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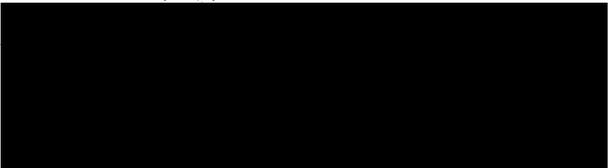
DEC 07 2004

FILE: SRC 02 79 52030 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

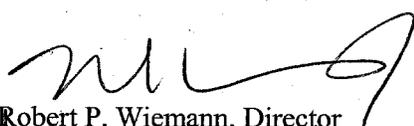
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a Florida corporation operating as a distributor and designer of marble. It seeks to employ the beneficiary as its sales manager. 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, counsel disputes the director's conclusions and submits a brief and additional documentation in support of the appeal.

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 main issue in this proceeding is whether the petitioner has 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.

In the statement appended to the petition the petitioner stated that it is a subsidiary of Planet Stone, S.N.C., located in Italy. The petitioner also submitted its Articles of Incorporation, as well as a list of shareholders along with the respective stock certificate numbers in which those shares were issued. Although the petitioner submitted its balance sheet for 2001, it did not acknowledge any shareholder ownership interests. The petitioner also submitted the first two pages of its 1998 tax return and its quarterly tax returns for 2001.

On June 30, 2003, the director issued a request for additional evidence instructing the petitioner to provide its stock ledger. The director also noted that the record shows discrepancies in the number of employees currently employed by the petitioner and requested that the petitioner submit W-2 tax statements for each of its employees.

Although the petitioner claimed in its response that it had submitted a stock ledger as part of Exhibit C, a stock ledger was not found among any of the exhibits marked A through G. The petitioner did, however, submit a number of W-2 statements, some from the petitioning organization, and a number of others for employees of [REDACTED] the petitioner's claimed affiliate. It is noted that beneficiary's W-2 statements for 2001 and 2002 indicate that the beneficiary was employed by [REDACTED] the year the petition was filed. There is no indication that the beneficiary was employed by the petitioner at the time the petition was filed. The AAO notes, for the benefit of the petitioner, that a qualifying relationship must be established between the beneficiary's foreign and prospective U.S. employers. See § 203(b)(1)(C) of the Act. Thus, in order to determine whether a qualifying relationship exists in this case, the AAO must determine which company is the beneficiary's prospective employer and only then move to determine whether that prospective employer has a qualifying relationship with the beneficiary's prior overseas employer.

In the instant case, the petitioner stated in its letter, dated March 25, 2002, that the beneficiary was initially transferred to the United States in November 2000 to manage its sales department. However, there is no indication in that letter that the petition is currently offering the beneficiary employment within its organization. Rather, the beneficiary's W-2 wage statements for 2001 and 2002 clearly indicate that his employer at the time the petition was filed was Country [REDACTED], not the petitioner named in Part I of the instant petition. Furthermore, the petitioner clearly states in a letter, dated September 23, 2003, which was submitted in response to the director's request for evidence, that the beneficiary was transferred to Country [REDACTED] on June 1, 2002 and apparently plans to maintain the beneficiary's employment at "the foreign company's new subsidiary" under an approved I-140 petition. Therefore, the basis for the instant petition is the beneficiary's proposed employment with Country [REDACTED] not with the petitioner, [REDACTED] which consequently had no basis for filing the instant petition. See 8 C.F.R. 204.5(j)(5). For this reason, the petition must be denied.

Even if the AAO were to consider Country Antique Marble, Inc. as the petitioner in the instant case, the evidence of record does not show that a qualifying relationship exists between the beneficiary's proposed employer and his prior employer abroad.

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 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 Scientology International, supra* at 595.

In the instant case, the primary concern is the ownership and control of Planetstone S.N.C., the beneficiary's foreign employer, and Country Antique Marble, Inc., the beneficiary's current and proposed U.S. employer.

In response to the request for additional evidence, the petitioner submitted a notarized affidavit from [REDACTED] the foreign entity's president, stating that he and the foreign entity cumulatively own 90% of the beneficiary's U.S. employer. [REDACTED] also claimed to have controlling interest in the current petitioner and the beneficiary's proposed employer and that as a result of such ownership both of the U.S. entities are subsidiaries of the foreign entity of which [REDACTED] also claims to be the controlling shareholder. However, 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*, 14 I&N Dec. 190 (Reg. Comm. 1972). In the instant case, the record does not contain any documentary evidence, such as stock certificates, a stock ledger, or bank records to establish the parties and their respective ownership interests in the beneficiary's U.S. employer. Although an untitled stock ledger has been submitted on appeal, it appears to describe stock issues of the petitioning entity rather than the beneficiary's employer. Furthermore, based on ownership breakdown as described in Country [REDACTED] articles of Incorporation, Fausto [REDACTED] and the foreign entity each own 4,500 shares, while the beneficiary owns 1,000 shares of the U.S. entity that proposes to employ the beneficiary under an approved I-140 petition. Thus, contrary to Mr. [REDACTED] claim, the foreign entity does not own a controlling interest in the beneficiary's U.S. employer. Therefore, it would be factually erroneous to conclude that the beneficiary's foreign and U.S. employers have a parent/subsidiary relationship. Nor does Country [REDACTED] ownership breakdown indicate that it is the foreign entity's affiliate, since there is no evidence to indicate that the beneficiary's U.S. and foreign employers are 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).

In review, the AAO concludes that the petitioner has failed to submit an employment letter to show its proposal to employ the beneficiary under an approved I-140 petition. Furthermore, even if the AAO were to assume that the beneficiary's proposed employer as the correct petitioner, the documentary evidence on record does not suggest that the beneficiary's U.S. and foreign employers have a qualifying relationship as defined in the regulations at 8 C.F.R. § 204.5(j)(2). For these reasons the petition cannot be approved.

Beyond the decision of the director, the record lacks sufficient information regarding the petitioner's foreign and proposed positions to determine that he has been and would be employed in a managerial or executive

capacity. Although a brief description of duties has been provided, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the descriptions of the beneficiary's duties, both abroad and in the United States, are too vague to convey an understanding of what the beneficiary has been and would be doing on a daily basis.

Additionally, the record lacks any sales invoices or other documentary evidence to indicate that the beneficiary's proposed employer had been engaged in the regular course of business for one year at the time the petition had been filed, as required by the regulations at 8 C.F.R. § 204.5(j)(3)(D).

It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Thus, based on the additional grounds discussed in the paragraphs above, this petition cannot be approved.

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.