

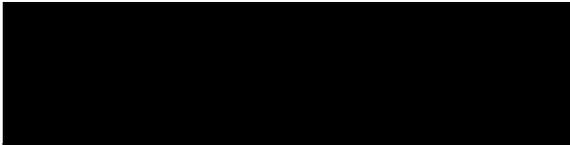
U.S. Department of Homeland Security

Citizenship and Immigration Services

BY

ADMINISTRATIVE APPEALS OFFICE
CIS AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

PUBLIC COPY



FILE: WAC 02 050 51689 OFFICE: CALIFORNIA SERVICE CENTER DATE:

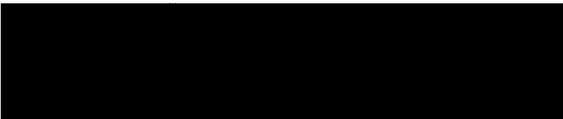
IN RE: Petitioner:
Beneficiary:



OCT 28 2003

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:



identifying data deleted to
PREVENT clearly unwarranted
invasion of personal privacy

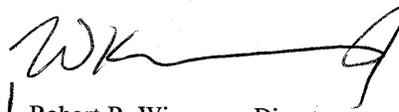
INSTRUCTIONS:

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 Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its general counsel and director of personnel. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because no qualifying relationship exists between the petitioner and a foreign entity.

On appeal, counsel submits a brief, new evidence, and copies of documents already included in the record of proceeding. Counsel states, in part, that the director's approval of two L-1A nonimmigrant petitions on the beneficiary's behalf is proof that a qualifying relationship exists between the U.S. and foreign entities.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a

statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is currently affiliated with D7K (Deutschland) GmbH (D7K), a German limited liability company, and was previously affiliated with the former German company, Nikoma MediaWorks GmbH (Nikoma); (2) develops and supplies telephone communication Internet software and Internet telephone services; and (3) employs six persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A).¹ Nikoma previously employed the beneficiary from April 1999 until April 1990. D7K previously employed the beneficiary from April 1990 until his transfer to the United States in September 2000. The petitioner is offering to employ the beneficiary permanently at a salary of \$72,000 per year.

The issue to be discussed in this proceeding is whether a qualifying relationship exists between the petitioner and a foreign entity. The petitioner claims that it is currently affiliated with D7K, and was previously affiliated with Nikoma. Pursuant to 8 C.F.R. § 204.5(j)(2), *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

When filing the I-140 petition with the California Service Center on November 23, 2001, the petitioner submitted copies of its Articles of Incorporation and bylaws, the minutes of a director's meeting, an Acknowledgement of Consideration, and stock certificate number one. According to the Acknowledgement of Consideration, on July 25, 2000, the petitioner received \$10,000 from Mr. Nikolai Manek for 5,000,000 shares of the petitioner's stock. Stock certificate number one, which was issued on July 25, 2000, indicates that Mr. Manek owned the 5,000,000 shares of stock.

The petitioner also submitted evidence relating to the ownership of both Nikoma and D7K. Regarding Nikoma's ownership, the petitioner submitted a sales agreement. This agreement indicated that, in April 2000, Nikoma's shareholders agreed to sell the company to

¹The petitioner did not indicate the number of its employees on the Form I-140 when it filed the petition. The petitioner did, however, supply this information in response to the director's July 16, 2002 request for additional evidence.

Tiscali SpA.² Mr. [REDACTED] was listed as one of the shareholders. Regarding D7K's ownership, the petitioner submitted a Register of Notarial Instruments, dated March 9, 2000. This register indicated that, in March 2000, Mr. [REDACTED] invested EUR 500,000 in capital for D7K, at which time D7K became a sole proprietorship.

On July 16, 2002, the director requested additional evidence from the petitioner:

- Annual Report: Submit a copy of the foreign company's annual report that **lists all affiliates**, subsidiaries, branch offices[,] and **percentage of ownership**. If the company does not produce an annual report, state so.
- Minutes of Meeting - Stock Ownership: Submit a copy of the minutes of the meeting for the foreign company that lists the **stock shareholders and the number and percentage of shares owned**.
- List of Owners: Submit a detailed list of all owners of the foreign company and what percentages they own. List **names and percentages of ownership**.

Note: The petitioner claims an affiliate relationship with D7K (Deutschland) GmbH and a former affiliate relationship with Nikoma MediaWorks GmbH. However, evidence of record is insufficient to establish that the claimed shareholder of the petitioning entity also owns and controls the claimed affiliate, D7K (Deutschland) GmbH, and that he used to own and control the claimed former affiliate Nikoma MediaWorks GmbH at the time the beneficiary was in its employ.

- Articles of Incorporation: Submit a copy of the foreign company's articles of incorporation.
- Proof of Stock Purchase: Submit evidence to show that Mr. Nikolai Manek, the claimed sole shareholder of [N]ikotel, Inc. (formerly [N]ikojet, Inc.) has, in fact, paid for the U.S. entity. The evidence should include copies of the **original wire transfers** from the aforementioned individual. Also include, cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase. Provide the account holder names and affiliation to the foreign entity for all persons making purchases and the bank accounts that

² Although not clearly stated in the agreement, Tiscali SpA appears to be an Italian company based upon its listed address as "Piazza del Carmine, 22, I-09124 Cagliari."

were used. The originator(s) of the monies deposited or wired must be clearly shown and verifiable by name with full address and phone/fax number. For all funds not originating with the claimed shareholder, explain the source and reason for receiving such funds and provide the names of all account holders depositing these funds and their affiliation to the foreign or U.S. company.

- Annual Report: Submit a copy of the U.S. company's annual report that **lists all affiliates**, subsidiaries, branch offices[,], and **percentage of ownership**. If the company does not produce an annual report, state so.
- Minutes of Meeting - Stock Ownership: Submit a copy of the minutes of the meeting for the foreign company that lists the **stock shareholders and the number and percentage of shares owned**.
- Stock Ledger: Submit copies of the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders and purchase price.

Note: The record contains a copy of stock certificate number 1 dated July 25, 2000 indicating that Mr. Nikolai Manek holds five million shares of Nikotel, Inc. [stock.] However, it is not accompanied by a stock ledger indicating the percentage of ownership.

- Detailed List of Owners: Submit a detailed list of the owners of the U.S. company and the percentages held by each owner. List names and percentages of ownership.

(Emphasis in original.) In response to the director's request for evidence relating to the foreign entity, counsel stated that, under German law, German companies are not obligated to produce annual reports. Instead, counsel submitted a copy of D7K's balance sheet. Counsel further stated that he was also not submitting copies of minutes of meetings because GmbH companies are not public companies under German law and, therefore, do not prepare minutes of meetings. In lieu of minutes of meetings, counsel submitted: (1) a statement indicating that Mr. [REDACTED] owned three shares of Nikoma and the value amount of those shares; (2) the previously submitted certification from a Notary Public, indicating that the total capital amount for D7K is EUR 500,000, and that Mr. [REDACTED] contributed the EUR 500,000; and (3) the previously submitted Register of Notarial Instruments, which records D7K's formation and capitalization. Counsel also outlined the ownership structure of both Nikoma and D7K in response to the director's request for a list of owners. Additionally, counsel stated that Nikoma's company

agreement and D7K's Register of Notarial Instruments were the equivalent of Articles of Incorporation for each company.

In response to the director's request for evidence relating to the petitioner's ownership, counsel stated that Mr. [REDACTED] deposited \$500,982 in the petitioner's operating bank account. Counsel further stated that the Acknowledgement of Consideration initially submitted with the I-140 petition, evidenced Mr. [REDACTED] initial contribution of \$10,000 for the petitioner's shares of stock. Counsel asserted that the petitioner does not produce an annual report, but he enclosed copies of minutes of meetings, a copy of the stock ledger, and a list of owners. Counsel also submitted a letter from the petitioner's accounting manager, who stated that a reporting error occurred on the petitioner's 2000 corporate income tax return (IRS Form 1120). The accounting manager stated further that Mr. [REDACTED] invested \$500,000 in the petitioner's initial capitalization.

The director denied the petition on August 30, 2002. The director first examined the relationship between the petitioner and D7K, and concluded that the Register of Notarial Instruments was insufficient evidence of Mr. [REDACTED] ownership of and control over the foreign entity because it is a statement from a notary public. The director then stated:

[I]n addition, the beneficiary was employed by [D7K] for less than a year. Therefore, consideration will be given to the possibility that a claimed affiliate relationship exists between [the petitioner] and the foreign entity, [Nikoma], where the beneficiary was employed for a year. However, the attorney of record clearly indicates that [Nikoma] was sold in April 2000, and that it is no longer an affiliate of the petitioning entity. Therefore, [a] qualifying relationship does not exist [sic] between the petitioner and the claimed aforementioned affiliate abroad.

The director concluded further that there was insufficient evidence that Mr. [REDACTED] owned and controlled the petitioner. The director noted discrepancies in the petitioner's 2000 corporate income tax returns (IRS Form 1120). The director acknowledged the submission of a letter from the petitioner's accounting manager, who stated that the information on the Form 1120 was incorrect and was being corrected. The director also acknowledged the accounting manager's statement that Mr. [REDACTED] capitalized the petitioner with \$500,000. However, the director concluded that neither of the accounting manager's statements was supported by documentary evidence.

On appeal, counsel opposes the denial of the petition on the qualifying relationship issue because this issue had been decided favorably in two L-1A nonimmigrant petitions that the petitioner filed on the beneficiary's behalf. Counsel believes that the

denial of the petition on this issue is an abuse of the director's discretion.

Counsel also asserts that the director does not understand adequately the function of a notary under German law. According to counsel, a notary under German law is "a lawyer specially trained to do transactional work . . . a respected official in the community, on par with judges, and his 'acts' bear official significance."

Regarding Mr. [REDACTED] ownership of the petitioner, counsel submits letters from the petitioner's corporate attorney and its certified public accountant (CPA), each of whom attests that Mr. [REDACTED] is the sole owner of the petitioner. Counsel also submits a copy of an August 2, 2000 wire transfer for \$500,000 from Mr. [REDACTED] to the petitioner. Counsel states, "If . . . this does not prove Mr. [REDACTED] ownership of [the petitioner], then the Service is violating its own regulations by applying an evidentiary standard not prescribed by the regulation." Finally, counsel discusses the ownership of Nikoma, which the director also discussed in the denial letter.

Before arriving at a conclusion on the qualifying relationship issue, the Administrative Appeals Office notes that both the director and counsel focused on the petitioner's relationship to Nikoma when determining whether the petitioner had a qualifying relationship to a foreign entity.

The critical question in this matter is the relationship between the petitioner and the claimed foreign entity at the time of filing. The petitioner filed the I-140 petition in November 2001. At that time, D7K was the only company that could claim an affiliation with the petitioner: Mr. [REDACTED] and his partners had sold Nikoma to the Italian company, Tiscali SpA, in April 2000, and Mr. [REDACTED] no longer held any ownership interest in the company. As Mr. [REDACTED] did not hold any ownership interest in Nikoma in November 2001, Citizenship and Immigration Services (CIS) does not need to consider whether it is affiliated with the petitioner under U.S. immigration law. For this reason, the Administrative Appeals Office will not discuss Nikoma any further in this decision.

The issue before the Administrative Appeals Office is whether the petitioner and D7K are affiliates. The petitioner claims that Mr. [REDACTED] is the sole owner of both D7K and the petitioner and, therefore, he controls both entities. 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 (Comm. 1988). 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. *Id.* at 595.

The Administrative Appeals Office first turns to the ownership and control of D7K, the German entity. The director determined that the evidence of Mr. [REDACTED] ownership of D7K was insufficient because a notary in Germany prepared both the Register of Notarial Instruments and the certification about D7K's capitalization. However, the Administrative Appeals Office concurs with counsel that the evidence from the notary is sufficient. Under German law, a notary is not the equivalent of a U.S. notary public. Therefore, the statements of a German notary carry weight in this proceeding. Accordingly, the director's comments on this issue are withdrawn; there is sufficient documentary evidence that Mr. [REDACTED] owns and controls D7K.

The Administrative Appeals Office now turns to the ownership and control of the petitioner. As stated previously, the record contains a copy of an Acknowledgement of Consideration, which states that, on July 25, 2000, the petitioner received \$10,000 from Mr. [REDACTED] for 5,000,000 shares of stock. The record, however, does not contain any proof that Mr. [REDACTED] paid this money on July 25, 2000.

In response to the director's July 2002 request for proof of Mr. [REDACTED] \$10,000 capitalization, counsel stated that the evidence of payment was the Acknowledgement of Consideration. However, the record does not contain copies of a wire transfer or the petitioner's bank statement for the period in question as proof that the petitioner received the \$10,000. Casting doubt on the petitioner's claim that Mr. [REDACTED] paid the \$10,000 when the stock certificate was issued is information in the petitioner's stock ledger. The ledger does not indicate the amount paid for the 5,000,000 shares of stock.

Counsel also asserts that Mr. [REDACTED] is the owner of the petitioner because both the petitioner's corporate counsel and its CPA have declared Mr. [REDACTED] the sole owner. However, neither corporate counsel nor the CPA supports his or her assertion by independent documentary evidence. The opinions are, therefore, of little evidentiary value. *Cf. Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Counsel further asserts that Mr. Manek's ownership of the petitioner is evidenced by a copy of an August 2, 2000 wire transfer from Mr. [REDACTED] into the petitioner's bank account for \$500,000. This wire transfer is dated subsequent to July 25, 2000, the date of the alleged payment for the petitioner's shares of stock. It is critical for the petitioner to establish, through the submission of independent objective evidence, that Mr. [REDACTED] paid \$10,000 for its shares of stock on July 25, 2000, as declared on the stock certificate and in the Acknowledgement of Consideration. Otherwise, both the stock certificate and the Acknowledgement of Consideration have no probative value. *Cf.*

Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). A petitioner's assertions, by themselves, will not suffice to establish the essential elements of ownership and control; supporting documentary is critical. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without evidence of Mr. Manek's contribution of \$10,000 to the petitioner on July 25, 2000 for the specific purpose of purchasing the petitioner's shares of stock, the Administrative Appeals Office cannot conclude that Mr. [REDACTED] owns the petitioner.

The Administrative Appeals Office now turns to counsel's statements regarding the errors on the petitioner's 2000 IRS Form 1120. Although the petitioner has submitted a letter from its accounting manager regarding the discrepancies on the form, the petitioner has not submitted documentary evidence of the critical issue: the claimed "reporting error" that led to the allegedly incorrect tax returns. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho, supra*. Merely asserting that erroneous information on Schedules E, K and L of the IRS Form 1120 was a "reporting error" does not qualify as independent and objective evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. Furthermore, evidence that is created by the petitioner after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event that is to be proven and existent at the time of the director's notice.

Counsel states on appeal that CIS has violated its regulations by "applying an evidentiary standard not prescribed by the regulation." CIS, however, maintains the discretion to request additional evidence to clarify whether eligibility has been established. 8 C.F.R. § 103.2(b)(8). The regulations governing multinational manager and executive petitions specifically allow the director to request additional evidence in appropriate cases, as CIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. 8 C.F.R. § 204.5(j)(3)(ii). This is particularly relevant if evidence the petitioner submits as part of the petition shows that it received monies for the stocks. Certainly, the director's inquiry into the means by which Mr. [REDACTED] allegedly acquired his ownership of the petitioner's stock was appropriate.

The petitioner and D7K are not affiliated under U.S. immigration law because there is insufficient evidence that Mr. [REDACTED] owns and controls the petitioner. As the petitioner has not established a qualifying relationship between it and D7K, the petitioner also cannot prevail on its assertion that a qualifying foreign entity employed the beneficiary in a managerial or

executive capacity for at least one year in the three years immediately preceding the beneficiary's entry into the United States as a nonimmigrant. 8 C.F.R. § 204.5(j)(3)(i)(B).³

Finally, the Administrative Appeals Office turns to counsel's statements regarding CIS's obligation to approve this immigrant petition because the beneficiary has been in the United States in L-1A status for the past three years.

The Administrative Appeals Office is never bound to follow the decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). If the facts in the L-1A nonimmigrant petitions were the same as the facts in this petition, the director's approval of those petitions would have been erroneous, as the petitioner has not established that it has a qualifying relationship with D7K. CIS is not required to approve 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*, *supra*. For the reasons discussed herein, the director's denial of the petition shall not be disturbed.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.

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³ Even if the petitioner had established its affiliation with D7K, the beneficiary would not have satisfied the criterion at 8 C.F.R. § 204.5(j)(3)(i)(B) because he was employed by D7K for only five months (April 2000 - September 2000) before his transfer to the United States as a nonimmigrant.