



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 01 2005
SRC 04 205 52133

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

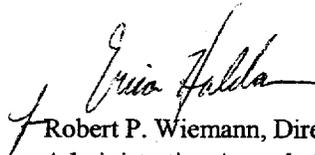
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Director, Texas Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be rejected.

The record does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative for the petitioner. The record contains a Form G-28 signed only by counsel and the beneficiary and submitted on behalf of the beneficiary. The regulation at 8 C.F.R. § 103.3(a)(iii)(B) states in pertinent part: "An affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition." Although the appeal must be rejected, the AAO will examine the primary issue in this matter.

The petitioner avers it is a corporation organized in the State of Florida in September 1998. It invests in property for resale. It seeks to employ the beneficiary as its marketing vice-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 had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits a brief.

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 a May 10, 2004 letter appended to the petition, the president of the beneficiary's foreign employer indicated that the foreign entity had employed the beneficiary since January 1997 until she was appointed as the petitioner's marketing manager in June 2001. The petitioner attached untranslated documents apparently related to the foreign entity's tax and marketing records. The petitioner did not provide information regarding its ownership and control.

The petitioner also provided its Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation for the years 2001 and 2002. The 2001 IRS Form 1120S showed on Schedule L, Line 22 that the petitioner's stock was valued at \$100 and on Schedule K-1 that [REDACTED] owned 50 percent of the petitioner's stock and that [REDACTED] owned 50 percent of the petitioner's stock. The petitioner's 2002 IRS Form 1120S showed on Schedule L, Line 22 that the petitioner's stock was valued at \$100 and on

Schedule K-1 that [REDACTED] owned 50 percent of the petitioner's stock, [REDACTED] owned 20.84 percent of the petitioner's stock, [REDACTED] owned 14.58 percent of the petitioner's stock, and the beneficiary owned 14.58 percent of the petitioner's stock.

On January 24, 2005, the director requested, among other things, all shareholder stock certificates and the petitioner's stock transfer ledger with receipts from all transactions of the United States company.

In a April 21, 2005 response, counsel for the petitioner provided copies of three stock certificates: stock certificate number 2 issued to [REDACTED] in the amount of 100 shares on September 9, 1998; stock certificate number 3 issued to the beneficiary in the amount of 50 shares on October 16, 2003; and, stock certificate number 4 issued to the beneficiary in the amount of 50 shares on April 9, 2002. The petitioner also provided its 2003 IRS Form 1120S which showed on Schedule L, Line 22 the value of the petitioner's stock as \$100 and on Schedule K-1 that [REDACTED] owned 50 percent of the petitioner's stock, [REDACTED] owned 6.25 percent of the petitioner's stock, and the beneficiary owned 43.75 percent of the petitioner's stock.

The petitioner also submitted: its Articles of Amendment filed October 14, 2003 in the Office of the Secretary of State of Florida showing the officers of the organization; a September 17, 2003 stock transfer agreement showing a transfer of 50 shares of the Company's 100 common shares with a par value of \$1 per share from [REDACTED] to the beneficiary; and minutes of a special meeting of stockholders dated September 17, 2003 with an attached stockholder list showing the beneficiary and Terri L. Williams as each owning 100 of the petitioner's issued shares.

On May 2, 2005, the director denied the petition, determining that the initial evidence submitted showed that an individual [REDACTED] owned a majority interest in the foreign entity and that the beneficiary and one other individual, [REDACTED] each owned 50 percent of the petitioner. The director determined that she could not conclude that there was an affiliated relationship between the petitioner and the beneficiary's foreign employer.

On appeal, counsel for the petitioner contends that the regulations do not preclude a multinational organization to be owned or partially owned by the alien executive. Counsel also asserts under the "portability rule," of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21), the petition had to be approvable at the time of filing and not at the time of decision. Counsel cites the Memorandum of William R. Yates, Associate Director for Operations, USCIS, HQPRD 70.6.28-P (May 12, 2005) ("Yates Memo") in support of his assertion.

Counsel's assertions are not persuasive. First, the record does not contain documentation establishing the ownership of the foreign entity. The documents related to the foreign entity are not translated. As the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Second, the documentation concerning the ownership and control of the petitioner is inconsistent. The stock certificates issued, the petitioner's IRS Forms 1120S, and the petitioner's amended articles present inconsistent

accounts of the petitioner's ownership in 2003 and the record contains no evidence clarifying the petitioner's ownership and control when the petition was filed in July 2004. 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 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.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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 Scientology International*, 19 I&N Dec. at 595.

Although the regulations do not preclude an alien executive to own the stock of a multinational organization, the petitioner must still provide consistent evidence of the petitioner's and that of the beneficiary's foreign employer's ownership and control. 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)). In this matter, the petitioner has not provided the necessary documentation establishing the claimed affiliate relationship between the petitioner and the beneficiary's foreign employer.

Counsel's assertion that the "portability rule" requires only that the petition be approvable when the petition was filed is not persuasive. First, counsel has misapplied the Yates memo to the matter at hand. The record contains no evidence that the beneficiary or a "new employer" is requesting that the beneficiary port to a new position. Second, even if the beneficiary has a "new job," the beneficiary's new job and the portability considerations of AC21 are separate issues that must be addressed in the adjudication of the beneficiary's I-485 application, not in the I-140 decision. No appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii).

Third, the AAO observes that for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "remain valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added). Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. It would also be absurd to suppose that Congress enacted a statute that would encourage large numbers of ineligible aliens to file immigrant visa petitions, if the legislation was actually meant to be an impetus for CIS to reduce its backlogs. To construe section 106(c) to include unadjudicated, denied, and revoked petitions would create a situation where ineligible aliens would gain a "valid" visa simply by filing frivolous visa petitions and

adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

In the present matter, the petition was filed on behalf of an alien who was not "entitled" to the classification and the petition was denied pursuant to the statutory authority of CIS. Section 106(c) of AC21 does not repeal or modify section 204(b), section 205, or section 245 of the Act, which all require an "approved petition" prior to CIS granting immigrant status or adjustment of status and further provide that CIS may revoke the approval at any time for good and sufficient cause. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

Beyond the decision of the director, the petitioner has not provided sufficient evidence that the beneficiary's employment for either the foreign entity or the petitioner has been or will be in a managerial or executive capacity. The petitioner did not provide a job description for the beneficiary's employment with the foreign entity. Further, the petitioner provided a general description for the beneficiary's job position with the petitioner. The job description is not sufficiently specific to determine whether the beneficiary's job duties comprise duties that will be primarily managerial or primarily executive or whether the beneficiary's job duties consist of performing the petitioner's routine operational tasks.

As the appeal was not properly filed, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

ORDER: The appeal is rejected.