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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 279 50810 Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2004

IN RE: Petitioner: [redacted]
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:

[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

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in September 1997. It is a wholesaler of computers and computer peripherals. It seeks to employ the beneficiary as its managing director. 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 determined that the petitioner had not established: (1) a qualifying relationship with the beneficiary's foreign employer; or (2) its ability to pay the beneficiary the proffered annual wage of $24,000.

On appeal, counsel for the petitioner submits a brief and documents in response to the director's decision.

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The petitioner submitted its Articles of Incorporation filed September 25, 1997. The petitioner's initial name was Acer Peripherals America, Inc. and it was authorized to issue 5,000,000 shares of stock. The petitioner also submitted its stock certificate number 1 issuing 300,000 shares to Acer Peripherals on November 11, 1997.

On September 12, 2000, the petitioner submitted a name change to the California Secretary of State changing its name to Acer Communications & Multimedia America, Inc. This is the name listed on the petitioner's I-140 filed September 16, 2002. The petitioner stated in the filing that the total number of outstanding shares of the corporation is 300,000.

On December 21, 2001, the petitioner submitted a name change to the California Secretary of State changing its name from Acer Communications & Multimedia America, Inc. to BenQ Incorporated. The petitioner stated in the filing that the total number of outstanding shares was 1,800,000.

On December 5, 2002, the petitioner submitted a name change to the California Secretary of State changing its name from BenQ Incorporated to BenQ America Corp. The petitioner stated in the filing that the total number of outstanding shares was 2,300,000.

The petitioner has also provided its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 1999, 2000, 2001, and 2002. The 1999 IRS Form 1120 on Schedule L, Line 22b, shows Acer Peripherals America, Inc. had outstanding common stock valued at $3,000,000 at the beginning and the end of the year.

The 2000 IRS Form 1120, Schedule L, Line 22b, shows that Acer Communications & Multimedia America, Inc. had outstanding common stock valued at $3,000,000 at the beginning of the year and valued at $1,800 at the end of the year. The IRS Form 1120 at Schedule K, Line 4, indicates that the petitioner is a subsidiary in an affiliated group identified as Acer Comm. & Multimedia, Inc. The IRS Form 1120 at Schedule K, Line 7a, and the attached IRS Form 5472 indicates that Acer Communications & Multimedia, Inc., located in Taiwan, owned 100 percent of the petitioner.

The 2001 IRS Form 1120, Schedule L, Line 22b, shows that BenQ, Inc. had outstanding common stock valued at $1,800 at the beginning of the year and at the end of the year. The IRS Form 1120 at Schedule K, Line 4, indicates that the petitioner is a subsidiary in an affiliated group identified as Acer Comm. & Multimedia, Inc. The IRS Form 1120 at Schedule K, Line 7a, and the attached IRS Form 5472 indicates that BenQ Technologies SDN BHD located in Malaysia, owned 100 percent of the petitioner.

The 2002[1] IRS Form 1120, Schedule L, Line 22b, shows that BenQ America Corp had outstanding stock valued at $18,000,000 at the beginning of the year and valued at $23,000,000 at the end of the year. The IRS Form 1120 at Schedule K, Line 4, indicates that the petitioner is a subsidiary in an affiliated group identified as BenQ (L) Corp. The IRS Form 1120 at Schedule K, Line 7a, and the attached IRS Form 5472 indicates that BenQ (L) Corp, located in Malaysia, owns 100 percent of the petitioner.

In a September 3, 2002 letter appended to the petition, the petitioner indicated that BenQ Incorporated was formerly known as Acer Communications & Multimedia Inc. and Acer Peripherals, Inc. The petitioner explains that in 1999 Acer Peripherals, Inc. re-organized the "entire organization" and established the Acer Communications & Multimedia Inc. Group. The petitioner lists several companies that are part of the Acer Communications & Multimedia Inc. Group. The petitioner states that the beneficiary has been employed by the parent company since May 1983 heading up various managerial and executive positions and currently was in charge of the material management division. The petitioner indicates that the beneficiary is being assigned to the U.S. subsidiary in charge of the manufacturing operation division.

The petitioner also provided several annual reports. A 2000 Acer Communications & Multimedia annual report includes an organizational chart for the group and includes a listing of a sales office in America. The annual report also lists a subsidiary identified as Acer Communications & Multimedia America Inc. The petitioner also includes an annual report for "BenQ" that also lists several sales offices throughout the world including one located at the petitioner's address and identified as BenQ America Corp.

In response to a request for additional evidence, the petitioner indicated that the beneficiary was currently the managing director in charge of the material management division of the U.S. subsidiary under an E-1 visa. The petitioner also provided the 2001 annual report, including audited financial statements for BenQ Corporation for the 1999, 2000, and 2001 years.

On page 14 of the 2001 annual report, BenQ Corporation listed the major business partners for the last two years, noting BenQ America as a supplier. On pages 33 through 36, BenQ Corporation listed its long-term investments for 1999, 2000, and 2001 as including an investment in BenQ (L) Corp. ("BQLB"). On pages 51 and 52, BenQ Corporation listed its transactions with related parties BQLB, a subsidiary of the company and with BenQ Incorporated ("BQA") a subsidiary of BQLB. On page 68 of the financial statement, BenQ Corporation included an investment structure for related parties dated April 20, 2002 but did not identify BQLB or the petitioner as a related party. On page 69 of the financial statement, BenQ Corporation listed BenQ (L) Corp., a Malaysian corporation, and BenQ Wireless Technology Center, located in San Diego, California, on an informational listing of related parties. The petitioner was not listed.

The director determined that the petitioner had not provided sufficient evidence to substantiate the claim of a qualifying relationship between the foreign company and the United States entity.

On appeal, counsel for the petitioner provides a computer printout for BenQ America Corp. The website printout indicates that BenQ has manufacturing and assembly plants in Malaysia, Mexico, China and Taiwan.

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[1] The director did not have the benefit of reviewing the petitioner's 2002 IRS Form 1120.

Counsel also provides an annual report for BenQ Group. The report lists several companies but does not explain their relationship or affiliation. Counsel also submits an organizational hierarchy chart showing that BenQ Corporation (Taiwan) owns 100 percent of BenQ (L) Corp., a holding company in Malaysia that in turn owns 100 percent of BenQ America Corp., a California company. The petitioner also submits its 2002 IRS Form 1120 with the detail noted above.

Counsel also includes BenQ Corporation's non-consolidated financial statements, with independent auditor's report, for 2000, 2001, and 2002. Counsel specifically references pages 8 and 27. Page 8 identifies BenQ (L) Corp. ("BQLB") as BenQ Corporation's 100 percent owned-subsidiary. Page 27 identifies BenQ America Corporation ("BQA") as a subsidiary of BQLB. Counsel asserts that the evidence submitted establishes that a qualifying relationship has existed since the incorporation of BenQ America Corp.

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.
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> *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.

The difficulties in this matter arise from the numerous name changes of both the petitioner and the foreign entity. In addition to the numerous name changes, the value of the petitioner's stock has fluctuated

significantly. Moreover, the petitioner indicated it initially issued 300,000 shares t[redacted] The petitioner subsequently stated that it had 1,800,000 shares outstanding and subsequent to that had 2,300,000 shares outstanding. The petitioner has not included other stock certificates or a stock transfer ledger in the record. The petitioner has provided documentary evidence that the petitioner is related to a foreign entity. However, the record contains insufficient data regarding the full ownership of the petitioner. Such insufficiency has not been resolved on appeal. Instead on appeal, counsel has referenced a document that states that BenQ Corporation (the purported Taiwanese indirect parent company) owns 100 percent of the Malaysian subsidiary BenQ (L) Corp. but that does not specify the interest the Malaysian entity purportedly owns in the petitioner.

The petitioner has not provided sufficient consistent documentary evidence to establish that the petitioner meets the criteria outlined in the definition of subsidiary or affiliate. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered annual wage of $24,000.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

When determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner provided its California Forms DE-6, Employer's Quarterly Return for the third and fourth quarters of 2002. The California Form DE-6 did not list the beneficiary as employed by the petitioner in the third quarter of 2002, the quarter in which the petition was filed. The record does not demonstrate that the petitioner employed the beneficiary at the time the priority date was established.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant*

Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on September 16, 2002, the AAO must examine the petitioner's tax return for 2002. The 2002 IRS Form 1120 presents a net taxable income of $37,327. The petitioner could pay a proffered wage of $24,000 per year out of this income. Thus, the director's decision will be withdrawn as it relates to this issue.

Beyond the decision of the director, the petitioner has not established that the beneficiary's position with the petitioner will be primarily managerial or executive. In this matter, the petitioner has presented a general and nonspecific description of the beneficiary's duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner is also referred to in various documents as a sales office, yet the beneficiary will purportedly manage the manufacturing operation division. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The record does not contain sufficient evidence that the beneficiary's duties will be in a primarily managerial or executive capacity as defined at sections 101(a)(44)(A) and (B) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.