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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 16 2007

SRC 06 184 51129

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, Chief
Administrative Appeals Office

DECISION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner filed the immigrant visa petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a limited liability company organized under the laws of the State of California that is engaged in the sale of marble products. The petitioner claims to be the affiliate of the beneficiary's foreign employer, and seeks to employ the beneficiary as its executive director.

The director denied the petition concluding that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities.

On appeal, counsel for the petitioner contends that the director erroneously interpreted the regulations governing the issue of whether a qualifying relationship existed between the foreign and United States entities. Counsel asserts that in determining the existence of a qualifying relationship, United States Citizenship and Immigration Services (USCIS) should consider the relationship at the time the immigrant petition was filed, rather than whether the two companies enjoyed a qualifying relationship when the beneficiary first entered the United States on a B-2 nonimmigrant visa, as considered by the director. Counsel submits a brief in support of the appeal.

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 or 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, which 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.
The issue in this proceeding is whether a qualifying relationship existed between the beneficiary's foreign employer and the petitioning entity at the time the immigrant petition was filed.

To establish a qualifying relationship under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e. a United States entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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;
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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 petitioner filed the Form I-140 on May 25, 2006. In an appended letter, dated March 23, 2006, the petitioner noted the existence of a corporate relationship between the petitioning entity and the beneficiary's foreign employer based on the foreign company's ownership of 50 percent of the United States company. The petitioner stated that at the time of its incorporation in the United States, which occurred on April 21, 1997, the company was owned by two members: [redacted] owner of 98 percent, and [redacted] owner of the remaining 2 percent. The petitioner explained that in March 2002, the United States company "reached a business agreement with our supplier in Hong Kong, [the beneficiary's foreign employer], in that [the foreign entity] would acquire 50% interest of our company," and noted that the transfer of stock was completed in 2002.

As evidence of the purported parent-subsidiary relationship, the petitioner submitted copies of the following: (1) its articles of organization; (2) the company's operating agreement, which identified [redacted] as the owner of 98 percent of the organization and [redacted] as owning the remaining interest in the company, as well as the capital contributions made by each member; (3) an April 16, 1998 statement of information filed with the State of California; (4) the minutes from an April 8, 2002 meeting of the

petitioner's members approving a transfer of interest in the petitioning entity equal to 50 percent of the company's ownership from [redacted] to the foreign entity; (5) a May 10, 2002 memorandum of transfer in which both [redacted] and the foreign entity acknowledged the transfer of a 50 percent membership interest in the United States entity to the beneficiary's foreign employer; and (6) Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., of the petitioner's 2005 partnership income tax return, which identify the company's members and corresponding interests as follows: the foreign entity, 50 percent; Yim Ho Leung, 48 percent; and [redacted], 2 percent.

On July 12, 2006, the director issued a request for evidence directing the petitioner to "specifically describe" and submit documentary evidence of the claimed qualifying relationship between the foreign and United States entities. The director instructed that relevant evidence would include clarification of the number of shares issued by the petitioner and documentation establishing the owners of the issued stock. The director stated that "[t]he evidence must clearly establish the degree of common ownership shared by the U.S. petitioner and the beneficiary's foreign employer" and reflect any stock transfers that occurred after the company's inception.

Counsel for the petitioner responded in a letter dated October 3, 2006, and submitted an October 2, 2006 letter in which the petitioner again noted the existence of a "parent/subsidiary or affiliate relationship" between the foreign and United States entities. The petitioner restated the means by which the ownership of the company was transferred from [redacted] to the foreign entity, noting that the 2002 "acquisition and transfer of interest" resulted in the foreign entity's ownership of 50 percent of the United States organization. The petitioner referred to a March 28, 2002 agreement between the United States and foreign entities, in which the foreign entity agreed to render $150,000 in cash and merchandise to the petitioner in exchange for a 50 interest in the organization. The petitioner submitted a copy of the referenced agreement. In response to the director's request for specific documents, the petitioner further explained that as a limited liability company, it does not issue stock or maintain a stock transfer ledger.

The petitioner noted that the foreign entity is a sole proprietorship owned by [redacted] and submitted copies of the foreign entity's business registration application, which the petitioner instructed is the only documentation required by law in Hong Kong to establish [redacted] ownership of 100 percent of the foreign organization.

In a decision dated March 21, 2007, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Noting that the beneficiary first entered the United States in May 2001 for employment with the petitioner as an L-1A nonimmigrant intracompany transferee, the director indicated that at the time of the beneficiary's entrance the petitioning entity was owned by [redacted] and [redacted], and that the beneficiary's foreign employer did not maintain an interest in the petitioning entity. The director acknowledged the subsequent transfer of interest in the petitioning entity to the beneficiary's foreign employer in April 2002, but stated "the qualifying relationship was established one year after the beneficiary arrived in the United States and commenced working for [the petitioner]." The director instructed that the regulations require that if the beneficiary is already working in the United States at the time of filing the immigrant visa petition, "the petitioner must demonstrate that [the beneficiary] worked for a foreign qualifying company for one year during the three years immediat[ely] preceding her admission as a nonimmigrant." The director concluded

that because a qualifying relationship did not exist between the foreign and United States entities at the time the beneficiary entered the United States as a nonimmigrant, the petitioner had not satisfied the eligibility requirements for the instant immigrant visa petition. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on April 17, 2007 contending that the director erroneously interpreted the regulations relevant to the instant matter. In an appended appellate brief, counsel instructs that the petitioner had not employed the beneficiary prior to the date on which the qualifying relationship was established between the foreign and United States entities. Counsel states that the beneficiary entered the United States on May 4, 2001 under a visitor visa, and changed her status to that of an L-1A nonimmigrant intracompany transferee on October 22, 2002, approximately five months after the establishment of the qualifying relationship, in order to be employed by the petitioner. Counsel contends, nonetheless, that the director incorrectly required the existence of a qualifying relationship between the foreign and United States entities during the time the beneficiary was employed by the foreign company "for at least one year within the three years preceding the beneficiary's entry of the US." Counsel challenges the director's finding, instructing that a qualifying relationship must have existed between the foreign and United States entities at the time of filing the immigrant visa petition, and that the corporate relationship need not have existed earlier. Counsel states: "If the domestic entity has a qualifying relationship with the entity abroad with which the alien worked in a qualifying capacity, the petition *may be filed immediately after the relationship was established*, e.g. by stock purchase." (emphasis in original). Counsel states:

> In the instant petition, the beneficiary worked for the foreign company before her entry in the US on May 4, 2001. The domestic company acquired a qualified affiliate relationship with the foreign company on May 10, 2002. Meanwhile, she continued to be employed by the foreign company until she changed her status from a B-2 to that of L-1 on October 22, 2002. She began working for the domestic company under that L-1 visa only after a qualified relationship has been established. Then on April 10, 2006, the domestic company filed the underlying EB-1 petition for her. This situation falls squarely within the scenarios described in the law and regulations cited above for which EB-1 petitions were approved.

Upon review, the petitioner has demonstrated the existence of a qualifying relationship between the foreign and United States entities at the time of filing the immigrant visa petition.

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.

Counsel correctly notes on appeal that the relevant consideration with respect to the ownership and control of the petitioning entity is the date on which the immigrant petition was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971)(finding that a petitioner must establish eligibility at the time of filing the

immigrant visa petition). The AAO notes that the ownership and control of the petitioning entity prior to the instant filing is relevant only to the beneficiary's eligibility for classification as a nonimmigrant intracompany transferee and does not affect the analysis of the instant matter. Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d).

Here, on the date on which the I-140 visa petition was filed, the petitioner was owned and controlled by the beneficiary's foreign employer. The record of proceeding contains sufficient documentation, including corporate agreements and income tax returns, evidencing the transfer of a 50 percent membership interest in the United States organization to the foreign entity more than four years prior to the filing date of May 25, 2006. As a result, at the time the immigrant petition was filed, a qualifying parent-subsidiary relationship existed between the foreign and United States entities. Accordingly, the director's decision will be withdrawn and the petition will be approved.

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 been met.

ORDER: The appeal is sustained.