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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

[redacted]

File: WAC 02 053 60552 Office: CALIFORNIA SERVICE CENTER Date: APR 1 0 2003

IN RE: Petitioner:
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]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based 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 corporation organized in California in March 1994. It is engaged in the import, export, and wholesale of portable power sources. It seeks to employ the beneficiary as its president and 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 determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the director's decision was arbitrary and an abuse of discretion as the beneficiary was previously approved as an L-1A manager. Counsel also asserts that the petitioner has submitted evidence of an "affiliate" relationship with the overseas entity.

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 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. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will be employed in an executive or managerial capacity for the petitioner.

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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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.

The petitioner initially submitted a letter signed by an individual, identified as the vice-president, in support of the petition. The letter provided a general description of the beneficiary's duties including "responsibility for the direction and coordination of activities and operation of the company." The petitioner also stated that the beneficiary would "be responsible for planning, formulating, and implementing administrative and operational policies and procedures." The petitioner indicated further that the beneficiary would supervise other managers and professionals and would implement the organization's goals through subordinate personnel including independent contractors and subcontractors.

The petitioner also provided its organizational chart depicting the beneficiary as president, a vice-president/general manager, a sales manger, an accountant, warehousemen, and sales representatives.

The director requested further evidence of the beneficiary's managerial or executive duties. The director specifically requested a more detailed description of the beneficiary's duties, a list of all employees under the beneficiary's direction, and the percentage of time the beneficiary spent on his duties. The director also requested copies of the petitioner's California Form DE-6, Quarterly Wage Report for the fourth quarter of 2001 and the source of all remuneration for all employees.

In response, the petitioner through its counsel stated that the beneficiary managed the entire organization and each essential function, controlled the work of the chief executive officer who supervised the sales, administrative, and shipyard departments. Counsel also stated that the beneficiary qualified under the executive capacity definition as the beneficiary performed those functions as well. The petitioner provided its organizational chart depicting generally the same managerial hierarchy as the organizational structure previously submitted, although the names of the individuals occupying the various positions had been changed.

The petitioner further provided its California Form DE-6, Employer's Quarterly Wage Report for the fourth quarter of 2001. The California Form DE-6 showed three employees, correlating with the positions of president, general manager, and sales manager identified on the most recent organizational chart. The petitioner also submitted two Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income, issued by it in 2001. The individuals on the IRS Forms 1099 correlated with the position of vice-president/general manager and sales representative on the organizational chart submitted with the petition. The most recently submitted organizational chart identified both the individuals as sales representatives.

Counsel also referred to the previous approval of the beneficiary in the L-1A classification and asserted that "it was a waste of valuable and limited Service resources to re-adjudicate, second guess or require additional evidence with respect to an issue already decided by the Service."

The director determined that the evidence submitted, including the petitioner's job descriptions of the beneficiary's responsibilities, the organizational chart, and the California Form DE-6 did not establish that the beneficiary was or would be employed in a position that was primarily managerial or executive in scope. The director determined that it was unreasonable to believe that the beneficiary would not be assisting with the day-to-day non-supervisory duties. The director further determined that the beneficiary was a first-line supervisor of non-professional employees. The director also determined that the petitioner had not shown that the beneficiary managed or directed the management of a function rather than performing the operational activities of the function. The director also noted, in reference to counsel's objection to submitting additional evidence, that he was not required to approve petitions where eligibility had not been demonstrated.

On appeal, counsel for the petitioner asserts that the beneficiary is a manager and that the director's decision to the contrary is arbitrary in light of the two previous approvals of the petitioner's L-1A petitions. Counsel asserts that the managerial capacity of the beneficiary's position has been demonstrated, and in addition, the beneficiary also supervises professional employees. Counsel appears to assert that the beneficiary's position is also an executive position.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has provided general descriptions of the beneficiary's duties. Stating that the beneficiary will be responsible for the direction and coordination of the activities and operation of the company and for planning, formulating, and implementing policies and

procedures does not convey a sense of what the beneficiary will be doing on a daily basis. These statements are conclusory in that they broadly re-state elements contained in the definitions of managerial and executive capacity. The petitioner declined to provide a more detailed description of the beneficiary's duties in response to the request for evidence, instead again, providing a general statement that the beneficiary managed the entire organization and each essential function.

In addition, to the lack of a detailed description of the beneficiary's duties, the record does not contain evidence of decisions made by the beneficiary that support the claim that the beneficiary performed duties in a managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The organizational charts provided are not sufficient, in and of themselves, to establish whether the beneficiary is performing managerial or executive duties with respect to the organization or is actually providing operational services to the organization. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel's assertions that the beneficiary is not providing services to the organization are not sufficient. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the petitioner's indication that the beneficiary supervised other managers and professionals and implemented the organization's goals through subordinate personnel including independent contractors and subcontractors, and controlled the work of the chief executive officer who supervised the sales, administrative, and shipyard departments is also not supported in the record. *See Ikea US, Inc. v. INS, supra.* The petitioner has provided evidence of only three salaried employees, the beneficiary, a vice-president/general manager, and a sales manger. The petitioner, also sometime in 2001, paid one individual to perform the duties of either a vice-president/general manager or a sales representative, as supported by the IRS Form 1099. The petitioner also paid a second individual to perform the duties of a sales representative, also as supported by the IRS Form 1099. It is not possible to determine from the IRS Form 1099s whether these two individuals were working for the petitioner at the time the petition was filed or were not. A petitioner must establish eligibility at the

time of filing. *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has not provided independent evidence of individuals employed in the warehouse or administrative departments. It appears instead from counsel's description of the general manager's duties, that the general manager is responsible for these duties. Although, counsel asserts that the petitioner's subordinate managers are given discretionary authority to hire employees, to negotiate contracts and sales, and supervise daily operations, there is no evidence that the "managers" have hired or supervised other employees, or "managed" their departments rather than providing the services necessary to operate the departments. Likewise, the petitioner has not provided evidence that the positions of sales representatives or a person handling shipments, disposition of merchandise, and purchasing are professional positions. The brief position descriptions provided do not compare with the type of positions used as examples in the definition of "profession" at section 101(a)(32) of the Act. The petitioner has not provided sufficient evidence that the beneficiary supervises and controls the work of other supervisory, managerial, or professional employees.

Finally, counsel's assertion that the director's decision is arbitrary in light of the two previous approvals of the petitioner's L-1A petitions is not persuasive. Although the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions, the director specifically points out that he is not bound to approve a petition where eligibility had not been demonstrated. In the instant case, the director did not specifically state that the previous decisions were made in error, but if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Bureau. As noted by the director, the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Bureau or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Moreover, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAO. The AAO is not bound to follow the contradictory rulings of service centers. *Louisiana Philharmonic Orchestra v. INS*, 44

F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). In sum, the petitioner has not submitted sufficient evidence on appeal, to overcome the director's decision that the beneficiary is not serving in a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

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;
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> (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.
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> *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.
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> *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 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.

The petitioner initially stated that it was a wholly-owned subsidiary of the foreign entity. The petitioner submitted a stock certificate and stock ledger to confirm that the overseas entity owned 1,000 shares of the petitioner, purchased at a cost of $20,000. The stock ledger does not show any other owners. The petitioner, in response to the director's request for evidence on this issue, indicated that it has an affiliate relationship with the overseas entity. The petitioner, through its counsel, indicated that both the overseas entity and the petitioner were owned and controlled by the beneficiary's family. Counsel again asserted that the qualifying relationship had been established by

the prior approvals of the petitioner's L-1A petitions and declined to submit further evidence or explanation on this issue.

The director noted the above inconsistent information, as well as information in the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2000. The director noted that the IRS Form 1120 stated on Schedule E that an individual owned 100 percent of the petitioner's common stock. On Schedule K of the same IRS Form 1120, the petitioner indicated that no foreign person owned, directly or indirectly, 25 percent of the corporation. On Schedule L, line 22 of the same IRS Form 1120, the petitioner indicated the value of the common stock issued was $200,000 and had been $200,000 the previous year as well. The director concluded that in light of the inconsistent information submitted on the issue of the petitioner's ownership and control, the petitioner had not established its qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel asserts that the petitioner and the overseas entity are owned and controlled by the beneficiary. Counsel asserts that the petitioner is not a subsidiary but is an affiliate of the foreign entity and the answers on Schedule K, line 4 of the IRS Form 1120 for 2000 relate to complex tax issues and not to the application of immigration laws. Counsel also asserts that the petitioner indicated that no foreign person owned 25 percent of the petitioner because the owner of the petitioner, the beneficiary in this instance, for tax purposes was considered a United States resident.

Counsel's assertions are not persuasive. Counsel does not explain why the petitioner is considered an affiliate instead of a subsidiary when the record contains only a stock certificate issued to the overseas entity and not to the beneficiary. Moreover, counsel provides no evidence of the ownership and control of the foreign entity to even enable the Bureau to review an "affiliate" relationship. Counsel does not explain "the complex tax issues" that would require the petitioner to state that the beneficiary is a United States resident for tax purposes. Counsel does not provide the relevant portions of the United States Tax Code that allow the petitioner to make contradictory statements regarding its ownership and control for tax and immigration purposes. Counsel does not explain the growth in value of the petitioner's stock as noted on Schedule L, line 22 of the IRS Form 1120. Finally, counsel's reference to previous approvals again is without merit. Again, as noted by the director, the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See Matter of Church Scientology International, supra*. In the instant case, it is clear that the petitioner has not established that it is affiliated with or a subsidiary of the beneficiary's overseas employer. The record contains contradictory information that has not been adequately explained or otherwise resolved. It is incumbent upon the petitioner to resolve any

inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The petitioner has not overcome the director's decision on this issue.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.