



U.S. Department of Justice

Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: [Redacted]

Office: NEBRASKA SERVICE CENTER

Date: JAN 18 2001

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)

IN BEHALF OF PETITIONER:

[Redacted]

Public Copy

Identifying data added to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Marj C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, [REDACTED], is a Utah corporation that claims to engage in the import and distribution of products from [REDACTED] located in Mexico. The petitioner seeks to employ the beneficiary as its general manager and, therefore, endeavors to classify him as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director of the Nebraska Service Center denied the petition because the petitioner failed to establish that a qualifying relationship exists between the U.S. and foreign entities.

On appeal, counsel states that a separate brief or additional evidence will not be submitted.

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 issue to be examined in this proceeding is whether the petitioner, Casanoble Food Co., is either a subsidiary or affiliate of the foreign entity, Distribucion Carnes Superiores.

8 C.F.R. 204.5(j)(2) states, in pertinent part:

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.

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; * * *

The record reflects the following regarding the ownership of stock for the U.S. and foreign entities:

U.S. Entity:

[REDACTED] 50% ownership
[REDACTED] 50% ownership

Foreign Entity:

[REDACTED] 40% ownership
[REDACTED] 20% ownership
[REDACTED] 20% ownership
[REDACTED] 19% ownership
[REDACTED] 1% ownership

In response to an August 31, 1999 request for additional information, counsel claimed that "...the US company is a subsidiary of the Mexican company because the principle [sic] owner of the Mexican company owns half of the U.S. company and controls the company." Counsel's argument that Mr. [REDACTED] can be considered a parent for the purpose of establishing that a parent/subsidiary relationship exists is inconsistent with the regulatory definition of parent.

According to 8 C.F.R. 214.2(1)(i)(I), parent means a firm, corporation, or other legal entity which has subsidiaries. Clearly, Mr. [REDACTED] is not a firm, corporation or legal entity and, moreover, an individual cannot have subsidiaries. Therefore, counsel was incorrect when she claimed that the relationship between the petitioner and the foreign entity was a parent/subsidiary relationship.

Concerning an affiliate relationship, in the initial I-140 petition, counsel stated the following about ownership and control of the two entities:

As your request noted, [REDACTED] owns 40% of the Mexican company and is in fact the sole individual that has the day to day control of the company.. [REDACTED]

[REDACTED] has equal control and veto power over the U.S. company.

The U.S. and foreign entities also do not qualify as affiliates for two reasons.

First, the petitioner did not present any documentary evidence, such as agreements over the voting of shares and proxy votes to show that Mr. [REDACTED] controls the U.S. entity and the foreign entity. Counsel's statement that Mr. Rivera controls the foreign company is insufficient for the purpose of this proceedings. 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). Furthermore, counsel's statement that Mr. Rivera has equal control and veto power over the U.S. company is irrelevant in the instant case. The issue of equal control and veto power pertains only to a 50-50 joint venture. The petitioner is a partnership, not a joint venture.

Second, it is clear from the alleged ownership of each entity that the same group of people do not own and control both the foreign and U.S. entities. As the ownership structure of each entity illustrates, the U.S. entity has two owners; the foreign entity has five owners.

The evidence in the record clearly reflects that the petitioner is not a subsidiary of the foreign entity, or that the petitioner and the foreign entity are affiliates. Therefore, the decision of the director is affirmed.

Beyond the decision of the director, the petitioner failed to establish that (1) it had been doing business for at least one year at the time the petition was filed; (2) it has the ability to pay the beneficiary the proffered wage; and (3) the beneficiary is currently and will continue to be employed in an executive or managerial capacity with the U.S. entity.

In order to establish that it has been doing business for at least one year, a petitioner must present evidence that it has engaged in the regular, continuous and systematic provision of goods and/or services. 8 C.F.R. 204.5(j)(2). The petitioner did not present any invoices, copies of its corporate tax returns, or customs documents to show that it had been engaged in the regular, systematic and continuous provision of goods and/or services for at least one year at the time it filed the petition. The Service, therefore, cannot find that the petitioner has been doing business.

The petitioner also failed to establish that it has the ability to pay the proffered yearly wage of \$36,000. According to 8 C.F.R. 204.5(g)(2), a petitioner must submit evidence of its ability to pay either in the form of copies of annual reports, federal tax returns or audited financial statements. The petitioner did not

submit any of these documents. Because the petitioner failed to comply with the regulatory requirement regarding appropriate evidence, the Service cannot conclude that the petitioner has the ability to pay the beneficiary's proffered wage of \$36,000 per year.

Finally, the petitioner failed to establish that the beneficiary is currently and will continue to be employed in an executive or managerial capacity for the U.S. entity. In the initial I-140 petition, the petitioner listed the beneficiary's duties as purchasing, transportation, human resources, customs procedures, translations, and forecast and planning of business strategies. The majority of these duties (purchasing, translations) are neither managerial nor executive in nature. The petitioner failed to establish that the beneficiary's primary role within the company fits the definition of executive capacity or managerial capacity noted in Sections 101(a)(44)(A) and (B) of the Act.

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.