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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 06 210 53412

Office: NEBRASKA SERVICE CENTER

Date: JUL 28 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

  
John F. Grissom

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition will be remanded to the director for further review and entry of a new decision.

The petitioner is a corporation organized in the State of California that claims to be engaged in the import and export of agricultural products and wholesale and retail sale of pet foods and pet supplies.<sup>1</sup> It is also doing business as Pet Value, a retail store. The petitioner claims to be a wholly owned subsidiary of Simar (Group) Co., Ltd., a company registered under the laws of Myanmar. The petitioner seeks to employ the beneficiary as its chief executive officer. 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, concluding that the petitioner had not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contended that the director's decision is in error, that it is based on the erroneous perception by the U.S. Citizenship and Immigration Services (USCIS) of the petitioner's business and organizational structure, and misinterpretation of the beneficiary's job duties and salary. The petitioner submitted further evidence in support of its 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

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<sup>1</sup> The AAO notes that a search of the public records filed with the California Secretary of State reveals that the U.S. entity was formed as a corporation in California, but its corporate status is currently listed as "suspended." The petitioner has not provided USCIS with any information regarding this status or any action the petitioner may have taken to regain active status. Thus, the current legal status of the U.S. entity is unclear.

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 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

At issue in the present matter is whether the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity.

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 an attachment to the Form I-140, Immigration Petition for Alien Worker, filed on July 10, 2006, the petitioner described the beneficiary's duties in the United States as follows:

Direct the management and overall administration of the U.S. subsidiary. Provide leadership and direction to ensure that the company mission and core values are put into practice. Establish and execute the goals and policies of the U.S. Subsidiary. Determine the company's expansion of business lines based on collected information of new technology and culture development. Review company's financial statements of current year. Figure percentages of sales, costs, expenses, etc. and set goals for the following year. Review and approve/disapprove key projects and major trading or financial documents. Make modifications if necessary. Authority to determine employees' salary and salary increase, hire/fire personnel of the whole company, including department managers, as necessary. Receive only general direction from the board of directors in Myanmar via telephonic meeting.

In a letter dated July 6, 2006, submitted in support of the petition, the petitioner provided further information on the job duties of the beneficiary under the following categories:

- Direct the management and overall administration of the U.S. subsidiary (40%)
- Establish and execute the goals and policies of the U.S. subsidiary (30%)
- Exercise wide latitude in discretionary decision-making, and make important decisions for U.S. Subsidiary on strategic planning and major financial activity (25%)
- Receive only general direction from the board of directors or the parent company (5%)

The petitioner listed some 27 separate duties under the four general categories above. As the letter is part of the record, the description in its entirety will not be repeated here.

The petitioner stated on the Form I-140 that it has 11 employees. Along with the petition, the petitioner submitted an organizational chart, dated 2001, on which the beneficiary is listed as "Simar Headquarters Managing Director." The staff below the beneficiary included: an accounting manager, supervising a bookkeeper; a trading & marketing developing department manager, supervising a logistics coordinator and a trading assistant; and a retail store manager, supervising a warehouse assistant and three sales staff. The petitioner also submitted an undated chart, listing the name, title, education, legal status, monthly salary, and a brief description of job duties of each of the beneficiary's subordinate employee whose position appeared on the organizational chart.

**On June 8, 2007, the director issued a request for further evidence (RFE).** In connection with the beneficiary's position in the United States, the director asked for further details and clarification relating to certain listed duties, such as "determine the company's expansion of business lines based on collected information of new technology and culture development" and "provide direction to ensure that the company's mission and core values are put into practice." The director requested a more detailed list of the specific day-to-day duties of the beneficiary, including an estimate of the percentage of time spent at each individual task at the beneficiary's job in the United States.

The director also requested an updated organizational chart; copies of IRS Forms W-2 for the beneficiary's subordinates for 2006; a copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2007; and a copy of the work schedule for all employees of the U.S. company for the preceding two weeks.

The petitioner responded to the RFE in a letter dated September 18, 2007, accompanied by additional evidence. In the letter, the petitioner explained at greater length the two job duties raised by the director. In response to the director's request for a more detailed list of day-to-day duties, the petitioner submitted a sample page of the beneficiary's daily agenda.

The petitioner provided a new chart depicting the company's organizational structure as of the end of the first quarter of 2007. The petitioner indicated that the beneficiary reports directly to the board of directors of the parent company and has no direct supervisor. The updated chart shows that by that time, the company had a total of sixteen employees, including the beneficiary. Again, the chart shows the same accounting department manager and bookkeeper. The trading & marketing developing department manager supervises the logistics coordinator, who now has four logistics assistants. The retail store manager continues to supervise a warehouse assistant and two sales assistants. As requested, the petitioner submitted Forms W-2 for the year 2006 for twelve employees.

On January 28, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity. Specifically, the director found that some of the described duties were described in vague or nonspecific terms. The director further found that based on the nature of the business, its size, organizational structure and the service it provides, it does not appear that the reasonable needs of the organization warrant or support an executive position with three subordinate managers. The director also determined that the petitioner has not established that the beneficiary will perform in a

primarily executive or managerial capacity with a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing the day-to-day duties required to operate the business.

On appeal, counsel for the petitioner contends that the director's decision is based on the USCIS' erroneous perception of the petitioner's business and organizational structure and misinterpretation of the beneficiary's job duties and salary. Counsel asserts that the primary purpose of the U.S. company is to engage in international trade as an import/export company. Counsel asserts that the petitioner has submitted evidence to show that the petitioner's gross income in 2007 is over \$1 million and that currently the petitioner has fifteen employees working in three departments. Counsel contends that the description of the beneficiary's job duties "fell exactly into the definition of an 'executive capacity'" and that none of the job duties indicated that the beneficiary would perform any specific day-to-day sales or delivery function. Counsel claims that the beneficiary has the highest authority in the company, that his job is primarily to control, manage and supervise his subordinate staff, and that the beneficiary's subordinate staff possess college degrees and their job duties are professional in nature. Counsel submits further evidence on appeal, including additional U.S. Customs Forms and IRS Form 1120, U.S. Corporation Income Tax Return, for the year 2007.

Upon review, the AAO finds that the evidence of record is sufficient to demonstrate that the beneficiary would be employed by the U.S. company in a primarily executive or managerial capacity. The director's decision dated January 28, 2008 will be withdrawn.

The petitioner has established that the beneficiary will be employed in a primarily executive capacity. The petitioner has provided sufficient explanations and documentary evidence to demonstrate that the beneficiary does in fact direct the management of the organization; establish the goals and policies of the organization, component, or function; exercise wide latitude in discretionary decision making; and receive only general supervision or direction from the board of directors or stockholders of the organization. The petitioner need only establish by a preponderance of the evidence that the beneficiary's duties are primarily executive or managerial in nature. Based on the totality of the evidence provided, the AAO is satisfied that the beneficiary performs the high-level duties associated with the statutory definition of executive capacity and that he would reasonably be required to devote more than half of his time to such duties.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. The AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The petitioner has established that it has a reasonable need for the beneficiary to perform primarily executive duties within the context of its current staffing levels,

overall purpose, and current stage of development. The petitioner has adequately demonstrated that that the majority of the day-to-day, non-managerial functions of the company are performed by the petitioner's subordinate supervisors and employees.

Based on the foregoing, the AAO finds that the petitioner has established that that the beneficiary would be employed by the U.S. company in a primarily executive or managerial capacity. Accordingly, the director's decision dated January 28, 2008 will be withdrawn.

Although the director's decision denying the petition will be withdrawn, the AAO finds the evidence is insufficient to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act. 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 the U.S. 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.

In this matter, the record contains certain material inconsistencies regarding the petitioner's ownership and control. In its July 6, 2006 letter, the petitioner claimed that the beneficiary served as the managing director of Simar since its inception in 1993 until his transfer to the U.S. company in 2002. The petitioner claimed that Simar owns 100% of the issued and outstanding stock of the U.S. company. The petitioner submitted a copy of a stock certificate number "001", dated August 20, 2001, certifying that Simar owns 100,000 of the U.S. company's shares, representing all of the company's authorized shares. The petitioner also submitted a copy of its stock transfer ledger showing that certificate 001 is an original issuance to Simar and is the only issuance of the company's shares, presumably as of the time the ledger was submitted to USCIS in July 2006. In addition, the petitioner submitted its IRS Forms 1120X, Amended U.S. Corporate Income Tax Return, for the years 2004 and 2005. The petitioner stated in part II of each of the Forms 1120X, which requires an explanation of amendments made, that the amended tax return "is to confirm ownership and capital contribution. Simar (Group) Company Limited (foreign company) is the 100% owner of this company."

However, the AAO notes that the petitioner has previously filed a Form I-140 on the beneficiary's behalf on March 25, 2005 (file number WAC 05 123 51824), which was denied by USCIS on November 04, 2005. The evidence submitted in support of that petition has been incorporated into the petitioner's present record. It is noted that, in support of its claim in the previous petition that it is wholly owned by Simar, the petitioner had submitted a stock certificate number "1" dated August 13, 2001, certifying that Simar owns 10,000 of the company's shares. In response to USCIS' request

at that time for its stock transfer ledger, the petitioner did not submit one and stated that its stock ledger had not been completed and that there is no regulation in the State of California requiring that a company's stock ledger be completed in order for business to be conducted. Significantly, the AAO notes that in connection with the 2005 petition, the petitioner submitted its IRS Forms 1120 for the years 2001 through 2004, all of which stated that the beneficiary, not Simar, owned 100% of the U.S. company's stock.

In the current petition, there is no reference made to the certificate number "1" representing 10,000 shares of the U.S. company owned by Simar that was purportedly issued on August 13, 2001, or to the beneficiary's ownership of the company's stock during the years 2001 through 2004, as stated on the petitioner's corporate tax returns for those years. The record lacks any documentation or explanation that would reconcile or clarify these inconsistencies regarding the ownership of the U.S. company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Again, any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies, and doubt cast on any aspect of the petitioner's proof may 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. 582, 591-92 (BIA 1988).

In light of the above unresolved inconsistencies regarding the ownership of the U.S. company, the AAO finds the record is insufficient to establish that there exists a qualifying relationship between the U.S. and foreign entities. The petition will be remanded and the director is instructed to request additional evidence relating to the qualifying relationship between the foreign entity and the U.S. entity. The director is instructed to request further clarification and supporting evidence regarding the ownership of the U.S. company at the time the petition was filed. The petitioner should provide explanations for: (1) the existence of the August 13, 2001 stock certificate and why it was not recorded in the company's stock register or mentioned in the current petition; and (2) why the U.S. company's tax returns for 2001 through 2004 indicate that the beneficiary owned 100% of the U.S. company, when the stock certificate dated August 20, 2001 and stock ledger submitted with this petition indicated that the foreign entity is the sole owner of the U.S. company since that date. The petitioner should submit further documentary evidence in support of its explanation of these discrepancies.

It is emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, June 22, 2006.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner meets the requirements for the requested immigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is

instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

**ORDER:** The decision of the director dated January 28, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.