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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 01 295 53625 Office: CALIFORNIA SERVICE CENTER Date: MAY 10 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter to the service center for the entry of a new decision. The AAO required that a new decision, if adverse to the petitioner, would be certified to the AAO for review. The matter is now before the AAO on certification. The director's decision will be affirmed.

The petitioner is a corporation organized in the State of Texas in July 1995. The petitioner maintains an office in Santa Cruz, California. The petitioner specializes in the chemical and mechanical treatment of parts and assemblies, and the maintenance and cleaning of equipment in the semiconductor electro-optics and the magnetic heads industries. It seeks to employ the beneficiary as its chief executive officer. 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 petitioner filed Form I-140, Immigrant Petition for Alien Worker on September 24, 2001. On July 23, 2002, the director denied the petition because the petitioner had not sufficiently established that it and the beneficiary's foreign employer were affiliates, and because it appeared that the beneficiary would not be working for the petitioner full-time. On appeal, counsel for the petitioner asserted that the director abused his discretion by not apprising the petitioner of the deficiencies in the record on these two issues when the director issued the February 1, 2002 request for further evidence. The AAO: (1) found that the statute did not limit this preference-visa classification to only those individuals who would be employed full-time. *See* Section 203(b) of the Act, 8 U.S.C. § 1153(b); and (2) remanded the matter to the director requiring that the director afford the petitioner a reasonable period to provide evidence pertinent to the issue of a qualifying relationship between the petitioner and the beneficiary's foreign employer.

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 issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. 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.

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.
>
> *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 director sent three requests for further evidence in an attempt to understand the qualifying relationship between the petitioner and the foreign entity. Counsel for the petitioner provided three responses with documentary evidence. Counsel asserted that the beneficiary owned and controlled both the foreign entity and the petitioner. The director in this matter focused on the fact that the two entities in question are not both directly owned by the same parent company or individual. The director observed that no voting proxies or other agreements have been provided to show that one or more of the shareholders of either entity have

relinquished control. The director determined that although commonality of ownership may exist, common control of both entities had not been demonstrated.

The director's decision on this issue will be affirmed. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter, when the petition was filed in September 2001, one individual owned 27 percent of the petitioner, [redacted] a holding company 99 percent owned by the beneficiary, owned 27 percent of the petitioner, and the foreign entity in this matter owned 46 percent of the petitioner. [redacted] also owned 71.5 percent of the foreign entity; seven individuals owned the remaining 28.5 percent. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. The AAO cannot conclude that the companies are affiliates as both companies are not owned and controlled by the same individuals or companies.

Counsel argues that the beneficiary's 99 percent control of [redacted] which owns 27 percent of the petitioner, coupled with the foreign entity's 46 percent ownership of the petitioner which [redacted] also controls with a 71.5 percent interest, establishes the beneficiary's indirect control of the petitioner. Further, counsel contends that since [redacted] also owns and controls the foreign entity with a 71.5 percent interest, that the beneficiary also indirectly controls the foreign entity. However, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The petitioner has not provided any documentary evidence that the various separate companies, in which the beneficiary owns an interest, have agreed to vote in concert. In order to establish "*de facto*" control of both the U.S. entity and the foreign entity by the beneficiary, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N at 293. A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999). A petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

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 director's May 19, 2004 decision is affirmed.