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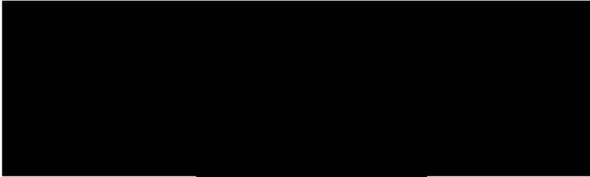
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U.S. Citizenship
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 09 2007
WAC 05 083 53844

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, Chief
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 was set up to facilitate Jingmei Biotech Co., Ltd., the beneficiary's foreign employer, to expand its bioresearch business into the U.S. market. The petitioner seeks to employ the beneficiary as its chief executive officer (CEO). 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 failed to establish that it would employ the beneficiary in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments.

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 primary issue in this proceeding is whether the petitioner would employ the beneficiary in a 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) 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 Form I-140, the petitioner provided a letter dated December 3, 2004, which included the following description of the beneficiary's proposed employment as CEO of the petitioning entity:

He plans, develops and establishes the policies and objectives of the company's businesses, directs the management of the company to ensure that the policies and objectives of the company are achieved. He directs the management of [the] company to ensure that the policies and objectives of the company are achieved. He directs the management of [the] company with wide latitude and discretionary decision-making powers. More specifically, in conjunction with his subordinates, he draw[s] up business plans for the company such as deciding to initiate the R&D program recently, hiring a number of highly trained researchers for the company's R&D program. Working with the company's CFO and accountant, he establishes the company's financial and accounting policies, and determines its budgets. He

travels across the world numerous times to attend professional conferences, trade shows, and [to] meet with potential suppliers. He signs most if not all of the company's important marketing and distributions agreements. [H]e also sets the goals and indirectly directs the R&D work of the company. In addition, he regularly travels back to China to train Jingmei's employees on R&D, product specifications, and management skills. He is directly responsible to the [b]oard of [d]irectors and the company's parent company and is not under the direction or supervision of any individual.

The petitioner also provided its organizational chart, which illustrates the petitioner's staffing structure. The beneficiary is shown at the top of the hierarchy as the company's CEO. The beneficiary's direct subordinates include a chief financial officer (CFO), a China coordinator, the company president, a chief operating officer (COO), and the vice president of marketing. The chart also indicates that the CFO oversees the work of one part-time and three full-time employees; the COO oversees the work of three full-time employees; and the vice president of marketing oversees the work of two full-time employees.

On July 2, 2005, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE), instructing the petitioner to provide a copy of its organizational chart illustrating its staffing levels as of the date the Form I-140 was filed. The petitioner was asked to provide each employee's name, position title, and brief job description. Additionally, the petitioner was asked to submit its quarterly wage reports for the last two quarters of 2004 and the first two quarters of 2005.

Although it is unclear why the director requested an organizational chart, as one was initially provided in support of the Form I-140, it is noted that the chart submitted in response to the RFE differs from the chart initially submitted in support of the Form I-140. Specifically, the chart initially submitted shows two separate individuals in the positions of CFO and president. In the more recent chart, [REDACTED] is identified as both the CFO and the company president with the individual previously named as president being limited to a position with the petitioner's board of directors. Additionally, while the accounting, human resources and logistics department previously employed four individuals, three full-time and one part-time, the more recent chart shows a total of two full-time employees assisting the CFO. Similarly, the marketing and sales department, which according to the first chart had two full-time employees assisting the vice president of market, is now shown with only one employee. Lastly, the research and development department in the more recent chart identifies four employees, whereas the original chart identified three employees, two of which appear to still be employed. Counsel explained that the petitioner has experienced some employee turnovers. However, as the petitioner did not provide the requested wage and withholding reports for the first quarter of 2005, it was unclear which of the two organizational charts more accurately illustrated the staffing composition of the petitioner at the time the Form I-140 was filed.

On September 22, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would primarily perform qualifying managerial or executive tasks. While the AAO concurs with the director's ultimate finding regarding the petitioner's eligibility, his underlying analysis does not accurately assess the supporting documentation submitted. First, the director concludes that the beneficiary's tasks "are more indicative of an employee who is performing the necessary tasks to provide a service or to produce a product." This finding is primarily based on the beneficiary's job description, which was initially submitted in the December 3, 2004 letter in support of the Form I-140. Based on the AAO's comprehensive analysis of the record, the petitioner's description of the beneficiary's proposed employment is primarily comprised of vague job responsibilities rather than specific job duties that convey an understanding of what

the beneficiary would be doing on a daily basis. Thus, while the AAO finds that the petitioner failed to establish its eligibility to classify the beneficiary as a multinational manager or executive, this finding is primarily based on the petitioner's failure to provide a detailed account of the beneficiary's specific daily job duties, not on an affirmative finding that the beneficiary would primarily perform duties of a non-qualifying nature. Case law confirms that 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). Accordingly, when, as in the present matter, a petitioner fails to state the specific duties the beneficiary would perform during the course of his proposed employment, CIS cannot make an affirmative finding of ineligibility based on information that has not be offered for review.

The director also commented on the petitioner's organizational chart and payroll records, finding that the payroll records for the first quarter of 2005 show that the petitioner did not employ anyone. This observation is incorrect and is contradicted by the evidence of record. Specifically, while the petitioner failed to provide the requested quarterly wage and withholding reports, the petitioner did provide a quarterly tax return, Form 941, for the first quarter of 2005. This documentation clearly establishes that the petitioner paid salaries totaling \$97,822 to eight employees from January through March of 2005. Therefore, despite the lack of the relevant wage and withholding report, which would have provided the names and the respective salaries of the petitioner's eight employees during the relevant time period, it appears that the director's finding that the petitioner had no employees in January of 2005 was erroneous. The director's comment is further contradicted by supplemental documentation submitted on appeal, including the relevant quarterly wage and withholding report, which also shows that the petitioner had eight employees in January of 2005 when the Form I-140 was filed. Therefore, the director's erroneous observation is hereby withdrawn.

However, the staffing composition suggested by the quarterly wage report is not corroborated by either of the organizational charts previously submitted. While both charts show [REDACTED] as the company's CFO and [REDACTED] as the China coordinator, the quarterly wage report for the first quarter of 2005 does not identify either individual as a paid employee at the time the Form I-140 was filed. Moreover, the first organizational chart provides the names and lists salaries for a total of 15 employees including the beneficiary; the second organizational chart, which was submitted in response to the RFE, identifies a total of 12 employees, including the beneficiary. Since the first quarter wage and withholding report for 2005 clearly shows that the petitioner employed no more than eight employees in January of 2005, the reliability of the claims made in either of the petitioner's organizational charts is questionable at best. Furthermore, when comparing each organizational chart to the other, it appears that several employees, i.e., Filipina Casanada, [REDACTED], and [REDACTED], switched positions from one of the petitioner's three departments to another. Therefore, while the petitioner has provided sufficient documentation identifying whom it employed in January of 2005, it is unclear which positions were filled and who was assuming the work load of the positions that were not filled.

That being said, 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). 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. Therefore, 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). As previously stated, the petitioner's description of the beneficiary's proposed employment lacks a detailed account of the specific tasks the

beneficiary would perform on a daily basis. While the job description encompasses responsibilities that appear to involve significant discretionary authority, the petitioner fails to specify the actual job duties the beneficiary would perform in meeting the demands of his position as the senior-most employee within the petitioner's hierarchy. As such, even if the petitioner were able to provide an adequate illustration of its staffing composition to show a support staff sufficient to perform the daily non-qualifying tasks, the AAO cannot assume that the beneficiary primarily performs tasks of a qualifying nature without a detailed description of the beneficiary's proposed job duties.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Specifically, 8 C.F.R. § 204.5(j)(3)(i)(C) states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. In the present matter, the petitioner claims to be a wholly owned subsidiary of Jingmei Biotech Co., Ltd., 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 support of the initial Form I-140 and in response to the RFE, the petitioner provided the following documents to establish its ownership and control:

1. Articles of Incorporation filed on February 14, 2000. Article IV indicates that the petitioner authorizes the issuance of ten million shares of stock.
2. Stock certificate no. 2 dated April 24, 2000 showing that the petitioner issued two million shares of stock to Jingmei Biotech Co., Ltd., the beneficiary's foreign employer.
3. The petitioner's stock transfer ledger reiterating the information conveyed in stock certificate no. 2. The ledger does not indicate the amount of money paid for the issued stock.
4. Notice of Transactions Pursuant to Corporations Code Section 25102(f) indicating that the petitioner received \$300,000 as consideration for the shares issued.

5. The petitioner's corporate tax returns from the years 2000 through 2004 with several schedules attached. Schedule L, item 22(b) of the tax return for 2000 shows that the petitioner received \$5,000 in exchange for the issuance of common stock by the end of the tax year. The four remaining tax returns continue to show that only \$5,000 was received in exchange for the sale of the petitioner's common stock.
6. Confirmation of a domestic incoming fund transfer dated June 16, 2000 from Jingmei Biotech Co., Ltd. in the amount of \$300,000.

Thus, when considered in its totality, the documentation provided by the petitioner is inconsistent in relaying information about the amount paid for the petitioner's stock. While the petitioner's notice of transaction indicates that \$300,000 was paid for the petitioner's stock, all of the petitioner's tax returns show that only \$5,000 was received. 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 present matter, the petitioner has provided no evidence or even acknowledged the existence of these considerable inconsistencies, which undermine the petitioner's claim regarding its ownership. Lastly, while the petitioner provided its stock transfer ledger, there is no indication as to what happened with stock certificate no. 1. Counsel merely explained that the stock certificate in question could not be located and that, perhaps, it may not have been issued. However, 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). Thus, the petitioner has failed to account for stock certificate no. 1, which may show whether the petitioner issued stock other than what is shown in stock certificate no. 2.

Additionally, the AAO notes that the fund transfer took place nearly two months after the issuance of stock certificate no. 2, thereby showing that the two events were not contemporaneous. As such, it is unclear whether the \$300,000 was transferred to the petitioner in exchange for a stock issuance that took place nearly two months earlier. Therefore, due to the petitioner's failure to establish that it has a qualifying relationship with the foreign entity, the petition must 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). Therefore, based on the additional ground of ineligibility as 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 it is shown 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 at 1043, *aff'd*, 345 F.3d 683.

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.