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U.S. Citizenship
and Immigration
Services

B4

[Redacted]

FILE: WAC 02 026 56512 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

[Redacted]

MAR 03 2004

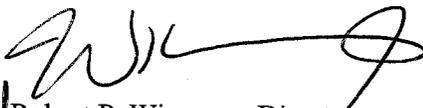
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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 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 an Arizona Limited Liability Company (LLC) that seeks to employ the beneficiary as its director of facilities. 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: (1) no qualifying relationship exists between the petitioner and the claimed foreign entity; (2) the petitioner does not have the ability to pay the proffered wage; and (3) the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief statement and additional evidence. Counsel indicated on the Form I-290B that he would be submitting a separate brief and/or evidence to the Administrative Appeals Office by August 22, 2002. As of this date, however, the record does not contain counsel's brief or any additional evidence. Therefore, the Administrative Appeals Office considers the record complete.

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 a subsidiary of the South African entity, Pinvest Holdings (Pty) Ltd. (Pinvest); (2) exports and imports telephone parts and computer accessories; and (3) employs 25 persons. The petitioner is offering to employ the beneficiary permanently at a salary of \$56,293 per year.

The first issue to be discussed in this proceeding is whether a qualifying relationship existed between the petitioner and the foreign entity when the petition was filed.

Pursuant to 8 C.F.R. § 204.5(j)(2), a subsidiary is defined, in part, as 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. As stated previously, the petitioner avers that it is a subsidiary of Pinvest of South Africa.

At the time of filing the petition with the California Service Center in October 2001, the petitioner submitted its Articles of Organization, which indicated at article two: "The initial owner of the company shall be [Pinvest] who shall own 100% of the company and which shall be evidenced by 100 ownership units." The petitioner also submitted an Operating Agreement between it and Symic, LLC that set forth the ownership of Arizona Food Company, LLC, (Arizona Foods). According to the Operating Agreement, the petitioner and Symic, LLC each owned 50 percent of Arizona Foods.

The petitioner also submitted part of a generic franchise agreement for the Atlanta Bread Company. The agreement did not specify how the petitioner, Symic, LLC or Arizona Foods was related to the Atlanta Bread Company.

The director denied the petition, in part, because of the Atlanta Bread Company's franchise agreement. The director stated:

[A]lthough the petitioner has attempted to establish a qualifying relationship through the submission of articles of organization, operating agreements, and a business plan, the evidence of [sic] is immaterial to the present case because the petitioner is a "Franchisee of the Atlanta Bread Company."

The petitioner may purchase a franchise but can never own and control it because it only holds a license from the franchiser to operate the store. . . . The petitioner submitted a copy of part of the franchise agreement. No evidence in the part submitted by the petitioner shows that the petitioner will have both ownership and control.

On appeal, counsel submits a letter from the Atlanta Bread Company. The vice president of Atlanta Bread Company confirms that Arizona Foods is a franchisee. The vice president asserts that, although Arizona Foods must adhere to certain rules governing systems and standards, Arizona Foods owns and controls the Atlanta Bread Company stores that it has opened already and will open in the future.

Persuasive documentary evidence does not support the petitioner's explanation of its ownership structure. 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). The petitioner must disclose all documents relating to the ownership and control of the two entities, which include, but are not limited to, copies of stock or interest certificates, a corporate stock ledger, stock certificate registry, corporate bylaws, minutes of relevant annual shareholder meetings, articles of organization, and operational agreements. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings). When examining this issue, documentary evidence is critical; the petitioner's assertions, by themselves, will not suffice. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record contains the petitioner's Articles of Organization, which indicate that Pinvest wholly owns the petitioner. The petitioner does not submit any interest or stock certificates to corroborate the information in

the Articles of Organization. In addition, as an attachment to its 2001 U.S. Return of Partnership Income (Form 1065), the petitioner submitted Form 5472, Information Return of a 25% Foreign Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. The petitioner indicated on this form that Pinvest was a 25 percent shareholder. It is noted that the petitioner's tax returns indicate that there are two owners, as the petitioner issued two Schedules K-1, directly contradicting the claim that the foreign entity is the sole owner. Although the ownership would still provide majority ownership, this ownership has not been substantiated by evidence in the record. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The Administrative Appeals Office notes that the petitioner has provided confusing information regarding the actual relationships among the petitioner, Arizona Food Company, and the franchiser Atlanta Bread Company. The petitioner's letter in support of the petition is written on Atlanta Bread Company's letterhead and the petitioner claims that it is doing business as Atlanta Bread Company. The petitioner's response to the director's request for evidence alleges that the petitioner's relationship to the franchiser is through its partially owned and managed subsidiary, the franchisee. The record does not contain a copy of a franchise agreement to substantiate the petitioner's or its partially owned subsidiary's relationship to the franchiser. Again, the record provides, at the least, confusing information regarding the various entities involved in this petition. Inconsistencies in the record must be resolved by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, although a franchise may be an asset of an independently owned and operated company, the petitioner has not submitted sufficiently consistent details of the ownership, control, and relationship between itself and the three other entities involved in this matter. See *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970). The record is deficient in documentary evidence that would support the petitioner's claim that it is actually operating a franchise through its partially owned subsidiary. 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, supra*.

Based upon information before the Administrative Appeals Office at the present time, the petitioner has not overcome this basis of the director's decision to deny the petition. For this reason, the director's decision to deny the petition, in part, on this issue shall not be disturbed.

The second issue to be discussed in this proceeding is whether the petitioner has the ability to pay the proffered wage of \$56,293 per year.

Pursuant to 8 C.F.R. § 204.5(g)(2):

Ability of prospective employer to pay wage. 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. . . .

On February 6, 2002, the director asked to petitioner to submit:

- IRS Tax Return Filing Status: Submit an original computer printout from the Internal Revenue Service (IRS), date stamped by the IRS, showing the status of all tax returns filed by the U.S. company. (Emphasis in original.)
- Federal Income Taxes: Provide signed and certified copies of the U.S. company's Federal income taxes (with appropriate signature(s)), to include Forms 1120, 2220, 4526, and 5472 as appropriate, for the date the U.S. company was established to the present.

In response, the petitioner submitted a copy of its 2001 U.S. Return of Partnership Income (Form 1065). According to this form, the petitioner experienced a loss of income in the amount of \$52,582. In denying the petition, the director cited this amount and determined that the petitioner could not pay the proffered wage.

On appeal, counsel states: "The petitioner has submitted evidence to document its ability to pay the wages of the beneficiary, including evidence that documents its ongoing viability" Counsel states in a cover letter that he is submitting a letter from the petitioner's accountant along with the Form I-290B; however that letter was not attached to the appeal. As the petitioner does not present any evidence regarding this issue on appeal, the director's decision concerning the petitioner's ability to pay the beneficiary's salary will not be disturbed.

The third and final issue to be discussed is whether the proffered position of managing director of operations is in an executive or managerial capacity.

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.

When filing the petition, the petitioner stated:

As Director (Facilities), [the beneficiary] will assist our Managing Directors in planning, directing and coordinating all physical facilities' activities of our U.S. office. Specifically, he will aid our Managing Directors in formulating company policies, administering construction strategies, and developing long range goals and objectives; improve upon these goals through his direction and management of subordinate administrative personnel . . . ; coordinate all construction/building activities of the company through subordinate managers; analyze new facilities construction and make recommendations to the Managing Directors; and establish and recommend to management major economic objectives. His principal focus will include directing and coordinating activities of various departments; and preparing recommendations on findings for management evaluation. [The beneficiary] will have hiring/firing authorities and be responsible for the facilities management functions for the company's management.

In the February 6, 2002 request for evidence, the director asked the petitioner to submit, in part:

- U.S. Business Organizational Chart: The submitted chart is deficient. Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)
- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Also indicate [the] percentage of time spent in each of the listed duties. Explain why the beneficiary's specific duties require [his] presence in the [United States] at this time.

- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees at the beneficiary's work site for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees. (If the United States [c]ompany is not located in California, submit the report of wages for the appropriate State.)

In response, the petitioner submitted an organizational chart, which showed that it was organized into four departments. The beneficiary was listed under the operations department as the "President of food operations and CEO of Arizona Food Company." According to the chart, the beneficiary would supervise 10 individuals. Although requested by the director, the petitioner failed to provide the job titles and job duties of the 10 employees under the beneficiary's supervision. Pursuant to 8 C.F.R. § 103.2(b)(14), failure to submit requested evidence that precludes a material line in inquiry shall be grounds for denying a petition.

The petitioner described the beneficiary's job duties, in part, as follows:

In this position, [the beneficiary] plans, directs and coordinates activities surrounding the development of a given project. His responsibilities encompass, identifying a business concept, identifying sites of implementation and establishing a work plan and staffing for the various phases of the project. [The beneficiary] oversees and directs all aspect[s] of the projects, including allotment of available resources, and establishes the procedures and guidelines to complete the project within the established goals, objectives, budget and timeframes. [The beneficiary] review the status reports prepared by project personnel in order to ensure that the project progress in [sic] on schedule and has discretionary powers to modify schedules and plans as he deems necessary.

The director determined that that the proffered position was not in an executive or managerial capacity, in part, because the petitioner failed to submit the job duties, educational level, or salary information for any employee under the beneficiary's supervision.

On appeal, counsel states briefly that the evidence submitted in response to the director's request for evidence establishes that the proffered position is managerial. Counsel also submits a list of the petitioner's employees, which includes each employee's salary, educational level, and brief job description.

The evidence submitted on appeal fails to overcome the director's conclusion that the proffered position is not in a managerial or executive capacity. The regulations governing immigration petitions under section 203(b)(1)(C) of the Act, § 1153(b)(1)(C), affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence concerning the job titles, job duties, salaries, and educational levels of its employees, and given a reasonable opportunity to provide this information for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The Administrative Appeals Office notes that, in response to the director's request for evidence, the petitioner changed the beneficiary's proposed job duties, the title of the position, the position's associated responsibilities, as well as its level of authority. In the initial petition filing, the beneficiary was titled a director of facilities. When responding to the director's request for evidence, the beneficiary became the president of facilities, with the added responsibility of being the CEO of the Arizona Food Company. Initially, the petitioner stated that the beneficiary would merely assist managing directors in planning, directing and coordinating operations. When responding to the director's request for evidence, however, the beneficiary became responsible for project management.

As stated previously, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. If this occurs, the petitioner is offering a new position to the beneficiary. Because the petitioner must establish that the initially offered position meets statutory and regulatory requirements, a determination of whether the proffered position is in a managerial or executive capacity will be based upon the initial job description. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

According to the petitioner, as the director of facilities, the beneficiary would, in essence, be an assistant to the managing directors. There is no evidence that the beneficiary would either direct the management of or manage a department or component of the petitioner's operations through managerial, supervisory or professional employs. There is also no evidence that the beneficiary would manage a function essential to the petitioner's operations. Accordingly, the director's decision to deny the petition, in part, because the proffered position is not in a managerial or executive capacity will not be disturbed.

Beyond the decision of the director, there is insufficient evidence that the petitioner had been doing business for at least one year when it filed the petition. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as "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." 8 C.F.R. § 204.5(j)(2).

According to its Articles of Organization, the petitioner was organized in March 2000. However, the petitioner's Form 1065 and the petitioner's accountant indicate that the petitioner did not begin operating until January 2001. The petitioner filed the instant petition in October 2001, approximately ten months after the petitioner began its operations. Therefore, the petitioner could not have engaged in the regular, systematic, and continuous provision of goods and/or services for at least one year prior to filing the petition. As the Administrative Appeals Office is dismissing the appeal on other grounds, however, this issue will 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 met that burden.

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