U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 15 2003

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)

IN BEHALF OF PETITIONER:

[redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a corporation engaged in trade and food service. It seeks to employ the beneficiary as its vice-president. Accordingly, it seeks 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 a qualifying relationship with a foreign entity.

On appeal, counsel for the petitioner asserts that the evidence submitted concerning the ownership and control of the petitioner met the highest legal standard and that the Service's decision reflected bias and an abuse of discretion. Counsel also submits evidence that two checks questioned by the director had been deposited and submits his affidavit outlining his receipt of funds for the purchase of the petitioner.

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.

The petitioner was incorporated in the State of Texas in December of 1993. The petitioner purports to have issued 55 percent of its outstanding shares to a Chinese entity, Co., Ltd. in March of 2000. The petitioner claims that the beneficiary was employed as the chief financial officer of in China, a purported subsidiary of the The petition was filed in June of 2000

The issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the claimed parent company.

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;
>
> *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.
>
> *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 petitioner initially submitted its Articles of Incorporation filed with the Texas Secretary of State on December 27, 1993. Article Four stated that the corporation was authorized to issue two classes of shares equaling 2,000,000 shares and that the holders of class "A" shares had the exclusive right to notice of shareholders' meetings and to vote at the meetings. The total

authorized class "A" shares equaled 1,000,000. The holders of class "B" shares do not have the right to notice of shareholders' meeting or the right to vote at the meetings. The total authorized class "B" shares equaled 1,000,000. The petitioner also submitted two of its share certificates numbered A1 and A2. Share certificate A1 was issued to Theldon R. Branch, III in the amount of 450,000 shares on March 20, 2000. Share certificate A2 was issued to [redacted] in the amount of 550,000 shares on March 20, 2000. The petitioner further submitted an affidavit of Theldon R. Branch, III stating that prior to the transaction on March 20, 2000 issuing share certificates A1 and A2, he was the sole shareholder of the petitioner. The affiant also stated that no stock certificate of class "B" stock had ever been issued by the company. The petitioner also submitted its Internal Revenue Service (IRS) Form, U.S. Corporation Income Tax Return for the year 1997. The 1997 return states at line 22 of Schedule L that the petitioner's capital stock consisted of common stock in the amount of 246,000 at the beginning of the year and 247,000 at the end of the tax year.

The petitioner also submitted a list of the claimed foreign entity's subsidiaries. The list of 14 subsidiaries included the [redacted]

The director requested evidence of payment of the petitioner's stock by the foreign company, a copy of the promissory note detailing the purchase of the petitioner's shares of stock by the foreign entity, and bank statements for all business bank accounts.

In response, the petitioner through its counsel submitted a copy of the stock purchase agreement and copies of checks purportedly made in the performance of that agreement. The Purchase and Sale Agreement between the petitioner as seller and [redacted] as buyer and dated March 20, 2000 provided:

> Article I. Purchase and Sale
>
> In the consideration of the mutual promises and conditions herein contained, seller hereby agrees to sell to Buyer and Buyer agrees to purchase from Seller, on the terms, conditions, warranties and representations set forth in this Agreement any and all interest of Seller in the following:
>
> (a) 55% of the issued Common Stock of the above named corporation, consisting of 550,000 common voting shares.
>
> Article II. Amount of Purchase Price
>
> The total purchase price to be paid by Buyer to Seller

 [redacted]

> for all the stock and rights of the Business described in Article I above (hereinafter referred to as the "Purchase Price"), shall be of Two Million Six Hundred and Ninety Five Thousand Dollars ($2,695,000.00). Down payment shall be $40,000.00 on the total purchase price, of which $20,000.00 shall be payable at closing and $20,000 no later than ninety (60) [sic] days of [sic] the signature of this Agreement. The remainder of $2,655,000.00 due and payable within 24 months of this agreement, failure to complete full payment shall void this agreement. This final payment may be extended by mutual agreement.
>
> * * *
>
> Article VI. Operational Control
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> 6.1 Buyer delegates to Seller the full operational responsibility for ongoing business decisions, transactions, and contracts until such time as Buyer's designee is approved by the Immigration and Naturalization Service for permanent residency in the USA, so that Buyer's designee may lawfully work in the United States.
>
> 6.2 Buyer grants to Seller an irrevocable proxy to vote Buyer's shares until such time as Buyer's designee is approved by Immigration and Naturalization Service to work in the United States.

Check number 3233 dated March 20, 2000 is payable to Horacio Golfarini in the amount of $30,000 and is signed by petitioner's attorney of record. Check number 3250 dated May 2, 2000 is payable to Horacio Golfarini in the amount of $30,000 and is also signed by the petitioner's attorney of record. Check number 622 dated March 23, 2000 is payable to the petitioner in the amount of $20,000 and is issued on Horacio H. Golfarini's check. Check number 672 dated May 8, 2000 is payable to the petitioner in the amount of $20,000 and is issued on Horacio H. Golfarini's check.

Petitioner through its counsel also provided a copy of a stock transfer agreement and closing statement dated March 20, 2000 and signed only by the "Capital Services Group Closing Agent." The purported closing agent stated that:

> Buyer, [redacted] Co.,Ltd.] through its attorney [redacted] has paid the sum of $60,000 to [redacted] the petitioner] as an inducement to them to transfer 100% of their partnership interests to Seller [redacted] Inc., the petitioner]; and as an inducement to sell control of the resulting corporation [redacted] through

> its broker, H. Golfarini, Inc. a.k.a. Capital Services Group, acknowledges receipt of said sum.

The closing agent also stated that the petitioner has issued stock certificates A1 and A2 and that all other stock certificates, if any, had been cancelled and there was no other stock outstanding.

The director determined that the documents submitted did not show that the claimed foreign entity had paid any monies for the stock of the petitioner. The director found that the evidence only showed that the agents for each company exchanged funds. The director concluded that the petitioner had not established that it had a qualifying relationship with the foreign entity.

On appeal, counsel asserts the petitioner has complied with Service regulations relating to evidentiary documentation for a small business to establish a qualifying relationship and cites INS Operation Instruction 214(l)(6)(ii)(A)(2). Counsel also asserts that the petitioner has provided a clear chain of the funds transferred by the agents of each company for the purchase and sale of the petitioner's stock. Counsel also submits an affidavit and documents to establish that the foreign entity transferred $90,000 to his trust account. Counsel concludes that the petitioner has conclusively demonstrated that the Service's decision was arbitrary.

Counsel's assertions and conclusion are not persuasive. The record contains numerous discrepancies that have not been addressed or explained. Although counsel may view these discrepancies as trivial, establishing a legitimate qualifying relationship is crucial for the approval of this immigrant petition. 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 the United States and a foreign entity 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 proceedings); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); (in nonimmigrant proceedings). As ownership is a critical element of this visa classification, the Service may reasonable inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

The petitioner has not provided a copy of its stock registry demonstrating its chain of ownership. The record is unclear in that the petitioner apparently for the first time issued stock certificates A1 and A2 on March 20, 2000. The record of previous ownership of the petitioner consists of an affidavit of the purported sole shareholder stating that he is the only

shareholder. The record contains insufficient documentation to support this claim. 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). In addition, the stock certificates issued on March 20, 2000 do not bear a specific notation that these certificates are for class "A" voting stock. Further, the petitioner's 1997 IRS Form 1120 indicates an increase in the value of common stock during the 1997 tax year. The record does not contain an explanation regarding the increase in value. We note that the purported agent of the petitioner also indicates in the closing statement provided in response to the director's request for evidence that there were no outstanding shares at the time of the transfer and if there were such shares the shares had been cancelled. However, no documentation has been provided to substantiate the authority of this individual to speak on behalf of the petitioner. The number of shares outstanding and the ownership of the shares of the petitioner prior to the purported transfer of stock have not been established.

In addition, the foreign entity does not appear to have operational control of the petitioner at the time the petition was filed. The purchase and sale agreement provides that the foreign entity had delegated authority to vote its shares of the petitioner. Such transfer of authority undermines the foreign entity's ability to control the petitioner. Accordingly, the petitioner has not only failed to establish ownership of the petitioner, it has also failed to establish control of the petitioner.

Contrary to counsel's assertion that the chain of funds had been clearly demonstrated with the response to the request for evidence, the purchase and sale agreement, the closing statement, and the checks submitted raise questions regarding the actual purchase and sale of the petitioner's shares. The purchase and sale agreement indicates that 550,000 shares of the petitioner's common stock will be transferred upon the down payment of $40,000 with the remaining $2,655,000 due within 24 months. The checks written by counsel to the petitioner's purported agent total $60,000. The checks written by the petitioner's purported agent to the petitioner total $40,000. In the purported agent's closing statement, the agent indicates that the seller has received $60,000 through him. The discrepancies between the amount of down payment, the amount paid by the foreign entity's agent (counsel of record) to the purported agent, the amount allegedly received by the purported agent on behalf of the petitioner, and the amount actually received by the purported agent on behalf of the petitioner do not provide a clear chain of funds in the purported sale and purchase of 550,000 shares of the petitioner's common stock. Further, as noted above, the petitioner has not provided any documentation establishing the bona fides of the purported agent.

Finally, although counsel asserts that he received funds from the Chinese foreign entity to purchase an interest in the petitioner, he has not provided sufficient evidence to support this assertion. 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). The record does not contain independent documentation identifying who paid the monies to counsel. As such, the Service cannot conclude that the petitioner has acknowledged receipt of any monies from the purported foreign entity for the sale of its stock. Counsel and the petitioner chose not to provide the petitioner's bank statements that were requested by the director even though such statements perhaps could have shed some light on this issue. 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). In the case at hand, the petitioner has not established that the foreign entity has any ownership of the petitioner.

Counsel's assertion regarding the Service's operation instructions pertaining to nonimmigrant visas is without merit. Operating instructions relating to how a small business may establish a qualifying relationship in the context of an L-1 nonimmigrant visa is not relevant to the adjudication of this immigrant petition.

Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed Chinese parent company.

Beyond the decision of the director, the petitioner has provided inconsistent statements regarding the beneficiary's prior employment with the claimed foreign entity. The petitioner claims that the beneficiary was employed by the claimed foreign entity's subsidiary [redacted] as its chief financial officer. However, the petitioner lists the foreign entity's 14 subsidiaries as including the [redacted] This inconsistent use of names may be a translation error, however, the error is compounded by the brochure provided for the [redacted] that does not include the beneficiary's name or picture. We note further, that the beneficiary is depicted on the foreign entity's organizational chart as the chief financial officer of the foreign entity rather than the foreign entity's subsidiary. These inconsistencies do not allow a conclusion that the beneficiary has been employed in a managerial or executive capacity for the claimed foreign entity, its affiliate or subsidiary. As the appeal is dismissed for the reason stated above, this issue is not examined further.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.