U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 07 2013 OFFICE: TEXAS SERVICE CENTER FILE

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The director dismissed a subsequently filed motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Texas corporation, states that it is engaged in "retail, fast food and investment." It operates a gas station, convenience store and a [redacted]andwich shop. The petitioner seeks to employ the beneficiary as Vice President/Director. 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 based on the following grounds of ineligibility: (1) the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer; (2) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; and, (3) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

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):
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> * * *
>
> (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 first issue that will be addressed in this proceeding is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner submitted a stock certificate, number 3, which states the beneficiary's foreign employer owns 700 shares of the petitioner's 1,000 authorized shares. The stock certificate was issued on October 30, 2007.

In response to the director's request for additional evidence that the foreign entity actually paid for its ownership in the U.S. company, the petitioner submitted copies of its bank statements. The petitioner highlighted three transactions on the bank accounts. The first transaction was dated March 5, 2007, and it is a wire transfer in the amount of $9975.50 and the originator is The second highlighted transaction is for April 12, 2007 and it is a wire transfer of $13,997.00 and the originator is The third highlighted transaction is dated April 30, 2007 and it is a wire transfer of $370.00 from As noted in the director's denial, dated April 4, 2012, the copies of the bank accounts are not sufficient to indicate investment of the foreign company since the wire transfers do not clearly name the foreign company as the originator of the wire transfers.

On appeal, the petitioner submitted new evidence of wire transfers in order to indicate the financial contributions of the parent company to the U.S. petitioner. The petitioner submitted a receipt of two wire transfers dated July 3, 2005 and August 5, 2005, from the beneficiary's foreign employer to the petitioner. However, the petitioner never explained why these wire transfer dates are different from the wire transfer dates submitted previously, or why they pre-date the incorporation of the petitioning company in February 2007. 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 reviewing the documentation submitted with the petition, the petitioner has not established a qualifying relationship between the beneficiary's foreign employer and the petitioner.

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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986);

Matter of Hughes, 18 I&N Dec. 289 (Comm'r 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., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. In the current petition, the petitioner submitted stock certificate number 3. The petitioner did not give any information of stock certificates number 1 and 2, thus, it is not clear if the petitioner is owned by other entities or individuals. Without the additional documentation as mentioned above, it is impossible to determine that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

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. As noted above, the petitioner submitted several receipts of wire transfers from individuals but it was not clear that the wire transfers originated from the foreign company. The petitioner also submitted two wire transfers from the foreign company but it is not clear that this was for payment for ownership of the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The remaining two issues that will be addressed in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying 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--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
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> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In the present matter, an analysis of the record does not lead to affirmative conclusion that the beneficiary was employed abroad or would be employed in the United States in a qualifying managerial or executive capacity. With regard to both the foreign and proposed positions the petitioner provided a list of job duties performed by the beneficiary which included broadly stated job responsibilities. Due to the overly general information, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying.

The petitioner explained that the beneficiary held the position of Director of Marketing Business Development when she worked abroad with the parent company. According to an organizational chart submitted by the petitioner, the beneficiary supervised an operations manager and an office manager who in turn supervised a corporate manager, general sales manager, and 14 sales associates and clerks.

In response to the director's request for evidence, the petitioner submitted a description of the beneficiary's job duties with the foreign employer; however, the duties described were general and nonspecific and failed to provide any insight into the nature of the beneficiary's actual day-to-day duties. For example, the petitioner stated that the beneficiary would "oversee the activities of the executives and staff that are subordinate to her"; "was instrumental in getting the company into the travel business and obtaining necessary licenses and accounts"; "visit and supervise company operations in different locations"; and, "was an important influence for finalizing the long term business plans of the organization and was instrumental in expanding operations." 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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). The petitioner's description of the beneficiary's position with the foreign entity does not identify the actual duties she performed, such that they could be classified as managerial or executive in nature.

The record lacks any corroborating evidence such as a comprehensive job description with a percentage breakdown for each duty, a description of job duties performed by the foreign company's other employees, or evidence of payment of the other employees. 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)).

On appeal, counsel for the petitioner asserts that the beneficiary primarily performed executive and managerial duties, however, the petitioner did not submit any documentation to corroborate this assertion. 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).

After reviewing the beneficiary's job description with the foreign entity, the AAO cannot conclude that the primary portion of the beneficiary's time was spent performing tasks within a qualifying managerial or executive capacity.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner provided a list of job duties that was not accompanied by a percentage breakdown. Due to the overly general and vague list of job duties, the AAO is unable to gain a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying. For example, in describing the beneficiary's position in the United States, the petitioner stated that the beneficiary will "approve contractual dealings of the company"; "continue bringing her expertise in supporting our business model of having an efficient management team to train new managers and free up the time of top management to focus on future opportunities"; "exploring ways and means for the company to enter into new markets so that the US subsidiary may expand scope of operations"; perform "strategic analysis of opportunities and competitive profiling of the company"; "assist in coordinating among departments and with outside agencies, specifically vendors and financial institutions"; and, be responsible for "coordination with the financial area of the foreign company." However, it is unclear which specific tasks actually fall within these broad categories. Merely using the term "manage" to describe the beneficiary's functions does not establish that the supervisory tasks the beneficiary will perform are of a qualifying nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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).

In the director's denial, dated April 4, 2012, he also noted that USCIS had spoken t who is identified on the petitioner's organizational chart as the ' manager." stated that the beneficiary was working at the as a sandwich bread prep/sandwich artist employee. In addition, USCIS spoke to the petitioner's president, who stated that the beneficiary would make sandwiches on extremely busy days but her main duties would be marketing the and the convenience store. The director noted that the duties mentioned by are different from the duties described in the letter submitted with the petition.

On motion, the petitioner submitted an affidavit from the beneficiary that stated that sometimes she does assist in making sandwiches for a "hands on" experience in order "to better understand customers' needs." The petitioner also submitted an affidavit from that stated, "my letter submitted with the response to the NOID described [the beneficiary's] job duties better than I could articulate in a telephone call of a few minutes." The final affidavit was from who stated that on the telephone call, "I was asked whether she made sandwiches at the to

which I replied 'yes' since she does that to get a feel for the customers' likes and dislikes and what type of bread and toppings they prefer. Also, she helps out if we get extremely busy."

It is not clear how the petitioner claims that the beneficiary will supervise 14 employees, yet she needs to fill in with the sandwich making at the when it is busy. As a Vice President/Director, the beneficiary should not have to perform non-qualifying duties of making sandwiches if she has sufficient staff. Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner has not established that it has sufficient employees, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business such as making sandwiches during busy times.

In summary, the petitioner has failed to provide sufficient evidence to establish that the beneficiary was employed abroad and that she would be employed in the United States in a qualifying managerial or executive capacity and based on these findings, the instant petition cannot be approved.

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.