

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

E1

[Redacted]

FILE:

[Redacted]

Office: HARTFORD, CT

Date:

MAR 28 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The application to preserve residence for naturalization purposes was denied by the District Director, Hartford, Connecticut. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision will be withdrawn and remanded to the director for the issuance of a new decision, which shall be certified to the AAO for review.

The applicant seeks to preserve his residence for naturalization purposes pursuant to section 316(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1427(b), as a lawful permanent resident who 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.

The district director determined that the applicant was not eligible for benefits under section 316(b) of the Act. The director concluded that, because the applicant failed to establish that he filed a 2006 federal tax return prior to filing the Form N-470, it appears that he relinquished the privileges of permanent resident status in the United States when he relocated to India. 8 C.F.R. § 316.5(c)(1)(ii)(2). As the applicant failed to overcome the presumption of relinquishment, the application was denied accordingly. *Id.*

On appeal, counsel to the applicant asserts that he sufficiently established the applicant's eligibility to preserve his residence for naturalization purposes pursuant to section 316(b) of the Act. While counsel admits that the actual preparation of the applicant's 2006 tax returns in June 2007 was spurred by the director's May 24, 2007 Request for Evidence, counsel argues that the applicant's filing of an extension request with the Internal Revenue Service (IRS) on April 15, 2007 constitutes "unequivocal proof that [the] Applicant did not intend to file as a nonresident alien when he left the U.S. in May [2006]." In support, counsel submits a 2006 IRS transcript showing that the IRS received an extension request on April 15, 2007.

Section 316(b) of the Act 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 (whether preceding or subsequent to the filing of the application for naturalization) 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 . . . no period of absence from the United States shall break the continuity of residence if-

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General [now Secretary, Homeland Security, "Secretary"] that his absence from the United States for such period is . . . to be engaged in the development of such foreign trade and commerce or whose residence

is necessary to the protection of the property rights in such countries in such firm or corporation, . . . and

(2) such person proves to the satisfaction of the Attorney General [Secretary] that his absence from the United States for such period has been for such purpose.

Furthermore, title 8 C.F.R. § 316.5(c)(1)(ii)(2) states as follows:

An applicant who is a lawfully admitted permanent resident of the United States, but who voluntarily claims nonresident alien status to qualify for special exemptions from income tax liability, or fails to file either federal or state income tax returns because he or she considers himself or herself to be a nonresident alien, raises a rebuttable presumption that the applicant has relinquished the privileges of permanent resident status in the United States.

The primary issue in the present matter is whether the applicant has relinquished a claim of having retained lawful permanent status and, thus, whether the applicant is ineligible to preserve his residence for naturalization purposes pursuant to section 316(b) of the Act.

As initial evidence, the applicant submitted copies of his 2004 and 2005 federal and state tax returns indicating residence in the United States. On May 24, 2007, the director requested copies of the applicant's federal and state tax transcripts for 2004, 2005, and 2006 tax years. In response, the applicant submitted copies of unsigned 2006 federal and state tax returns prepared on or about June 13, 2007 along with 2004 and 2005 federal tax transcripts. As noted by the director in his decision, the applicant did not submit a 2007 federal tax transcript or any state tax transcripts. While not specifically requested by the director, the applicant also did not submit evidence that he filed for an extension of time to file his 2006 federal tax return.

On appeal, counsel submitted a copy of the applicant's 2006 federal tax transcript. The 2006 transcript indicates that the applicant filed for an extension to file on April 15, 2007 and ultimately filed his federal tax return on June 13, 2007.

Upon review, the AAO agrees with counsel that the record does not raise a presumption that the applicant relinquished the privileges of permanent resident status in the United States under 8 C.F.R. § 316.5(c)(1)(ii)(2). There is no indication in the record that the applicant ever voluntarily claimed nonresident alien status. Furthermore, there is no indication that the applicant failed to file his tax returns because he considered himself to be a nonresident alien. As asserted by the applicant, it appears to be more likely than not that the applicant failed to timely file his 2006 tax returns because he was preoccupied with employment matters in India. Finally, even if the applicant's failure to timely file his 2006 tax return raises a rebuttable presumption that the applicant has relinquished his claim of having retained lawful permanent resident status, this presumption has been overcome by evidence that the applicant timely filed for an extension to file his 2006 federal tax return on April 15, 2007, which was prior to the director's issuance of his Request for Evidence.

Accordingly, the director's decision will be withdrawn.

However, upon review, the applicant has not submitted sufficient evidence to establish eligibility for the benefit sought. While not addressed by the director, the applicant has failed to establish that he is employed by an "American firm or corporation" or that this employer is "engaged in whole or in part in the development of foreign trade and commerce of the United States."

For purposes of section 316(b) of the Act, the nationality of a firm or corporation has traditionally been determined through 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 legacy Immigration and Naturalization Service INS Regional Commissioner stated in *Matter of Warrach*, 17 I&N Dec. 285, 286-287 (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.

See also *Matter of Chawathe*, [REDACTED] AAO January 11, 2006).

In this matter, it is claimed in an affidavit dated June 8, 2007 that the "American firm or corporation" that employed the applicant in the United States, United Software Group, is 50% owned by [REDACTED] and 50% owned by [REDACTED]. However, while United Software Group is a New Jersey corporation, the record is devoid of evidence establishing that both of these stockholders are citizens of the United States. This is crucial to determining whether United Software Group is an "American firm or corporation" and whether the applicant may preserve his United States residence for naturalization purposes while being employed abroad by an Indian subsidiary of United Software Group. It is emphasized that, in order to be an "American firm or corporation," both 50% stockholders must be citizens of the United States since the entity must be "majority" owned by United States citizens.

Furthermore, the record is devoid of evidence establishing that United Software Group and its Indian subsidiary are engaged in whole or in part in the development of foreign trade and commerce of the United States or that the applicant will "be engaged in the development of such foreign trade and commerce" during his absence from the United States. United Software Group's business activities are described in the June 8, 2007 affidavit as follows:

The United Software Group in the US Corporation [sic] and wherever we are able to obtain projects to be done offshore in India we will be doing it for and on behalf of our US companies thereby saving the US companies' cost and expenses. This is clearly a case of international commerce that would ultimately benefit the U.S. Company.

While the affidavit also lists the applicant's proposed duties in setting up the Indian office, the record is not persuasive in establishing that the American corporation, its Indian subsidiary, or the applicant will be engaged in the development of foreign trade and commerce of the United States. The record is devoid of

specific evidence identifying the United States companies which will be serviced, examples illustrating the claimed savings in "cost and expenses," or how, exactly, this offshore model constitutes the development of foreign trade or commerce of the United States.

Accordingly, the director is directed to review the record and request pertinent additional evidence regarding (1) the nationality of both of the purported stockholders of United Software Group at the time the application was filed; (2) United Software Group's claimed development of foreign trade and commerce of the United States, including client contact information, specific examples of foreign commerce and trade, financial statements, and tax returns; and (3) the applicant's claimed development of foreign trade and commerce while working for United Software Group's Indian subsidiary, including client contact information, specific examples of foreign commerce and trade, financial statements, and tax returns.

For this reason, the appeal may not be sustained, and the matter must be remanded to the director for further action.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and the entry of a new decision, which shall be certified to the AAO for review.