

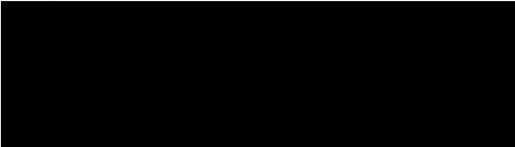
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass., 3/F
425 I Street N.W.
Washington, D.C. 20536



File:



Office: TEXAS SERVICE CENTER

Date:

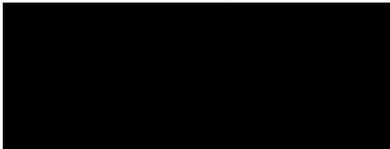
DEC 9 - 2003

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:

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 Citizenship and Immigration Services (CIS) 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, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The petition will be denied.

The petitioner is a Michigan corporation engaged in the import and sale of furniture. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, it 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 a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. The AAO affirmed the director's decision. The AAO further found that the petitioner had not established that the beneficiary had been employed in an executive or managerial capacity with the foreign entity for at least one year in the three years immediately preceding the beneficiary's entry into the United States as a nonimmigrant, or that the proffered position with the petitioner would involve the execution of primarily executive or managerial duties.

On motion, counsel for the petitioner requests reconsideration of the decision and states, respectfully, that the law was inappropriately applied and the analysis was inconsistent with the information provided and precedent decisions.

The first issue in this case is whether the petitioner has established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

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.

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 basic facts of this issue are undisputed. The petitioner has provided evidence that the petitioner has two shareholders. The beneficiary's husband, [REDACTED] owns fifty percent of the petitioner and the beneficiary also owns fifty percent of the petitioner. The beneficiary's foreign employer also has two shareholders. The beneficiary's husband owns seventy-five percent of the foreign entity and the beneficiary owns the remaining twenty-five percent of the foreign entity. Counsel asserts that the petitioner was established to sell furniture manufactured by a Chinese factory wholly-owned by the beneficiary's foreign employer.

Counsel specifically questions the AAO's analysis of two precedent decisions, *Matter of Siemens*, 19 I&N Dec. 362 (Comm. 1986) and *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Counsel asserts that control of an entity can be found if one has veto power over the affairs of the entity (as found in *Siemens*) or if one has a significant interest (50%) and the entity was formed to sell one's products (as found in *Hughes*).

It is clear that the beneficiary's husband owns fifty percent of the petitioner, however the matter of control of the petitioner has not been established. Counsel asserts that the beneficiary's husband has control over the petitioner because he has veto power over the affairs of the petitioner and thus negative control. Counsel's apparent assertion that *Hughes* requires only a significant interest in an entity along with a requirement that an entity was created to sell one's products to establish control is not persuasive. *Hughes* instead requires 50 percent ownership, de facto control, and that the company exists to solely to sell the product. As noted below, the petitioner has not established that the beneficiary's husband has de facto control. Moreover, in the instant petition, it is not clearly documented that the petitioner was created to solely sell the products of the foreign entity's subsidiary. 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). There is insufficient information in the record to support a finding of economic linkage between the petitioner and the beneficiary's

foreign employer.

Counsel's assertion that the beneficiary's husband has de facto control over the petitioner is also not persuasive. Counsel provides the beneficiary's affidavit, in support of this assertion, wherein she states that she had agreed to vote her portion of stock in full agreement with her husband's vote. The beneficiary also notes in the affidavit that the petitioner's by-laws require all shareholder matters and director matters to be approved by a majority vote. Also included in the by-laws is a requirement that all proxies shall be in writing and properly signed. As noted in *Siemens*, the petitioner must identify all agreements between the parents relating to the voting of shares that might affect actual control over fifty percent of the subsidiary. The question arises as to whether the beneficiary's affidavit is sufficient to establish that the beneficiary's husband has de facto control over the petitioner. Counsel contends that the affidavit memorializes an oral agreement between the beneficiary and her husband. Counsel also cites Internal Revenue Service Code sections 267(c)(2) and (4) for the proposition that ownership of stock by a husband or a wife is attributable to the other spouse. We agree with counsel that evidence of de facto control of a legal entity is not limited to evidence of proxy votes. Other evidence of de facto control may be submitted and may establish de facto control. However, in this particular case, the informal arrangement between the husband and wife on how shares of the petitioner might be voted is not sufficient to establish the beneficiary's husband had de facto control of the petitioner. At the time the petition was filed the agreement between the husband and wife was apparently an informal, oral understanding, an understanding that could be manipulated for various purposes. The AAO declines to accept oral agreements regarding the voting of shares as evidence establishing de facto control. The petitioner has provided insufficient evidence that at the time of filing the beneficiary's husband had de facto control of the petitioner.

We note the beneficiary has formally expressed her understanding regarding the voting of her shares through her affidavit. However, the affidavit does not constitute a legally binding contract and was signed subsequent to the date the petition was filed. A petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

There is no question that the beneficiary's husband is a majority owner of the Chinese company with both de facto control and control per se of the foreign entity. The beneficiary's husband owns 75 percent of the foreign entity. This ownership raises another question regarding the petitioner's qualifying relationship with the beneficiary's overseas employer. In this case the Chinese company and the petitioner are not in a parent-

subsidiary relationship based on the definition contained in the regulation. Neither entity owns a portion of the other establishing such a relationship. Nor has the petitioner established that the petitioner and the beneficiary's foreign employer are affiliates.

The petitioner has not sufficiently established that a qualifying relationship exists as required for this visa classification.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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-

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.

Counsel, on motion and in response to this issue, repeats information contained in the record regarding the beneficiary's duties both for the foreign employer and for the petitioner. Counsel asserts that the information previously provided information is much more information than was provided in the *Hughes* and *Siemens* cases on this issue.

Counsel's assertion is not persuasive. The information provided in the record does not provide a comprehensive description of the beneficiary's duties for the foreign employer or the petitioner. In 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 statement that the beneficiary served as the foreign entity's vice-president and treasurer before becoming chief executive officer does not provide a sufficient description of the beneficiary's daily duties for the foreign employer. The petitioner's statement that the beneficiary "is a key person to implement [the petitioner's] expansion plans and her continuing presence is essential" is conclusory and does not convey an understanding of the beneficiary's actual daily duties for the petitioner.

Upon review of the limited information and salaries of the petitioner's other employees, it appears that several of its employees are part-time employees. The record is insufficient in the description of the duties of the petitioner's possible full-time employees to conclude that these individuals perform duties in positions that are managerial, supervisory, or professional. 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. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-

qualifying duties. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

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 Administrative Appeals Office's decision of March 12, 2002 is affirmed. The petition is denied.