



U.S. Citizenship  
and Immigration  
Services

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FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date: JAN 24 2008

SRC 04 150 52731

IN RE:

Petitioner:

[Redacted]

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:

[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, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further consideration and entry of a new decision.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Texas that is engaged in the sale of jewelry. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that a qualifying relationship exists between the foreign and United States entities. The director also noted uncertainty in the type of business performed by the foreign corporation.

On appeal, counsel for the petitioner claims that the record demonstrates that both the foreign and United States entities are owned and controlled by the beneficiary, thereby establishing an affiliate relationship. Counsel submits an appellate brief and additional evidence in support of the claim of a qualifying relationship.

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 or 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, 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 is whether a qualifying relationship exists between the foreign and United States entities.

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.

The petitioner filed the instant petition on April 29, 2004. In an attached letter, the petitioner stated that the corporation was a subsidiary of the Pakistani company, which is engaged in importing, wholesale and retail sales, and investing. As evidence of its operations in the United States, the petitioner submitted: (1) its certificate of incorporation; (2) its articles of incorporation, which identified the foreign entity and the beneficiary as "initial shareholders"; (3) by-laws; (4) minutes from a board of directors' meeting reflecting the issuance of 510 shares of stock to the Pakistani company and beneficiary; (5) stock certificate number one naming the foreign entity as the holder of 510 shares, or 51%, of the United States corporation; and (6) Internal Revenue Service (IRS) Schedule K-1, Shareholder's Share of Income, Credits, Deductions, indicating that the beneficiary owned 100 percent of the corporation's stock in the year 2003.

With regard to the foreign entity, the petitioner submitted the following documentation: (1) an incomplete tenancy agreement to rent business premises in Karachi, Pakistan; (2) copies of vouchers evidencing rent paid in 2003; (3) electric and telephone bills; (4) a bank account summary for 2003; (5) tax assessment receipts for the years 2001 through 2005 identifying the beneficiary as the proprietor of the foreign company; and (6) an income tax ordinance dated April 7, 2003 identifying the beneficiary as the proprietor and confirming the foreign company's payment of annual taxes.

In a March 15, 2005 request for evidence, the director asked that the petitioner submit documentary evidence of the common ownership and control between the foreign and United States entities. The director noted that such evidence could include "stock certificates, copies of corporate bylaws/constitutions which clearly indicate stock ownership, certified affidavits from corporate executives or corporate legal counsel, or copies of published annual reports which indicate affiliates and/or subsidiaries and the percent of ownership held by the parent corporation."

Counsel responded in a letter dated May 31, 2005. In the attached documentation, counsel submitted the petitioner's 2003 IRS Form 1120S, U.S. Tax Return for an S Corporation, which indicated that the corporation had one shareholder during the year. Counsel again submitted the previously referenced Schedule K-1.

In a decision dated June 23, 2005, the director concluded that the petitioner had not demonstrated that a qualifying relationship exists between the foreign and United States entities. The director noted that the petitioner had "failed to address or submit the [requested] evidence of the U.S. or foreign entity's affiliation." The director concluded that the original evidence submitted with the petition did not establish the purported affiliate relationship. Consequently, the director denied the petition.

In an appeal filed on July 28, 2005, counsel claims that the director incorrectly concluded that an affiliate relationship did not exist between the two entities. In an attached appellate brief, counsel references the tax payment receipts for the foreign entity, which name the beneficiary as the corporation's owner. Counsel notes that it is "cultural norm" in Pakistan for an individual to assume his father's first name as his last name, which may have caused confusion in the company's ownership when Citizenship and Immigration Services (CIS) was reviewing the foreign entity's corporate documents. Counsel submits evidence in the form of the beneficiary's birth certificate, Form I-797A, Notice of Approval of L-1A status, and Form I-512L, Parole Document, identifying the full name of the beneficiary. In addition, counsel submits the National Tax Number Certificate issued to the beneficiary by the Pakistan government in 1997 when the proprietorship was formed, and tax payment receipts issued by the Pakistan treasury department. Counsel notes that the tax payment receipts contain the same tax identification number as that assigned to the beneficiary on its tax certificate in 1997.

With regard to the ownership of the United States corporation, counsel references the petitioner's stock certificate, which identifies the foreign entity as a holder of 51 percent of the petitioner's issued stock. Counsel cites *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) and *Matter of Tessel*, 17 I&N Dec. 631 (Comm. 1981) as guidance in establishing an affiliate relationship between the companies as a result of "effective de jure or de facto control of both organizations" and "a common majority owner."

Counsel also addresses the director's statement regarding ambiguity of the foreign entity's operations. Counsel references documents submitted by the petitioner in the form of bank statements, corporate tax documents, invoices, utility bills, and lease agreements evidencing each corporation's operations. Counsel expresses difficulty "[in] understand[ing] what the [director] means by this comment," and notes that it "creates the presumption that the [director] did not review the file, or evidence of the activities, nor looked at the photographs of the foreign business." Counsel further addresses the director's notation that the petitioner had failed to submit requested customs documents. Counsel clarifies that while the director requested Custom Forms 7501 and 301, the petitioner is not engaged in the import and export of products, thereby making the request irrelevant. Counsel identifies invoices that were previously submitted for the record that demonstrate that the petitioner is trading with domestic suppliers and vendors, and does not import its merchandise.

Upon review, the record demonstrates that an affiliate relationship exists between the foreign and United States entities.

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.

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. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Although the record contains inconsistencies, the totality of the evidence establishes an affiliate relationship between the foreign and United States entities. The petitioner has submitted evidence in the form of a tax certificate, tax payment receipts, and an income tax ordinance to establish the beneficiary's sole ownership of the foreign entity. Evidence of the petitioner's ownership, while not entirely consistent, ultimately establishes the beneficiary as the sole owner of the petitioning corporation. The record contains discrepancies whether the beneficiary is the sole owner of the petitioner, or whether the foreign entity owns a portion of the petitioner's issued stock. In either instance, the beneficiary, who is the sole proprietor of the foreign entity, would own and control the petitioning entity. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). It is irrelevant whether the petitioner's stock is issued in the name of the beneficiary or in the fictitious name used by his proprietorship. The petitioner has therefore demonstrated the existence of the requisite qualifying relationship. Accordingly, the director's decision will be withdrawn.

The AAO notes the director's duty to specifically explain why the record is deficient in establishing the existence of a qualifying relationship between the foreign and United States entities. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Here, the director failed to satisfy this burden.

It is unclear from the June 23, 2005 decision whether the director also concluded that the foreign entity had not been doing business at the time of filing. Evidence such as rental payment receipts, tax payment receipts, and invoices and utility statements dated within the years 2004 and 2005 demonstrate that the foreign corporation continued doing business following the beneficiary's departure.

Although the petitioner has overcome the specific deficiencies found by the director, the AAO notes that the director did not address the issues of whether the beneficiary was employed abroad in a primarily managerial or executive capacity or would be employed by the United States in a qualifying 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

In the letter appended to the petition, the petitioner stated that while employed abroad as the foreign company's general manager, the beneficiary oversaw and ran the corporation. The petitioner further stated:

[The beneficiary] [was] responsible for assessing, and analyzing any possible acquisition candidate, spending time understanding the dynamics of allied industry, while performing

many directorial duties as the president of the company involving strategic planning, supervision, coordination and representation of the corporation. [The beneficiary's] responsibility include[d] direct[ing] and overseeing the total operation of the company, including the hir[ing], train[ing], supervis[ion], and fir[ing] of all employees, as well as making business decisions regarding any future growth, merger, or acquisition, and expansion plans.

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. § 214.2(l)(3)(ii). Although the petitioner submitted an organizational chart identifying ten positions in the company, including the beneficiary's as "president-owner," the limited evidence in the record does not demonstrate that the beneficiary's role was managerial or executive in nature. The managerial or executive job duties of the beneficiary cannot be ascertained from the petitioner's job description. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). Additionally, the petitioner has not clarified whether the beneficiary's role within the company was that of "general manager" or "president." 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 petitioner also stated in its initial letter that the beneficiary, as the president of the United States corporation, would divide his time in the following manner: (1) investigating business opportunities and setting personnel policies, and reporting to the parent company, 20%; (2) hiring, firing, training and supervising managers, reviewing employees' work performance, setting corporate goals, and overseeing the operation of the business, 30%; (3) communicating with attorney, accountants, vendors and providers, 15%; (4) acting as a liaison between the United States and foreign corporations to standardize marketing and development functions, 5%; (5) representing the petitioner at trade shows and tracking industry changes, 20%; and (6) mentoring and counseling management and employees, 10%. The record also contains a letter from the foreign entity describing responsibilities held by the beneficiary in relation to expanding the petitioner's business. The petitioner submitted the company's organizational chart identifying five lower-level employees, however, the petitioner's quarterly tax report for the period ending June 30, 2004, the quarter during which the instant petition was filed, reflects the employment of four workers, the beneficiary, the company's vice-president, and two individuals who were not identified on the petitioner's organizational chart. The limited job description, as well as the discrepancies in the petitioner's staffing levels, prevents a finding that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Case law dictates that a petitioner's blanket claim of employing the beneficiary as a manager or executive without a description of how, when, where and with whom the beneficiary's job duties occurred is insufficient for establishing employment in a primarily managerial or executive capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The record as presently constituted does not establish the beneficiary's eligibility for this immigrant visa classification, and the petition will therefore be remanded to the director for further action and consideration. The director is instructed to consider the issues of whether the beneficiary was employed abroad and would

be employed in the United States in a primarily managerial or executive capacity, and, if necessary, request additional evidence related to the beneficiary's former and proposed employment capacities. The director should enter a new decision based on her review of the record and any additional documentary evidence.

**ORDER:** The decision of the director dated June 23, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.