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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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



File: WAC 01 244 59074 Office: CALIFORNIA SERVICE CENTER Date: APR 08 2003

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]

COPY

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 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 which 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was established on November 1, 1991 in the State of California. The corporation is engaged in the business of publishing financial books and sponsoring international seminars on financial investment. The petitioner seeks to employ the beneficiary as its operations manager, at a salary of \$75,000 per year. 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 on March 7, 2002 concluding that the petitioner had not established that a qualifying relationship exists between the petitioning company and the foreign entity. The director also concluded that the petitioner had failed to establish its ability to pay the beneficiary's proffered wage.

On appeal, counsel for the petitioner submits an appellate brief asserting that the director's findings were erroneous. Counsel submitted additional evidence in support of those arguments.

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 in this proceeding is whether the petitioner has established that a qualifying relationship exists between the United States and foreign entity.

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

*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;

*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.

The visa classification that the petitioner seeks is intended for multinational executives and managers. The language of the statute specifically limits this visa classification to those executives and managers who have previously worked abroad for at least one year in the preceding three for the overseas entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. In order to qualify for this visa classification, the petitioner must establish that there is a qualifying relationship between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

In the initial petition, the petitioner claimed that the foreign and U.S. entities are affiliates of one another as they are both entirely owned by the same individual. In support of this claim the petitioner provided the Articles of Incorporation for the U.S. company and a copy of a stock certificate, issued on December 12, 1991, representing 10,000 shares of common stock.

On November 13, 2001, the director requested that the petitioner submit additional evidence, in the form of a stock ledger, for the purpose of establishing its qualifying relationship with a foreign entity.

The petitioner's response included a statement from counsel stating that the U.S. and foreign entities' stock certificates, which had been previously submitted, are "the best evidence available to prove the affiliate relationship." Although the petitioner submitted both sets of stock certificates again, it did not comply with the director's request for a stock transfer ledger.

It is noted that where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider

evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, it may file a new petition.

On appeal, counsel asserts that sufficient evidence has been submitted to establish that the U.S. and foreign entities are affiliates. Counsel also submits the petitioner's stock ledger, arguing, however, that such a document is inadequate to prove ownership as it is "easily altered." The petitioner failed to comply with the Bureau's request until the filing of the appeal. Therefore, as directed by the case precedent discussed above, the stock transfer ledger will not be considered in this proceeding.

Turning to the issue of a qualifying relationship, counsel also asserts that Schedule K of the petitioner's tax returns for 1999 and the year 2000 establish the ownership of the U.S. petitioner. However, Schedule K does not establish ownership of the foreign corporation, a component that is necessary in establishing the existence of a qualifying relationship between the U.S. and foreign entities. Therefore, regardless of the validity of the information provided in the petitioner's tax returns, the tax return does not establish whether a U.S. and foreign entity share common ownership and control.

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 immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). 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 of Scientology International*, *supra* at 595.

As general evidence in an immigrant petition for a multinational executive or manager, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of an 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. Without full

disclosure of all relevant documents, the Bureau is unable to determine the elements of ownership and control.

Furthermore, a certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. *Black's Law Dictionary* (7th ed. 1999). The regulation at 8 C.F.R. §204.5(j)(3)(ii) specifically allows the director to request additional evidence in appropriate cases. As ownership is a critical element of this visa classification, the Service may reasonably inquire beyond the issuance of paper stock certificates. The director did so in the instant case. However, as previously discussed, the petitioner failed to provide all of the requested necessary documentation. As a result, the only evidence of the ownership of the U.S. and foreign companies is their respective stock certificates. In accordance with the above discussion, it has been determined that the evidence of record is inadequate to establish a qualifying relationship between the petitioner and its claimed foreign affiliate. For this initial reason the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established that it has the ability to pay the beneficiary's proffered wage of \$70,000 per year.

8 C.F.R. §204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the

petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

In the denial, the director discussed the petitioner's 1999 and year 2000 tax returns. The director noted that, despite the beneficiary's claimed salary of \$70,000 per year and the petitioner's four additional employees claimed to be supervised by the beneficiary, the petitioner paid only \$42,075 in salaries and wages in 1999 and only \$75,274 in the year 2000. Also, the director discussed the petitioner's negative net income of hundreds of thousands of dollars during both of those tax years.

On appeal, counsel asserts that the director erred in focusing on the petitioner's net operating loss and claims that it is a "standard business practice" for a company to "[strive] to reduce its net profits so as to reduce its tax liability." Precedent case law, however, has established the factors that the Bureau should consider when determining a petitioner's ability to pay. As discussed above, the Bureau will look at the petitioner's net income figure reflected on its federal income tax return, without consideration of depreciation or other expenses. In the instant case, the petitioner's year 2000 tax return, its most recent tax document, indicates that the petitioner's total income is negative \$25,003 and that its taxable net income for the same tax year is negative \$575,981. Thus, even without the latter figure, the tax return indicates that the petitioner had a significant loss of income even prior to having paid any of its employees' salaries. The petitioner submitted no W-2 forms for the beneficiary (or any of its other claimed employees) to show that the beneficiary's proffered wage had, in fact, been paid. The only evidence that suggests the petitioner's ability to pay is the written opinion of a certified public accountant who reviewed the same tax return that was reviewed by the Bureau. However, the mere opinion of a third party, without evidence to support it, is nothing more than an extension of the petitioner's claim. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The opinion of a third party, even in her professional capacity, cannot be considered evidence.

Furthermore, contrary to counsel's analysis of the director's denial, the director has not imposed upon the petitioner an additional requirement of having to prove its ability to pay the proffered wages of all of its employees. Rather, in the director's thorough review of the petitioner's record, she properly noted that the petitioner's most recent tax return, which shows a considerable loss of income prior to having paid any employee salaries, is inconsistent with its claim that it employs and has the ability to pay four individuals aside from the beneficiary.

On review, the evidence submitted by the petitioner is not sufficient in establishing the petitioner's ability to pay the beneficiary's proffered wage. For this additional reason, the petition cannot be approved.

Beyond the decision of the director, based on the descriptions of the beneficiary's past and present duties, the petitioner has failed to establish that the beneficiary has been and will primarily function as a manager or executive. The petitioner's year 2000 tax return indicates that less than \$6,000 were paid to the four employees that the beneficiary purportedly supervises. This figure is extremely low to have paid the salaries of four full-time, professional employees. Therefore, the petitioner did not submit sufficient evidence to indicate that someone other than the beneficiary is performing the essential function(s) of the petitioning organization. However, as the petition will be dismissed based on the grounds discussed above, this issue need not be addressed further.

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.

APPROVED AND FORWARDED:  
[Signature]  
[Date]  
[Title]