



U.S. Citizenship
and Immigration
Services

E-1

[Redacted]

FILE:

[Redacted]

Office: SAN FRANCISCO, CA

Date:

JUL 22 2004

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application to Preserve Residence for Naturalization Purposes under Section 316(b) of the Immigration and Nationality Act; 8 U.S.C. § 1427(b).

ON BEHALF OF APPLICANT:

[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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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The record contains the following evidence to support the applicant's claim that [REDACTED] (Cendura) is an American firm or corporation engaged in the development of foreign trade and commerce of the United States, and that [REDACTED], India [REDACTED] qualifies under the Act as a subsidiary of [REDACTED].

A December 23, 2002, letter from [REDACTED] VP of Engineering [REDACTED] stating that the applicant became an employee of [REDACTED] in January 2002, that Cendura is an American corporation incorporated in the state of Delaware in January 2002, and that [REDACTED] is engaged in development of software products using U.S. and Indian technical resources.

A December 27, 2002 letter from [REDACTED] VP of [REDACTED] stating that [REDACTED] is a subsidiary of [REDACTED], and that [REDACTED] India will be engaged in product development and localization and will work with Indian and Asia Pacific region customers to help develop business.

A Certificate of Incorporation signed by [REDACTED] Incorporator, reflecting that [REDACTED] was incorporated in the state of Delaware on January 2, 2002.

A Statement and Designation by Foreign Corporation, filed in California on January 23, 2002, stating that [REDACTED]'s principal office is located in Mountain View, California.

The Articles of Association of [REDACTED] India, dated October 25, 2002, reflecting that [REDACTED] India is a limited ownership private company, established in India and operating in India, and that [REDACTED] is subject to the laws of India. The Directors of the [REDACTED] India are listed as [REDACTED]. Their addresses are in Hyderabad, India.

A July 30, 2003, affidavit by [REDACTED] stating that he is the Managing Director of Cendura India, and that [REDACTED] was incorporated in October 2002 under the laws of India. The affidavit additionally states that [REDACTED] is the parent company of Cendura India, that [REDACTED] is a leader in the management and support of distributed applications software, and that the applicant will work for [REDACTED] India in the same capacity as he presently holds for [REDACTED].

An August 5, 2003 affidavit by [REDACTED] stating that he is the Chairman and Chief Executive [REDACTED] and that "[REDACTED] is the ultimate parent company of all [REDACTED] and is a U.S. owned entity in that more than 50% of its shareholders are U.S. citizens or U.S. corporate/legal entities." The affidavit states further that [REDACTED] is "a leader in the management and support of distributed applications software," and that the applicant "will be assigned to [REDACTED] in [REDACTED] India for an extended period(s) of up to two (2) years, commencing August 10, 2003 and ending August 10, 2005, in the same capacity as he presently occupies."

Three [REDACTED] India share certificates reflecting that [REDACTED] [REDACTED] India, sold or transferred 90,000 of their shares to [REDACTED] on January 7, 2003, and that they sold or transferred 9,000 and 1,000 of their shares to Cendura on July 8, 2003.

An application for foreign collaboration, filed by [REDACTED] in India on January 22, 2003. [REDACTED] proposed activities are listed as "carrying on the business of software development, providing consultancy and other services, communication and information services, and providing network resources through internet web browser and allied services." The application lists [REDACTED] foreign equity participation as 100%, "by way of acquisition of 10,000 shares held by [REDACTED] in the ratio of 9,000 and 1,000 shares of Rs. 10/- each by [REDACTED] USA in the paid up capital of Rs. 1.00 lakh in [REDACTED]

An April 4, 2003, Reserve Bank of India document reflecting that 10,000 [REDACTED] equity shares were transferred from resident to non-resident shareholders, and that the Indian government "approved the foreign equity participation in the equity capital of [REDACTED] Pvt. Ltd. Hyderabad (CSPL) up to 100% by [REDACTED] U.S.A. (CCUSA)."

A July 7, 2003, Reserve Bank of India document giving final approval to the transfer of 10,000 equity shares from resident to non-resident shareholders. The document states, amongst other things, that, "the shares to be acquired by CCUSA shall not be sold, transferred gifted or disposed off [sic] in any manner except in terms of the extant [sic] regulations issued / notified by the Reserve Bank of India under the Foreign Exchange Management Act 1999."

In *Matter of Warrach*, 17 I&N Dec. 285, 286-87 (BIA 1979), the Board of Immigration Appeals stated:

[W]hen it is shown that 51 percent or more of the stock of the employer corporation is owned by a foreign firm, such firm is a "foreign corporation" within the meaning of section 316(b). The fact that a firm is incorporated under the laws of a state of the United States does not necessarily determine that it is an American firm or corporation. The nationality of such firm would be determined by the nationality of those persons who own more than 51 percent of the stock of that firm.

Citizenship and Immigration Services (CIS) Interpretations 316.1(4)(iii) states:

- (iii) [W]hen no one American firm or corporation controls the employing foreign corporation through direct ownership of more than 50% of its stock, the foreign corporation cannot be regarded as a "subsidiary" of an American firm or corporation for purposes of current section 316(b), even though all of the stock of the foreign corporation is actually owned by American firms or corporations.

The fact that a firm is incorporated under the law of a state of the United States does not necessarily determine that it is an American firm or corporation. The nationality of the firm is determined by the nationality of those persons or corporations who own more than 50 percent of the stock of that firm.

The AAO finds that the applicant has established that [REDACTED] incorporated in Delaware and that its office is based in California. However, based upon a thorough review of the record, the AAO finds that the applicant has failed to establish that [REDACTED] meets the definition of an American firm or corporation engaged in the development of foreign trade and commerce of the United States. The AAO finds that the applicant has also failed to establish that [REDACTED] India is a subsidiary of Cendura as defined by the Act, or that Cendura India is engaged in the development of foreign trade and commerce of the United States.

The AAO notes that the record contains no evidence to establish the nationality of the owners of [REDACTED] or to substantiate the claim that 51% or more of [REDACTED] ownership is made up of U.S. citizens or U.S. corporate or legal entities. Moreover, the AAO notes that the record contains no evidence to establish the actual percentage of ownership interest [REDACTED] has in [REDACTED] India. The AAO notes further that despite the equity participation of [REDACTED] in [REDACTED] India, there is no evidence to indicate that [REDACTED] controls the operation of [REDACTED] and the evidence indicates that [REDACTED] India existed and was incorporated in India independently of [REDACTED] and that [REDACTED] continues to operate as an Indian company. The AAO additionally finds that the applicant failed to present employment contract evidence to establish his employment with [REDACTED] or terms of his employment with [REDACTED]. The applicant additionally failed to provide evidence to establish that [REDACTED] is actually engaged in software product development in India, or that the engagement in such business would, in this case, constitute the development of foreign trade and commerce of the United States.

Accordingly, the AAO finds that the applicant has failed to establish that he qualifies for benefits under section 316(b) of the Act. The appeal will be dismissed accordingly.

ORDER: The appeal is dismissed