



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: WASHINGTON, DC

Date: **MAY 16 2008**

IN RE:

Applicant:

[Redacted]

APPLICATION:

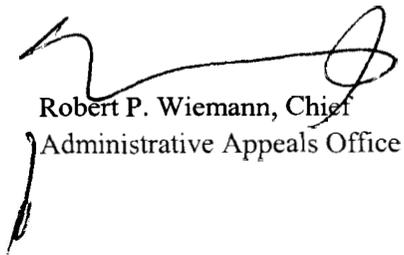
Application to Preserve Residence for Naturalization Purposes under Section 316(b) of the Immigration and Nationality Act, 8 U.S.C. § 1427(b).

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 Form N-470, Application to Preserve Residence for Naturalization Purposes (N-470 Application) was denied by the Acting District Director, Washington, D.C. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the N-470 application will be denied.

The applicant seeks to preserve her 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 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 acting district director determined that the applicant did not establish eligibility under section 316(b) of the Act because she failed to establish the facts of ownership or control of the foreign subsidiary by her current employer, Capital International LLC. The application was denied accordingly.

On appeal, counsel to the applicant submits additional evidence which he asserts establishes that the applicant's employer owns and controls the foreign subsidiary.

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 (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.

The primary issue in this matter is whether the applicant has established that she is employed by an American firm or corporation or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation.

In support of the application, the applicant submitted an undated letter from Capital International LLC indicating that its employee, the applicant, would "be transferred to [its] office located in Donesk, Ukraine, for a period of three years." The applicant also submitted a letter from counsel dated October 24, 2006 which states that "Capital International, a joint-venture company with Ukraine Methane Partners, LLC (UMP) requests the presence of [the applicant] at their office in Donesk, Ukraine for the duration of three years." Counsel further indicates that Ukraine Methane Partners "is a majority owner of Ukraine Methane Group, LLC (the entity which is conducting this project)." In addition, the applicant submitted a letter from the managing director of Ukraine Methane Partners, LLC, which indicates that the applicant "has been working on our projects." Finally, the applicant submitted a copy of her Employment Agreement dated September 1, 2006 with Capital International LLC. The Form N-470 was filed on October 27, 2006.

On February 12, 2007, the acting district director denied the application and determined that the applicant failed to establish the facts of ownership or control of the foreign subsidiary by her current employer, Capital International LLC.

On appeal, counsel submitted a brief and additional evidence including a letter from Capital Methane LLC dated February 28, 2007 in which its president, [REDACTED], claims that Capital Methane LLC has "assumed responsibility" for the applicant's employment agreement. Mr. [REDACTED] also claims that he owns an 87% interest in Capital Methane LLC which, in turn, owns a "controlling interest" in Ukraine Methane Partners, LLC. However, while [REDACTED] describes Capital International LLC as an "affiliated company" and indicates that owners of Capital International LLC include the applicant, he does not specifically establish the facts of its ownership or control or clearly articulate which of the various entities mentioned in the record will actually employ the applicant in Ukraine, if any. Finally, counsel submits a "new copy" of an employment agreement between the applicant and Capital Methane LLC dated February 28, 2007.

Upon review, counsel's assertions are not persuasive.

As a threshold matter, it must be noted that counsel's attempt to change the identity of the applicant's employer on appeal to Capital Methane LLC from Capital International LLC was inappropriate and will not be considered by the AAO. The application clearly identifies the applicant's employer as Capital International LLC and indicates that she will be working in Ukraine for Ukraine Methane Partners, LLC. Therefore, the applicant must establish that Capital International LLC is an "American firm or corporation" which owns more than 50% of any foreign subsidiary that will employ the applicant. If the applicant's employer has changed since the filing of the application on October 27, 2006, the applicant must file a new Form N-470. An applicant must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). An applicant may not make material changes to an application

in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In view of the above, the record is not persuasive in establishing that Capital International LLC is an "American firm or corporation" or that Capital International LLC owns more than 50% of Ukraine Methane Partners, LLC. 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 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, (AAO January 11, 2006).

In this matter, the record is devoid of evidence establishing the ownership of Capital International LLC. 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)). Accordingly, it has not been established that Capital International LLC is an "American firm or corporation," and the application may not be approved for this reason. Furthermore, as it has been alleged that both Ukraine Methane Partners, LLC and Ukraine Methane Group LLC are directly or indirectly owned and controlled by Capital Methane LLC, it does not appear as if the applicant's Ukrainian employer would be a subsidiary of Capital International LLC, the applicant's purported employer, even if it were established that Capital International LLC is an "American firm or corporation" for purposes of section 316(b) of the Act.

Therefore, as the record is not persuasive in establishing that the applicant is employed by an American firm or corporation or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation, the application may not be approved and the appeal will be dismissed.¹

¹It is noted that, even if the AAO considered counsel's claim on appeal that the applicant is now employed by Capital Methane LLC, the record is not persuasive in establishing that the applicant is employed by an American firm or corporation or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation. While counsel asserts that Capital Methane LLC is 87% owned [REDACTED], it has not been established that [REDACTED] is a United States citizen. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Beyond the decision of the acting district director, the applicant has failed to establish that she has been continuously physically present in the United States for the requisite one-year period after being lawfully admitted for permanent residence.

The legacy Immigration and Naturalization Service (INS) and Citizenship and Immigration Services (CIS) have long interpreted the term "uninterrupted physical presence" to bar any departure from the United States. "[I]t is not possible to construe the uninterrupted physical presence requirement of section 316(b) to allow departures." *Matter of Graves*, 19 I&N Dec. 337, 339 (Comm. 1985). In *Matter of Copeland*, the Commissioner of legacy INS stated:

[A]ny departure from the United States for any reason or period of time bars a determination that an alien has been continuously physically present in the United States or present in the United States for an uninterrupted period during the period including the departure. An applicant's failure to establish he or she has been present in the United States for 1 year after lawful admission for permanent residence bars eligibility for preservation under section 316(b).

19 I&N Dec. 788, 789 (Comm. 1988).

In this matter, the record indicates that the applicant was lawfully admitted for permanent residence in the United States on March 23, 2005. According to the Form N-470, the applicant was absent from the United States in May 2005, November 2005, and May 2006. The instant application was filed on October 27, 2006.

Therefore, the record indicates that the applicant has not been continuously physically present in the United States for the requisite one-year period after being lawfully admitted for permanent residence. Accordingly, the applicant is not eligible for the benefit sought and the application will be denied for this additional reason.

The burden of proof is on the applicant to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has failed to meet her burden of proof in the present matter. The appeal will therefore be dismissed, and the application will be denied.

ORDER: The appeal is dismissed. The application is denied.