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U.S. Citizenship
and Immigration
Services

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OCT 28 2005

FILE: [REDACTED] Office: PHOENIX, AZ Date:

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

DISCUSSION: The application to preserve residence for naturalization purposes was denied by the District Director, Phoenix, Arizona. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous AAO decision dated July 2, 2003, will be withdrawn and the appeal will be sustained.

The applicant is an employee of Amkor Technology, Inc. (hereafter referred to as "Amkor"), who was granted permanent residence on November 24, 1998, as a multinational executive or manager. Expecting to file an application for naturalization as a United States citizen in the future, the applicant filed a Form N-470, Application to Preserve Residence for Naturalization Purposes (Form N-470) with his local immigration office in Phoenix, Arizona, on August 24, 2001. The applicant seeks to preserve his residence for naturalization purposes under section 316(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1427(b), as a lawful permanent resident who will be temporarily absent from the United States for the purpose of employment with an "American corporation".

In order to be naturalized as a United States citizen, the Act requires in part, that a person reside continuously in the United States as a lawful permanent resident for at least five years prior to filing an application for naturalization, and that the person be physically present in the United States for at least one half of the required residency period. *See generally*, section 316 of the Act, 8 U.S.C. § 1427. Section 316(b) of the Act addresses the effect of absences during the required five-year period of continuous residence, and provides, in pertinent part that:

[A]bsence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship . . . shall break the continuity of such residence except that in the case of a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and who thereafter . . . is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation.

In the present matter, the district director determined that the applicant had failed to establish that his employer, Amkor, was an "American firm or corporation" as defined by the Act. The district director denied the application for preservation of residence for naturalization purposes on this basis, and the AAO affirmed the district director's decision on appeal.

8 C.F.R. § 103.5(a) states in pertinent part:

(2) [R]equirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when

filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

In the present motion to reopen/reconsider, counsel submits additional documentation reflecting that [REDACTED] is a publicly traded corporation that is incorporated in Delaware, and that trades exclusively on the U.S.-based, NASDAQ stock exchange market. Counsel asserts that relevant Department of State policy and Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) legal opinions establish that, for treaty trader and investor (E visa) purposes, a corporation that is incorporated in the U.S., is publicly held, and trades exclusively on a U.S. stock market, is presumed to have U.S. nationality. Counsel indicates that the size and investor ownership realities of today's publicly held corporations mandate that the AAO employ a similar definition when defining "American firm or corporation" for section 316(b) of the Act purposes.

The AAO finds that counsel has stated new facts to be proved in a reopened proceeding and that the facts are supported by documentary evidence. The AAO additionally finds that counsel has stated the reasons for a reconsideration of the previous AAO decision, and that counsel has referenced relevant legal policies and opinions. The AAO will therefore grant the present motion to reopen/reconsider.

For purposes of section 316(b) of the Act, the nationality of a firm or corporation has traditionally been determined by tracing the percentage of individual ownership interests in a firm or corporation, and by tracing the nationality of the persons having principal ownership interests (more than 50%) in the firm or corporation. The Immigration and Naturalization Service Regional Commissioner stated in *Matter of Warrach*, 17 I&N Dec. 285, 286-87 (Reg. Comm. 1979), that:

[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.

Thus, under the principles set forth in *Matter of Warrach*, Amkor's incorporation in the State of Delaware does not, in and of itself, establish that Amkor is an "American corporation". Rather, the applicant must also demonstrate that more than 50% of Amkor is owned by persons who are U.S. citizens. The applicant in the present matter provided no evidence to establish who all of the individual [REDACTED] stockholders are, or to establish the percentage of ownership interests held by each stockholder. Nor did the applicant provide evidence or information to establish the nationality of each stockholder or owner of the corporation. The applicant therefore failed to establish that Amkor is an "American corporation" as defined in *Matter of Warrach, supra*.

The AAO notes that the principles set forth in *Matter of Warrach, supra*, apply well to traditional situations involving closely held companies or corporations. However, as pointed out by counsel in the present motion to reopen/reconsider, the *Warrach* principles fail to address or to take into account the difficulties of tracing

the ownership interests and nationalities of modern publicly held corporations that have thousands of stockholders whose stocks are traded on a daily basis on the stock market.¹

The present record contains a copy of the Amkor, 2003, Securities and Exchange Commission (SEC) Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, (Form 10-K), submitted by counsel. The AAO notes that a Form 10-K provides a comprehensive overview of a corporation's business and financial condition, and must be filed by publicly traded corporations with the SEC on an annual basis. See <http://www.sec.gov/answers/form10k.htm>. The 2003, Amkor Form 10-K reflects that Amkor is incorporated in the state of Delaware and that Amkor stock is traded exclusively on the NASDAQ stock exchange. See Form 10-K, Part II. The AAO notes that the NASDAQ stock exchange is an electronic exchange located in the United States. See <http://www.nasdaq.com>. See also, NASDAQ Fact Sheet 2004, distributed by ALPS Distributors, Inc. The AAO notes further that the Amkor Certificate of Incorporation, dated September 26, 1997, reflects that Amkor stock is traded publicly, and that the corporation has authority to issue five hundred and ten million (510,000,000) shares of stock, of which five hundred million (500,000,000) shares are common stock and ten million (10,000,000) are preferred stock.

Counsel points out on appeal that the U.S. Department of State expanded the nationality definition of a corporation for treaty trader and investor (E visa) purposes in Volume 9 of the Foreign Affairs Manual (9 FAM) 41.51 N3.2, which states, in pertinent part that:

[I]n cases where a corporation is sold exclusively on a stock exchange in the country of incorporation . . . however, one can presume that the nationality of the corporation is that of the location of the exchange. The applicant should still, and may be requested to provide the best evidence available to support such a presumption. In the case of a multinational corporation whose stock is exchanged in more than one country, then the applicant must satisfy the consular officer by the best evidence available that the business meets the nationality requirements.

In addition, a 1995 Legal Opinion by the Immigration and Naturalization Service, Office of the General Counsel (General Counsel) discussed U.S. State Department regulations and precedent legal decisions interpreting the definition of a corporation's nationality for treaty trader and investor purposes, and indicated that it would be anomalous to have two conflicting principles to decide the same issue, depending upon which section of the Act a case arose under. See HQ 319-P, Legal Opinion "Interpretation of American Firm or Corporation for section 319(b) INA" September 14, 1995 (Legal Opinion).²

¹ A corporation can be held either privately (closely) or publicly. A closely held corporation may issue stock and have stockholders. It does not, however, sell its stock (also referred to as shares) to the general public or trade its stock on public stock exchange markets. By contrast, a publicly held corporation trades its stock exclusively to the general public on public stock exchange markets. See generally, BLACK'S LAW DICTIONARY, 341-344, 7th Ed. 2002. A stockholder is a person who owns shares of stock in a corporation. See *id.* at 1380.

² General Counsel concluded that the definition of "American firm and corporation" established for section 316(b) of the Act purposes should apply to relevant section 319(b) of the Act cases as well.

The AAO agrees that the ownership realities of publicly held corporations make it extremely difficult, if not impossible, for an applicant under section 316(b) of the Act to trace the interests and nationalities of, in this case, millions of stockholders. The AAO therefore finds that given the above background and the immense difficulty of tracing nationalities and ownership interests of modern public corporations, it is reasonable to presume that a publicly held corporation meets the definition of "American corporation" for section 316(b) purposes, if the applicant meets the burden of providing the best evidence available to demonstrate that the corporation is incorporated in the United States and trades its stock exclusively on U.S. stock exchange markets.

In the present matter, the AAO finds that the evidence contained in the record establishes that Amkor is incorporated in the United States and that it is a publicly owned corporation whose stock is exclusively sold on United States stock exchange markets. The applicant has therefore established that Amkor meets the definition of an "American corporation" under section 316(b) of the Act.

Because the applicant has established that Amkor meets the definition of an "American corporation, the AAO finds that the applicant meets the requirements for preservation of his residence for naturalization purposes. The appeal will therefore be sustained.

ORDER: The appeal is sustained