

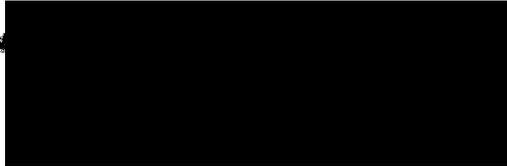
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date JAN 27 2005

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IN RE:

Petitioner:



Beneficiary:

PETITION:

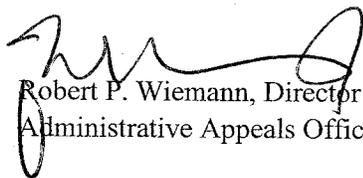
Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

The petitioner is an organization incorporated in August 1994 in the State of Illinois. It is an independent broker with the Commodity Futures Trading Commission and with the Securities and Exchange Commission. It seeks to employ the beneficiary as its managing director. Accordingly, it 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 beneficiary asserts that the director misunderstands case law and that Citizenship and Immigration Services (CIS) has previously approved matters similar to the matter at hand.

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 with the beneficiary's foreign employer. 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. *See* section 203(b)(1)(C) of the Act.

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.

The facts in this matter are not in dispute. The record shows that the petitioner is owned as follows:

[REDACTED]	3,750 (37.5 percent)
[REDACTED]	3,750 (37.5 percent)
[REDACTED]	2,500 (25 percent)

The record confirms that the foreign entity is owned as follows:

[REDACTED]	19 percent
[REDACTED]	21 percent
[REDACTED]	15 percent

The director determined that the owners of the petitioner and the foreign entity were not the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; thus, a qualifying relationship between the two entities did not exist.

On appeal, counsel for the petitioner cites *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Counsel asserts that the *Matter of Hughes* decision held that even though the same group owned less than the majority ownership but had control, an affiliate relationship had been established. Counsel asserts that two shareholders, [REDACTED] and [REDACTED], have majority control over both organizations.

Counsel refers to an Assignment of Shares and Addendum to Memorandum of Association of the foreign entity. Counsel cites Article 8 of the agreement wherein all the shareholders of the foreign entity have given complete control of the management of the foreign entity to [REDACTED]. Counsel implies this is evidence that [REDACTED] as sole manager of the foreign entity, has control of the entity. Counsel also provides statements from two of the petitioner's shareholders stating that [REDACTED] and [REDACTED] have the same control over the management of the petitioner.

Counsel's assertions are not persuasive. The regulations 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 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. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter no one shareholder owns a majority interest in either company. Counsel asserts that two individuals by virtue of their combined shares own a majority interest in both organizations and concludes that the combined shares establish control of both entities. However, for both shareholders, [REDACTED] and [REDACTED] to control the petitioner or the foreign entity, both shareholders must vote in concert. The petitioner has provided no evidence that these two shareholders have agreed to always vote their shares the same way for each entity. Moreover, even if the two shareholders had agreed to vote their shares in concert, the two entities are not owned and controlled by the same parent or individual, or by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L). As noted above, in order to establish "de facto" control of both entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *See Matter of Hughes*, 18 I&N Dec. at 293. A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999). An agreement to vote shares in concert does not rise to the level of a proxy agreement that would give one individual control over the voting rights of a majority of the issued shares. For this reason, the petitioner has not established that a qualifying affiliate relationship exists between the two entities.

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.