the petitioner's employees at the time the Form I-140 was filed. However, the director fails to acknowledge that the relevant quarterly wage report was unavailable at the time of filing. Although the director could have issued a request for additional evidence at a later date when the relevant document may have become

available for submission, he failed to do so. The petitioner's failure to submit specific evidence that was never requested by the director cannot be used in support of a finding of ineligibility.

Generally, the AAO will not consider evidence submitted on appeal if the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In the present case, however, the director failed to issue a request for evidence. Accordingly, the AAO will accept the additional evidence submitted on appeal as a supplement to the record of proceeding that was before the director.

Based on further review of the record, including the additional submissions provided with the appeal, the AAO concludes that the petitioner has overcome the director's finding. The petitioner has provided sufficient evidence and information to meet the burden of establishing, by a preponderance of the evidence, that the beneficiary would primarily perform duties of a qualifying nature. Section 101(a)(44) of the Act.

The other issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 the instant matter, the director determined that the petitioner failed to meet the regulatory requirements discussed in 8 C.F.R. § 204.5(j)(3)(i)(C). This determination was based on the petitioner's submission of a wire transfer receipt (for \$57,149.37 dated May 10, 2000), which the director deemed to be inconsistent with the claim that Genercon (Tianjin) Metals Ind. Co., Ltd., the purported parent entity, purchased the 57,000 shares initially issued by the petitioner. More specifically, the director questioned the credibility of the petitioner's claim in light of the fact that the transferred sum of money originated with a company other than the claimed parent organization.

While counsel explains the reasons for the inconsistency on appeal, case law requires that the petitioner 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). Thus, counsel's explanation, despite its plausibility, is insufficient to overcome the inconsistency discussed in the denial.

Notwithstanding the AAO's support of the director's conclusion with regard to the purchase of the initial issuance of the petitioner's stock, the AAO concludes that the director's overall finding regarding the issue of the petitioner's claimed qualifying relationship has been overcome on appeal.

Counsel states that even if the petitioner failed to adequately establish the parent entity's purchase of the 57,000 shares initially issued by the petitioner, a qualifying relationship was nevertheless established with the petitioner's issuance of an additional 57,865 shares in September of 2004. As corroborating evidence of the foreign entity's payment in exchange for the 57,865 shares, the petitioner provides two of its bank statements showing that money, which had originated from the claimed parent entity, was transferred to the U.S. petitioner's bank account near the time the shares were issued. The first sum of \$26,810.45 was transferred on September 1, 2004 and the second sum of \$31,055.40 was transferred September 14, 2004. The AAO notes that the combined total of the two fund transfers equals \$57,865.40, which is the approximate value of the number of shares issued in stock certificate no. 2. The petitioner also provided a resolution issued by the foreign entity's board of directors on August 16, 2004, which discusses the foreign entity's plans to purchase the additional shares in September of 2004. Thus, while the petitioner failed to substantiate its first claim regarding its sale of 57,000, it provided sufficient information regarding its subsequent issuance of 57,865, which is sufficient to establish that the beneficiary's foreign employer owns and controls more than 50% of the petitioner's shares. *See* 8 C.F.R. § 204.5(j)(2)(definition of "subsidiary")

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 sustained that burden.

ORDER: The appeal is sustained.