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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 Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

DEC 17 2003

FILE: EAC 02 056 55369 Office: VERMONT SERVICE CENTER Date:

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: Self-represented

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

The petitioner was incorporated in 1994 in the State of New Jersey and is claimed to be a subsidiary of [redacted] located in India. The petitioner is engaged in the business of software development and computer consulting. It seeks to employ the beneficiary as manager of its "eBusiness solutions" group. 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 failed to establish that it has a qualifying relationship with a foreign entity.

On appeal, the petitioner disputes the director's findings and submits additional documentation in support of its claims.

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 issue in this proceeding is whether the petitioner has established that a qualifying relationship existed between the petitioner and the claimed foreign entity since the filing date of the petition.

Regulations at 8 C.F.R. § 204.5(j)(2) state 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 the initial filing, the petitioner described its relationship with the Indian company as one of parent/subsidiary with the

Indian company as the parent and the U.S. entity as the subsidiary. The petitioner also submitted a Memorandum of Association, which stated that 120 shares of the Indian company were allotted to Mr. [redacted] 50 shares of the company were allotted to Mr [redacted] and 10 shares were allotted to Mrs. [redacted]

On January 25, 2002, the director issued one of two requests for additional evidence. Among the documentation requested was a copy of the petitioner's tax return for the year 2000 and copies of stock certificates showing ownership of all issued and outstanding shares.

The petitioner complied by submitting the requested documents, both of which indicated that ownership of the petitioning entity was divided equally among four individuals, one of whom was Mr. [redacted]

After reviewing the submitted documentation, the director issued the second request for additional evidence, dated June 11, 2002. In that request the director discussed the division of ownership interests in the petitioning entity and stated that according to the Articles of Association regarding the Indian company, the company is equally divided into thirds among [redacted] Sai, and [redacted] It is noted that the director failed to consider the Memorandum of Association that specifically recited the share allotments amongst the three shareholders. Therefore, the director improperly concluded that the Indian Company was equally divided into equal thirds. However, even if the director properly interpreted the ownership interests in the foreign entity, there would have nevertheless remained the question of whether a qualifying relationship existed between the foreign and U.S. entities. Therefore, the director was correct in asking the petitioner to provide a detailed explanation of why the Indian company qualifies as the U.S. company's parent.

The petitioner responded by submitting an affidavit from [redacted] one of the four owners of the petitioner's stock. The affiant claimed that although he owns 25% of the petitioner's stock, Mr. [redacted] has "controlling authority" over his shares, thereby giving him majority control over the remaining shareholders. The petitioner submitted no evidence documenting the claimed transfer of control of the 25% of the petitioner's shares. Simply going on record without

supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Contrary to the petitioner's apparent misconception, the affidavit itself is not primary evidence of the claimed relationship. It is merely an unsupported claim made by a third party.

The petitioner also submitted two additional affidavits, both dated August 19, 2002. One affidavit was from [redacted] claiming that she transferred 30% of her interest in the parent entity to Mr. [redacted] the other affidavit came from Mr. [redacted] claiming that he owned 33% of the parent company's shares all of which he has transferred to Mr. [redacted] Again, the petitioner submitted no evidence documenting the alleged transfers of shares, nor did either of the affiants state when the claimed transfers took place. Furthermore, it is noted that each affiant claimed to have a one-third interest in the foreign entity. However, this claim is in direct conflict with the Memorandum of Association, which indicated that Mr. [redacted] had a majority of the foreign entity's ownership and control since the date the entity was formed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any 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, 591-92 (BIA 1988). In the instant case, the petitioner has not acknowledged the existence of the inconsistency discussed above.

The director denied the petition on November 29, 2002, stating that the petitioner failed to provide documentary evidence that the Indian and U.S. entities had a qualifying relationship as of December 2001 when the petition was filed.

On appeal, the petitioner claims that Mr. [redacted] owned 97% of the foreign entity's shares since August 1999, and that he controlled 50% of the U.S. entity since June 1996. Once again the petitioner submits only affidavits in support of its claim. As previously stated, affidavits are merely third party claims that cannot be deemed as documentary evidence. Making a claim, even one that is in the form of an affidavit, is just another way of going on record without supporting documentary evidence, which, according to established case law, is not sufficient for

the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

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 at 595.*

In the instant case, the petitioner initially claimed to be a subsidiary of the foreign entity. However, it does not claim to be owned, in any capacity, by the foreign entity. Rather, it claims to be directly owned by a group of four individuals, each owning 25% of the petitioner's shares as indicated by the stock certificates submitted in response to the director's first request for additional evidence. Therefore, it cannot be deemed a subsidiary of the foreign entity. It also cannot be deemed to be an affiliate of the foreign entity since the two entities are not owned by a common parent; nor are the two entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 204.5(j)(2). Thus, the petitioner has failed to establish that it currently has a qualifying relationship with a foreign entity, or that it had such a relationship at the time the petition was filed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. As the appeal will be dismissed, these issues need not be examined 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.