



U.S. Citizenship
and Immigration
Services

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FILE:

WAC 03 171 50063

Office: CALIFORNIA SERVICE CENTER

Date: AUG 22 2005

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 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, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in May 1999. It is a delivery service to major food distributors. 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 denied the petition determining that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) failed to consider the primary evidence establishing the qualifying relationship and misinterpreted the secondary evidence, the petitioner's tax returns.

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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the 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.

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.

In an April 20, 2003 letter appended to the petition, counsel for the petitioner stated that a Lebanese entity, [REDACTED] owned and controlled 100 percent of the petitioner. The petitioner provided its June 22, 1999 share certificate number 1 issued to [REDACTED] Lebanon in the amount of 250 shares. The petitioner also included its June 22, 1999 organizational minutes indicating it was authorized to issue 10,000 shares and had sold 250 shares of common stock to [REDACTED] Lebanon, for \$25,000. The record also included the petitioner's 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, indicating on Schedule K, Lines 5 and 7 that no corporation owned more than 50 percent of the petitioner's stock and that no foreign person owned directly or indirectly at least 25 percent of the petitioner. The 2001 IRS Form 1120 on Schedule L, Line 22(b) indicated that the value of the common shares issued was \$25,000.

On July 22, 2004, the director requested, among other things, proof that the foreign company had, in fact, paid for its interest in the petitioner. The director requested that the evidence include copies of the U.S. bank original wire transfers from the parent company to the U.S. Company, and for all funds not originating with the foreign company, an explanation for the receipt of funds from someone other than the foreign entity. The director also requested the petitioner's IRS Forms 1120 for 1998, 1999, 2000, 2001, 2002, and 2003 including all schedules and pages.

In an October 12, 2004 response, the petitioner provided a copy of a June 4, 1999 money transfer notification showing that [REDACTED] had deposited \$25,475 to the petitioner's account. The petitioner did not submit an IRS Form 1120 for the 1999 year. The petitioner did submit its IRS Forms 1120 for the years 2000 through 2003.

The 2000 IRS Form 1120 showed on Schedule E, Line 1(d) that the beneficiary owned 100 percent of the petitioner's common stock and on Schedule L, Line 22(b) that at the beginning of the year 2000 the value of the petitioner's issued stock was \$0.00 and at the end of the year 2000 the value of the petitioner's issued stock was \$25,000. The 2000 IRS Form 1120 indicated on Schedule K, Lines 5 and 7 that no corporation owned more than 50 percent of the petitioner's stock and that no foreign person owned directly or indirectly at least 25 percent of the petitioner.

The petitioner's 2001 IRS Form 1120 listed the beneficiary as an officer of the corporation but did not indicate that the beneficiary owned any of the petitioner's stock. The 2001 IRS Form 1120 indicated on Schedule K, Lines 5 and 7 that no corporation owned more than 50 percent of the petitioner's stock and that no foreign person owned directly or indirectly at least 25 percent of the petitioner. The 2001 IRS Form 1120 indicated on Schedule L, Line 22(b) that at the beginning of the year 2001 the value of the petitioner's issued stock was \$25,000 and at the end of the year 2001 the value of the petitioner's issued stock was \$25,000.

The petitioner's 2002 IRS Form 1120 showed on Schedule E, Line 1(d) that the beneficiary owned 100 percent of the petitioner's common stock and on Schedule L, Line 22(b) that at the beginning of the year 2002 the value of the petitioner's issued stock was \$25,000 and at the end of the year 2002 the value of the petitioner's issued stock was \$25,000. The 2002 IRS Form 1120 indicated on Schedule K, Lines 5 and 7 that no corporation owned more than 50 percent of the petitioner's stock and that no foreign person owned directly or indirectly at least 25 percent of the petitioner.

The petitioner's 2003 IRS Form 1120 showed on Schedule E, Line 1(d) that the beneficiary owned 25 percent of the petitioner's common stock and a second officer also owned 25 percent of the petitioner's stock. The 2003 IRS Form 1120, on Schedule L, Line 22(b) showed that at the beginning of the year 2003 the value of the petitioner's issued stock was \$25,000 and at the end of the year 2003 the value of the petitioner's issued stock was \$25,000. The 2003 IRS Form 1120, indicated on Schedule K, Lines 5 and 7 that no corporation owned more than 50 percent of the petitioner's stock and that no foreign person owned directly or indirectly at least 25 percent of the petitioner.

The director observed that although the petitioner had issued a stock certificate to [REDACTED] Lebanon, an individual, [REDACTED] had wired the purported capitalization funds to the petitioner. The director concluded that [REDACTED] actually owned the petitioner. The director also noted the discrepancies in the petitioner's submitted IRS Forms 1120 for the 2000 and 2002 tax years that showed that the beneficiary owned 100 percent of the petitioner. The director denied the petition on December 11, 2004 determining that the petitioner had not provided unerring and concise evidence to substantiate the claim of qualifying foreign company ownership of the U.S. entity, thus the record did not substantiate the claimed parent-subsidiary relationship.

On appeal, counsel for the petitioner notes that the director improperly stated that the foreign entity in this matter is the parent company of "Baifu International Trading Company," a company that is unrelated to the matter at hand. Counsel suggests that the director copied a denial from another matter, without considering the full record of the instant matter.¹ Counsel asserts that CIS failed to consider the petitioner's share certificate number 1 issued to [REDACTED] the primary evidence establishing the qualifying relationship. Counsel claims that [REDACTED] the president of the foreign company. Counsel states that the director "recognizes that the wire transfer form Bank of America, dated June 4, 1999 shows that the foreign company is an owner of the U.S. Company," but then unnecessarily takes into consideration the petitioner's U.S. Corporation Income Tax Returns.

Counsel argues that the petitioner's tax returns are secondary evidence and should be considered only if there is no other evidence available. Counsel submits an unsworn statement from the petitioner's tax return preparer admitting he had assumed that the petitioner's officers were the owners of the corporation and that "amendments for the tax returns for the tax years of 2000, 2001, 2002 and 2003 had been made to reflect the changes in statement of officers." The record also includes the petitioner's revised tax returns purportedly reflecting the correct information regarding the petitioner's ownership.

The IRS Forms submitted on appeal consist of three different types of forms filed for each of the years 2000, 2001, 2002, and 2003. The petitioner has filed an IRS Form 1120X, Amended U.S. Corporation Income Tax Return, dated January 20, 2005 and filed with the IRS January 27, 2005 for each of the subject years. The reason for the amendment is "wrong forms were filed[;] 1120-F were filed instead." The record includes IRS Form 1120, U.S. Corporation Income Tax Return, all dated January 19, 2005 which show that the beneficiary owns 100 percent of the petitioner on Schedule E, Line 1(d) in years 2000, 2001, and 2002 and the beneficiary owns 25 percent of the petitioner in 2003. The petitioner has also filed IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, listing the petitioner as the filer and showing that [REDACTED] owns 100 percent of the petitioner, all dated January 20, 2005 and filed January 27, 2005 for the years 2000, 2001, 2002, and 2003.

Counsel contends that the primary evidence clearly shows that the foreign entity owns 100 percent of the petitioner and now the secondary evidence submitted on appeal confirms that the foreign entity owns 100 percent of the petitioner and overcomes the director's only apparent reason for the denial.

Counsel's assertions and evidence are not persuasive. 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*,

¹ The AAO acknowledges that the director did not recite the correct name of the petitioner in his decision. However, the director's decision does take into account the evidence in this record and accurately sets forth the pertinent evidence regarding the petitioner's capitalization and the petitioner's IRS Forms. The director's typographical error in not accurately stating the petitioner's name, although regrettable, is not material to the director's determination and ultimate denial of the petitioner's claim that it is a subsidiary of [REDACTED]

19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. Stock certificates can be easily manipulated to demonstrate ownership that will show qualifying relationships between business entities, often to establish a petitioner's eligibility for this visa classification. As such, CIS often declines to accept stock certificates without substantiating evidence to show that the claimed shareholder actually paid for the issued shares. The regulations specifically allow the director to request additional evidence in appropriate cases. See 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In this matter, the petitioner has submitted confusing evidence to support its claim that the foreign entity owns and controls the petitioner. The petitioner presented evidence that an individual, not the foreign entity, transferred funds in June 1999 apparently to capitalize the petitioner and in exchange for issued shares. Thus the evidence submitted created an inconsistency regarding the petitioner's actual ownership. Despite the director's request that the petitioner explain any money transfers from parties other than the claimed foreign entity, the petitioner offered no explanation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, it is not clear why the petitioner does not acknowledge that it was capitalized in June 1999, rather than sometime in 2000 as evidenced by its year 2000 IRS Form 1120, at Schedule L, Line 22(b). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO notes that counsel claims that [REDACTED] was the foreign entity's president, but the record does not contain evidence supporting counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, neither the petitioner nor counsel effectively explains why an individual would be the originator of funds used to purchase an interest in the petitioner. The record does not indicate that [REDACTED] transferred the funds on behalf of the foreign entity. Further, the AAO notes that contrary to counsel's observation that the director "recognizes that the wire transfer from Bank of America, dated June 4, 1999 shows that the foreign company is an owner of the U.S. Company," the director actually determined that the record established that [REDACTED] an individual, owned the petitioner. This portion of the director's decision does not rely on the petitioner's tax returns but rather on the lack of substantiating evidence establishing the foreign entity's ownership of the petitioner.

The petitioner's evidence submitted on appeal only serves to further confuse the issue of the petitioner's ownership and control. The petitioner's IRS Forms 1120 initially submitted in support of the petition and in response to the director's request for evidence showed that the beneficiary owned: 100 percent of the petitioner in the 2000 and 2002 tax years; no percentage in the 2001 tax year; and 25 percent in the 2003 tax

year. The record does not establish that these IRS Forms 1120 were actually filed with the IRS. On appeal, the IRS Forms 1120 varied from the IRS Forms 1120 initially submitted and submitted in response to the director's request for evidence, in terms of date and the beneficiary's ownership of the petitioner. The manipulation of the petitioner's IRS Forms 1120 casts doubt on the veracity of the petitioner's representations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

On appeal, the petitioner submits IRS Forms 1120X and IRS Forms 1120-F that bear evidence that they were filed with the IRS in 2005. However, it is not clear why the petitioner, an organization incorporated in the United States, would file tax returns as if it were a foreign corporation. If the petitioner submits evidence to show that it is incorporated in the United States, then that entity cannot be considered a "branch office" since it is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The IRS Forms 1120X and the IRS Forms 1120-F also casts doubt on the reliability of the nature of the petitioner's corporate structure.

The petitioner has not substantiated its qualifying relationship with the foreign entity in this matter. Neither counsel nor the petitioner has provided sufficient evidence to verify a foreign entity, rather than an individual(s) including the beneficiary or [REDACTED] owns the petitioner. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary was employed in a managerial or executive capacity for a foreign entity prior to his entry into the United States in a nonimmigrant capacity. The record does not contain a description of the beneficiary's actual duties for the foreign entity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). The record contains the foreign entity's organizational chart but it is unclear whether the beneficiary is simply a principal of the foreign organization or whether the beneficiary actually performs managerial or executive duties, rather than provide the oversight common for an owner of a shipping concern. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this additional reason, the petition will be denied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.