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FILE: WAC 03 102 52312 OFFICE: CALIFORNIA SERVICE CENTER Date: JUN 07 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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The petitioner is a Minnesota corporation engaged in dietary and herbal supplement network distribution. The petitioner indicates that it is an affiliate of Canada Limited, the beneficiary's foreign employer. It seeks to employ the beneficiary as its vice president of operations. 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 the beneficiary's foreign employer and denied the petition.

On appeal, counsel disputes the director's finding and submits a brief along with additional evidence in support of the petitioner's claim.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 issue in this proceeding was whether the petitioner established that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

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 support of the initial petition, the petitioner submitted copies of the stock certificates issued to [REDACTED] the petitioner's foreign parent entity. The petitioner also submitted a list of all of its stockholders identifying each stockholder, the stock certificates issued in their names, the number of shares issued, and the issue date of each certificate. The list included all stock certificates that had been issued from May 1998 through October 10, 2002. A comprehensive review of this documentation indicates that as of October 10, 2002, 59% of the petitioner's stock was owned by [REDACTED] which, like the beneficiary's foreign employer, is entirely owned by Anthony Jurak.

In response to the director's request for additional evidence, the petitioner submitted an additional list of stockholders, which reflects the petitioner's ownership distribution as of July 12, 2004. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, documentation that reflects the petitioner's stock distribution at some point after the petition is filed has no probative value in determining whether the petitioner was eligible for the immigration benefit sought at the time the petition was filed. Rather, such documentation is a relevant indicator of whether the petitioner continued to demonstrate eligibility up through the filing of the application for adjustment of the beneficiary's status. *See* 8 C.F.R. § 245.1(a). In the instant matter, the stockholder list shows that as of July 12, 2004, [REDACTED] directly owned approximately 43.2% of the petitioner's stock and controlled an additional 9% of the stock issued to [REDACTED] virtue of proxy votes, which were transferred to [REDACTED] through a trust agreement signed by the owner of the shares. Therefore, as of July 12, 2004, [REDACTED] effectively controlled more than 50% of the petitioner's stock.

The petitioner's response to the request for evidence also included its Form 1120 corporate tax return for 2002, which accounts for the one-year period beginning on June 1, 2002 and ending on May 31, 2003. As this tax return includes the time period during which the petition was filed, it is an accurate indicator of the petitioner's ownership during the relevant time period. According to Schedule K, items 5 and 7, of the relevant tax return, 60% of the petitioner's stock was owned by a Canadian individual, corporation, or partnership. Statement 9, which is appended to the relevant tax return, clarifies that [REDACTED] is the owner of 60% of the petitioner's voting stock; and Form 5472, which is also appended to the tax return, further indicates that [REDACTED] the direct owner of more than 25% of the petitioner's stock. Based on the chart, which shows [REDACTED] as the direct owner of [REDACTED] and [REDACTED] the information provided in the petitioner's tax return corroborates the petitioner's claim regarding its

ownership and control at the time the petition was filed. The fact that [REDACTED] and [REDACTED] [REDACTED] both named as owners of the petitioner is consistent with the petitioner's initial claim that [REDACTED] ownership of the petitioner is derivative through his direct ownership of [REDACTED]

Despite the submitted documentation, the director denied the petition on August 11, 2004 noting that no voting proxies or other agreements were submitted to show common ownership and control. The director primarily focused on the petitioner's ownership breakdown, which consists of 49 different shareholders, and ownership of the beneficiary's foreign employer, which consists of Anthony [REDACTED] as the sole shareholder.

On appeal, counsel submits a brief stating that the petitioner did, in fact, submit evidence of proxy votes, which were discussed in a voting trust agreement signed on "Oct. '03" by [REDACTED] one of the petitioner's shareholders. However, the voting trust agreement did not exist when the petition was filed. Therefore, it cannot be considered for the purpose of determining the petitioner's eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49.

In the instant matter, the petitioner's initial shareholder list, which was issued shortly prior to the filing of the petition, states that [REDACTED] owned approximately 9.9 million of a total 15.5 million issued shares, thereby giving [REDACTED] approximately 59% of the petitioner's voting stock when the petition was filed. This information is corroborated in the petitioner's 2002 tax return. The evidence of record indicates that at the time the petition was filed, [REDACTED] owned and controlled 100% of the beneficiary's foreign employer and more than 50% of the petitioning organization by virtue of his 100% ownership of [REDACTED]. Therefore, the petitioner has submitted sufficient evidence to establish that at the time the petition was filed, the U.S. entity and the beneficiary's foreign employer were affiliates by virtue of being majority owned and controlled by the same individual, regardless of the voting trust agreement. As such, the director's decision is hereby withdrawn.

However, pursuant to a thorough review of the record, the AAO concludes that the record lacks sufficient evidence to establish that the petitioner had been doing business for one year prior to the filing of the petition and continued to do business after the petition was filed. *See* 8 C.F.R. 204.5(j)(3)(i)(D). Although the director instructed the petitioner to submit various tax information in the request for additional evidence, this documentation is not an accurate indicator of whether a company is doing business. The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business 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." Although the petitioner claims to be engaged in retail of a particular product, the record lacks any documentation that would indicate that the product has been sold on a regular, systematic, and continuous basis.

Additionally, the record does not contain sufficient information as to the beneficiary's job duties and the petitioner's organizational structure at the time the petition was filed. Although the petitioner submitted an organizational chart in response to the director's request for evidence, the chart is dated May 2004, which is one year and three months after the petition was filed. As previously stated, the petition must establish that it was eligible to classify the beneficiary as a multinational manager or executive at the time the petition was filed. *See Matter of Katigbak*, 14 I&N Dec. at 49. Furthermore, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In the instant matter, the petitioner has not provided an adequate description of the duties performed by the beneficiary at the time the petition was filed. 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).

Accordingly, this matter is remanded. The director is instructed to review the record of proceedings in light of the AAO's findings and issue an additional request for evidence addressing the relevant issues discussed above.

ORDER: The director's decision, dated August 11, 2004, is hereby withdrawn. The matter is remanded for further action consistent with the above discussion and entry of a new decision, which, if adverse, shall be certified to the AAO for review.