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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 04 2005

WAC 96 218 50455

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation claiming to be engaged in international trade. The petitioner seeks to employ the beneficiary as its general manager. 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 revoked the petition upon determining that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity; that the petitioner had not submitted sufficient documentary evidence to establish a qualifying relationship with a foreign entity; and that the petitioner had not establish that it had been and continues to do business.

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

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 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 first issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

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;
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> (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 initial petition, the petitioner submitted the beneficiary's proposed position description. The director repeated that description in its entirety. As such, the AAO need not duplicate the director's efforts by repeating the beneficiary's position description.

On January 23, 20004, after further review of the record and the information submitted by the petitioner, the director issued a notice of his intent to revoke approval of the petition. The director repeated the beneficiary's job description and reviewed the information provided in the petitioner's organizational chart. Based on the director's review of the documentation submitted, the director requested that the petitioner submit a more

detailed description of the beneficiary's job duties, which illustrates the beneficiary's typical day on the job. The petitioner was also instructed to submit its quarterly wage reports for all four quarters of 2002 and 2003. The petitioner was given 30 days in which to respond to the director's concerns.

In response to the notice of intent, the petitioner provided an additional list of job duties for the beneficiary. As the director has incorporated this entire list in the revocation, the AAO will consider that list without repeating it in this discussion. It is noted that the petitioner failed to submit the requested wage statements.

On April 6, 2004, the director revoked approval of the petition concluding that the petitioner failed to establish that the beneficiary would be performing managerial or executive duties.

The director noted that even if it had other lower-level managers, "such managers cannot be considered managers, for immigration purposes, because *they* are not managing professional employees." (Emphasis in the original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. In the present matter, the organization is structured so that the second tier, first-line supervisor relieves the beneficiary from supervising non-professional employees. Consequently, the beneficiary may not be disqualified based on the conclusion that he does not manage professional employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees. The director's comment, therefore, is incorrect and is hereby withdrawn.

The director also questioned the beneficiary's freedom to primarily perform qualifying duties in light of the petitioner's quarterly wage report during the third quarter in 1996, which indicates that the beneficiary was the petitioner's only full-time employee.

On appeal, counsel asserts that the director failed to take into account the reasonable needs of the petitioner, which is unlike other traditional import and export businesses, as its primary focus is to locate and negotiate contracts with retailers and wholesalers that operate in the United States. While counsel claims that the petitioner "designates professional employees to manage the execution of contracts," he fails to address the director's initial concern regarding the petitioner's quarterly wage statement, which shows that the beneficiary was the petitioner's only full-time employee at the time the petition was filed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). While counsel is correct in suggesting that the director must consider the reasonable needs of the petitioning organization when reviewing the company's staffing levels, the fact remains that the petitioner must establish that it is adequately staffed to relieve the beneficiary of having to perform non-qualifying duties. The fact that the petitioner's entire staff at the time of the petition's filing was comprised of three employees, only one of whom was working full-time, strongly suggests that the petitioner was in need of the beneficiary's services in more than merely a managerial or executive capacity.

Counsel further claims that the beneficiary is responsible for the essential function of serving as the "key link" between the U.S. subsidiary and its foreign parent and that as a result the beneficiary fits the definition of function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the description of duties provided in response to the notice of intent to revoke suggests that the beneficiary has broad managerial powers, including oversight of the business operation, development of business strategies, and personnel management. Although the petitioner indicated that the beneficiary's duties include representing the U.S. and foreign entities at public events and conferences, as well as meeting with the parent company's key executives, the overall list of duties does not emphasize the beneficiary's role as a liaison between the two companies. Nor has the petitioner identified, with any specificity, the essential function that the beneficiary has been and would be purportedly managing. The idea of classifying the beneficiary as a function manager appears to have originated with counsel in his appellate brief, and is not corroborated by any of the claims made independently by the petitioner in any of its prior submissions. It is noted, however, that the 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).

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). 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). In the instant matter, the petitioner's descriptions of the beneficiary's duties are entirely too broad to convey any understanding of what the beneficiary actually does on a daily basis. Generally stating that the beneficiary develops strategy, oversees business operations, and manages subordinate personnel merely indicates that the beneficiary has discretionary authority, but does not specifically disclose what actual duties the beneficiary performs.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that the beneficiary would otherwise be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the

record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a qualifying managerial or executive capacity. For this initial reason, the petition must be revoked.

The second issue in this proceeding is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
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> (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.

In the petitioner's supporting statement, dated July 30, 1996, the petitioner stated that it is a subsidiary of Qingdao Banway Trade Co., Ltd., located in China. In support of this claim, the petitioner submitted the following documentation: 1) the petitioner's articles of incorporation authorizing the issuance of 100,000 shares of stock; 2) a stock certificate showing the foreign entity as the sole owner of petitioner's outstanding stock; 3) Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing a total offering of $100,000 of common stock; 4) a stock transfer ledger showing that the foreign entity paid no money for its ownership of 100,000 shares of the petitioner's stock; 5) the petitioner's 1995 tax return, which indicates in Schedule L, No. 22(b) that the petitioner has $100,000 in stockholder equity; and 6) the petitioner's 1996 financial statement, which includes a balance sheet showing $102,360.97 in shareholder equity. It is noted that the petitioner's 1995 tax return and its 1996 financial statement contradict the petitioner's stock transfer ledger, which indicates that the foreign parent entity paid no money for its ownership of the petitioner's stock.

In the director's notice of intent to revoke, the petitioner was instructed to submit original wire transfer documents to show that the claimed parent company paid for its ownership of the petitioner's stock. The director specifically noted the petitioner would need to explain the source of any funds that did not directly originate with the claimed parent organization and to further explain the petitioner's affiliation with that source. The petitioner was also instructed to provide the minutes of the meeting in which its shareholders were named along with the percentage of their ownership shares.

In response, the petitioner submitted three wire transfer documents, dated February 16, 1996, August 20, 1996, and October 30, 1996, respectively. It is noted that all three fund transfers originated with Agencia Commercial Banway and totaled under $7,000. The petitioner also submitted an altered stock transfer ledger indicating that the foreign entity paid a total of $10,000 for 90,000 shares of the petitioner's stock.

After reviewing the evidence of record, the director concluded that the petitioner failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel states that the petitioner submitted sufficient evidence to establish that it has the requisite qualifying relationship with a foreign entity, but fails to resolve the factual inconsistencies discussed above. However, 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). The 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). Thus, counsel's insistence that the petitioner's evidence is adequate cannot be deemed objective evidence and, as such, does not help resolve the considerable inconsistencies pointed out in this discussion.

Counsel asserts that the director placed undue emphasis on the foreign entity's monetary contribution and failed to consider the amount of control the foreign entity has over the U.S. petitioner. However, as pointed out by counsel himself, the regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). 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. In the instant case, the only evidence of fund transfers indicates that all three transactions for which receipts were submitted originated with Agencia Commercial Banway. The petitioner has offered no explanation of this company's relation, if any, to the claimed foreign parent organization. Therefore, the AAO cannot assume, based on the three fund transfers, that the foreign entity provided any capital contribution for its claimed ownership of the petitioner's stock.

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 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 the present matter, the petitioner has failed to provide sufficient evidence documenting the foreign entity's purchase of ownership interest in the U.S. entity. Therefore, the AAO concludes that the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition must be revoked.

The final issue in this proceeding is whether the petitioner has established that it has been and continues to do business in the United States.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as 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.

In the director's notice of intent to revoke, the petitioner was instructed to submit shipping documents in chronological order accounting for each month of 2001, 2002, and 2003. However, the petitioner failed to comply with that portion of the director's request for evidence.

It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant case, the petitioner failed to provide documents expressly requested by the director and, which directly pertain to the crucial issue of whether the petitioner has been and continued to do business during the relevant time period. Therefore, the AAO concludes that the petitioner has failed to establish that it had been doing business for one year prior to the filing of the I-140 petition. For this final reason, the petition must be revoked.

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.