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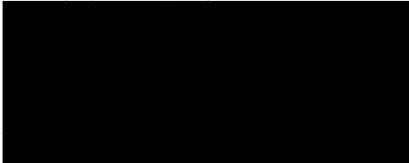
U.S. Department of Homeland Security

Citizenship and Immigration Services

B4

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536



NOV 26 2003

FILE: WAC 02 123 50701 Office: CALIFORNIA SERVICE CENTER Date:

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:



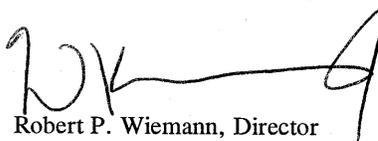
INSTRUCTIONS:

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 the 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

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

The petitioner was incorporated in 1999 in the State of California and is claimed to be a subsidiary of Surya Films, located in India. The petitioner is engaged in the business of developing and producing motion picture films and television programs in the United States for distribution in India. It seeks to employ the beneficiary as its president. 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 the following: the existence of a qualifying relationship between the petitioner and a foreign entity; that the petitioner is doing business; that the petitioner has the ability to remunerate the beneficiary his proffered wage; and that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement refuting the director's findings.

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 first issue in this proceeding is whether the beneficiary has established the existence of a qualifying relationship with a foreign entity.

The regulation at 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.

With the initial filing, the petitioner submitted, in part, Minutes of Special Meeting of the Board of Directors, which states that the petitioner issued 25,000 authorized shares of its stock. The petitioner also submitted a stock certificate indicating that Surya Films of India was the purchaser of 1,000 of those authorized shares, indicating that the foreign entity is the petitioner's sole owner.

On May 9, 2002, the director requested that the petitioner submit additional evidence. Among the issues in question was that of a qualifying relationship. Therefore, the petitioner was instructed to submit documentation memorializing the foreign entity's purchase of the petitioner's stock. The director asked that the evidence be in the form of original wire fund transfers, cancelled checks, and deposit receipts.

Although the petitioner submitted a response addressing other issues brought forth in the request for additional evidence, it did not submit any of the above-requested documentation. It merely addressed the issue of a qualifying relationship by resubmitting the stock certificate naming the foreign entity as the owner of 1,000 shares of its stock.

In the denial, the director noted that the petitioner claims an affiliate relationship with a foreign entity. The director's comment is incorrect, given the petitioner's claim that it is wholly-owned by a foreign parent entity. However, such error is insignificant and does not change the fact that the director properly concluded that the petitioner's submission of a stock certificate is insufficient evidence of a qualifying relationship with a foreign entity.

On appeal, counsel states that the director's denial on the basis of a qualifying relationship is improper, given the prior approval of the petitioner's I1-A non-immigrant petition and subsequent approval for an extension of that non-immigrant visa. Counsel asserts that granting the prior non-immigrant petitions was, in essence, CIS's determination that a stock certificate is sufficient evidence of a qualifying relationship.

However, the director's decision does not indicate whether he reviewed the prior approval of the nonimmigrant petitions referred to by counsel. The record of proceeding does not contain copies of the visa petitions that counsel claims to have been previously approved. If the previous nonimmigrant

petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute clear and gross error on the part of CIS. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

The Administrative Appeals Office is not bound to follow the contradictory decisions of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Counsel also asserts that there is no statutory or regulatory requirement that necessitates the submission of specific documentation for the purpose of establishing a qualifying relationship. However, 8 C.F.R. § 204.5(j)(4) states that in appropriate cases, the director may request additional evidence. In the instant case, that request is particularly warranted because, contrary to counsel's belief, a single stock certificate by itself is not sufficient to establish that a stockholder maintains ownership and control of a corporate entity. CIS must examine the total number of shares issued by the petitioner, the number held by the claimed parent company, and the resulting effect on ownership and control. Furthermore, as ownership is a critical element of this visa classification, CIS may reasonably 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 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*, at 593; 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. The petitioner in the instant case has failed to submit any additional evidence to establish that it is owned by a foreign entity as claimed. Therefore, it is concluded that the petitioner has failed to establish the existence of a qualifying relationship with the claimed foreign entity. Consequently, this petition cannot be approved.

The second issue in this proceeding is whether the petitioner is doing business as defined in the regulations.

The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) states that the petitioner is required to submit evidence that the prospective United States employer has been doing business for at least one year.

Furthermore, the regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the director's request for additional evidence, the petitioner was instructed to submit certified copies of tax returns that it had filed in the previous three years with the Internal Revenue Service (IRS), containing the IRS's date stamps. Based on the petitioner's failure to submit the requested documentation, the director determined that the petitioner failed to establish that it had been doing business. On appeal, counsel asserts that neither law nor regulation requires the petitioner to submit a "date stamped return".

The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide certified copies of its tax returns for the three years prior to the filing of the petition. The certified copies of the tax returns would demonstrate the amount of gross receipts the petitioner reported to the IRS and further reveal that it had actually filed tax returns in the course of doing business. The petitioner's failure to submit

these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). For this reason the petition may not be approved.

The third issue in this proceeding is whether the petitioner has the ability to pay the beneficiary his proffered wage.

The regulation at 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 Service 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 Service 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 Service should have considered income before expenses were paid rather than net income.

In the instant case, the petition indicates that the beneficiary's proffered wage is \$30,000 annually. The petition also indicates

that the beneficiary has been in the United States, working for the petitioner, as an L-1A non-immigrant worker. However, the petitioner's 2001 tax return, which is the most current tax return in the record, does not indicate that the petitioner has paid any money for the compensation of officers or for employee salaries and wages. Furthermore, even though asked to do so, the petitioner has not submitted any of its Form DE-6, Quarterly Wage Reports, which would disclose the salaries paid to any of the petitioner's employees.

On appeal, counsel states that it is common business practice for companies to show as little taxable income as possible in order to avoid excessive taxation. However, employee salaries and officer compensations would only offset the petitioner's income, therefore accomplishing the petitioner's goal of showing a low net income. Thus, counsel's explanation gives rise to further doubt regarding the petitioner's ability to pay the beneficiary's proffered wage. For this additional reason, the petition cannot be approved.

The remaining issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

In the initial filing, the petitioner stated that the beneficiary's prospective duties include reviewing financial reports and supervising the day-to-day operations.

In the request for additional evidence, the director instructed the petitioner to submit in part, its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under the beneficiary's supervision. The petitioner was asked to provide brief job descriptions, educational levels, and the salaries or wages of all of the beneficiary's subordinates.

The petitioner's response includes the following description of the beneficiary's duties:

[The beneficiary], as President of our company, oversees all aspects of control and leadership

He directs and develops client contact for contractual negotiations of new deals. He has the final decision making of all financial issues of the company.

[W]e continue to grow under the guidance of [the beneficiary's] leadership. He develops the policies that the company runs under and will continue to develop the client base for future endeavors.

As noted by the director, the petitioner failed to provide its organizational chart. The petitioner also failed to discuss the duties of the beneficiary's subordinate and petitioner's only other employ, besides the beneficiary himself.

The director concluded that the petitioner failed to submit sufficient evidence to establish that the beneficiary's duties in the United States would be of a primarily managerial or executive capacity.

On appeal, counsel asserts that despite the petitioner's small size, the beneficiary will nevertheless perform managerial or executive duties. To support his argument, counsel cites a prior non-precedent AAO decision. However, 8 C.F.R. § 103.3(c) provides that only AAO precedent decisions are binding on all CIS employees in the administration of the Act. There is no provision, either in the Act or in the regulations, that suggest that AAO employees are similarly bound by unpublished decisions.

While counsel is correct in asserting that the petitioner's size is not the determining factor in establishing whether the beneficiary will be employed in a qualifying capacity, the fact remains that CIS will look first to the petitioner's description of the job duties in making such a determination. See 8 C.F.R. § 204.5(j)(5). In the instant case, the only description provided of the beneficiary's job duties is too general and vague to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The petitioner is only clear in stating that the beneficiary will develop the client base. There is, however, no indication as to how that task will be accomplished.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. 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). Further, the description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Nor does the record sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.