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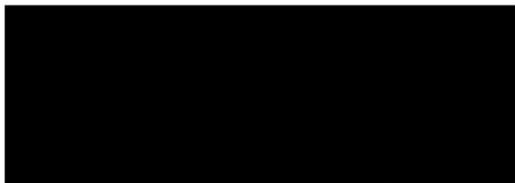
U.S. Department of Homeland Security
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Washington, DC 20529



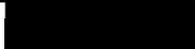
U.S. Citizenship
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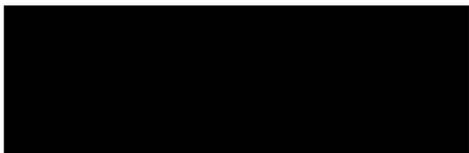
Petitioner:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation engaged in the production and sales of portable karaoke systems. It seeks to employ the beneficiary as its director of marketing. 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 based on three independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity; 2) the petitioner failed to establish that the it would employ the beneficiary in a managerial or executive capacity; and 3) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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.

While the director was correct in placing great emphasis on the descriptions of the beneficiary's duties with the foreign and U.S. entities, this element must be reviewed in light of a comprehensive analysis of other relevant factors. These factors include the petitioner's overall organizational structure, which in the present matter is complex with a number of managerial employees, as well as the beneficiary's position with respect

to others within each given entity. Proper consideration of all three factors indicates that each entity is widely staffed with individuals who are assigned to perform the daily non-qualifying tasks of each entity. Therefore, it is more likely than not that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. The decision of the director will be withdrawn as it relates to the managerial and executive capacity of the beneficiary. As such, this decision will address the remaining basis for denial.

The remaining issue in this proceeding is whether the ownership breakdowns of the petitioner and its foreign counterpart fall within one of the definitions of a qualifying relationship.

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 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. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In support of its Form I-140, the petitioner submitted a letter dated March 20, 2006 in which it stated that Enter Tech, the beneficiary's foreign employer, owns 12% and that Enter Tech's chief executive officer (CEO) owns 44% of the petitioner's stock. Reference was made to a joint venture agreement between the two companies memorializing the foreign entity's ownership share of the U.S. petitioner. The CEO's ownership is memorialized in a separate shareholder agreement. Despite the petitioner's claim that it and Enter Tech are affiliate organizations, the letter was silent as to Enter Tech's actual ownership.

Accordingly, the director issued a request for additional evidence (RFE) dated September 20, 2006 instructing the petitioner to submit documentation establishing that the beneficiary's prospective U.S. and foreign employers are commonly owned and controlled.

In response, the petitioner submitted a letter from counsel dated December 13, 2006. Counsel explained that the foreign entity is a publicly traded corporation with offices in various countries. While counsel reiterated the petitioner's ownership breakdown and provided some documentation in support of the petitioner's claim, the record remained silent as to the foreign entity's ownership.

After reviewing the documentation provided, the director determined that the petitioner failed to establish the existence of a qualifying relationship with the beneficiary's foreign employer and denied the petition. The director reviewed the information provided by the petitioner with regard to its own ownership and pointed out that the petitioner did not provide all of the stock certificates it issued and failed to provide a stock ledger. The director properly pointed out the petitioner's failure to provide documentation pertaining to the ownership of the foreign entity. It is noted that 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).

On appeal, counsel maintains the claim that the beneficiary's foreign and U.S. employers have a qualifying affiliate relationship in that they are both owned and controlled by ██████████ CEO, who owns 50% of the petitioner's voting shares and 10% of the foreign entity's shares. Counsel further explains that despite the fact that ██████████ owns only 10% of the foreign entity's stock, he in fact controls the company by virtue of being the president and CEO as well as the largest single shareholder. Counsel contends that Mr. ██████████ ownership interests in the respective companies amount to controlling interests.

Counsel's arguments, however, are not persuasive. Contrary to counsel's assertions, the mere "possibility of control," as discussed in the *Estate of Winkler v. Comm'r of Internal Revenue*, is not sufficient to establish who consistently controls the foreign entity at any given time. 57 T.C.M. 373 (1989). If Citizenship and Immigration Services (CIS) were to generally apply counsel's reasoning, anyone with an ownership interest would stand the chance of controlling the company, regardless of the portion of ownership, and there would be no need to establish controlling ownership interest as required in part A of the definition of affiliate. *See*

8 C.F.R. § 204.5(j)(2). Thus, counsel's interpretation of control is directly contradicted by relevant regulatory provisions.

While counsel understandably points out the impracticality of providing documentation for each of the many shareholders of the foreign entity, the record shows that the petitioner previously provided no documentation at all, not even documentation to establish [REDACTED] purported 10% ownership. As properly noted by the director, 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)). While the petitioner submits evidence regarding the foreign entity's ownership on appeal, the AAO notes that petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As the petitioner failed to submit the requested evidence in response to the RFE, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Additionally, the record lacks documentation to establish that [REDACTED] controls the foreign entity as claimed. The fact that he is president and CEO of the company is insufficient in light of the many shareholders and a board of directors maintaining their respective checks on [REDACTED] authority. Without evidence that [REDACTED] has been given majority control by proxy from other shareholders, his 10% ownership would be insufficient to establish that he owns and controls the foreign entity in a manner similar to his ownership and control of the U.S. petitioner. Thus, the petitioner has failed to submit sufficient documentation to establish that it shares common ownership and control with the beneficiary's foreign employer.

As a final note, counsel makes several references to the petitioner's current approved L-1 employment of the beneficiary, suggesting that eligibility for the immigration classification currently sought has already been established. With regard to the beneficiary's L-1 nonimmigrant classification, it should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Furthermore, although the regulatory definitions for subsidiary and affiliate are the same, the question of overall eligibility requires a comprehensive review of all of the provisions. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003).

In addition, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. CIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1

petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.