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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

CONFIDENTIAL

[Redacted]

BU

FILE: [Redacted]
WAC 03 207 50016

Office: CALIFORNIA SERVICE CENTER Date: **AUG 12 2005**

IN RE: Petitioner: [Redacted]
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 matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be sustained.

The petitioner filed the instant petition seeking 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 corporation organized under the laws of the State of California involved in the import, export and distribution of products manufactured by the foreign entity. The petitioner seeks to employ the beneficiary as its vice-president of sales and finance.

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

The petitioner's former counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel claims that the petitioner's stock certificate is the best evidence for establishing a shareholder's interest in the company. Both the petitioner's former and present counsel submit a brief and additional documentation clarifying and confirming the funding of the petitioning entity by the foreign corporation.

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 exists between the United States and foreign entities.

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;

* * *

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 instant petition on July 7, 2003. In an attached letter, dated May 28, 2003, the petitioner's president explained that the petitioning entity, established in 1996, is a wholly-owned subsidiary of the foreign entity, [REDACTED]. The petitioner provided the following documentation in support of the parent-subsidiary relationship: (1) a company profile addressing the formation of the United States company by the overseas corporation; (2) an "Approval and Reply" from the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China, dated October 28, 2002, allowing the foreign entity to complete formation of the United States company; (3) a Certificate of Approval from the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China, dated November 25, 2002, approving the foreign entity's establishment of United States company; (4) the minutes from the petitioner's annual meetings from years 1997 through 2001 and a July 2, 2001 meeting approving the issuance and reissuance of stock to the foreign entity; (5) an untitled certificate reflecting an investment of \$900,000, representing 100% of the petitioner's registered capital, by the foreign entity in the petitioning corporation; (6) the minutes from the petitioner's January 16, 2002 annual meeting identifying the foreign entity as the owner of 200 shares of stock in the petitioning entity; (7) the petitioner's articles of incorporation and amended articles of incorporation, representing a change in the petitioner's authorized shares of stock; (8) the petitioner's stock transfer ledger; (9) a stock certificate dated December 5, 2002 reflecting the foreign entity's ownership of one million shares in the United States entity; and (10) seven Statements by Domestic Stock Corporation filed with the State of California from March 1997 through May 2002.

As noted in the minutes from the petitioner's annual meetings, the petitioner's stock ledger reflected an initial issuance of 10 shares of stock on January 29, 1996 to the foreign entity, previously named [REDACTED].

[REDACTED]

[REDACTED] and an additional distribution of 10 shares of stock on June 28, 1998, both for the amount of \$50,000. The petitioner indicated on the stock transfer ledger a name change of both the foreign and United States entities, which necessitated the reissuance of twenty shares of stock on July 31, 2001. At this time, the petitioner also issued an additional 180 shares of stock to the foreign entity in exchange for \$900,000. On September 30, 2002, as reflected in the minutes from the petitioner's January 17, 2001 meeting and its amended articles of incorporation, the petitioner increased its authorized stock to 2,000,000 shares, which was reflected on its stock transfer ledger as an issuance of 1,000,000 shares for \$1,000,000.

The petitioner also submitted Form 1120, U.S. Corporation Income Tax Return, for the years 2001 and 2002, which indicated that it was wholly owned by the overseas company.

In a July 9, 2004 request for evidence, the director asked that the petitioner provide the following documentation related to the claimed parent-subsidary relationship: (1) original wire transfers documenting funds transferred from the foreign company to the United States entity, clearly showing from where the funds originated; (2) if funds did not originate from the foreign entity, an explanation of the source of funds; (3) a list of the names of all account holders, those making purchases and the accounts used in the exchange; (4) the petitioner's bank statements confirming the receipt of funds from the foreign entity; (5) copies of the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f) reflecting the total offering amounts; and (6) the petitioner's amended articles of incorporation.

Counsel responded in a letter dated September 27, 2004 stating that the parent-subsidary relationship had been established through the stock certificates and stock transfer ledger. As additional evidence, counsel submitted copies of the following documentation as evidence of funds transferred from the foreign entity to the United States corporation: (1) a November 8, 2000 wire transfer of \$225,000 and the deposited checks and bank statement verifying the transfer; (2) a December 8, 2000 wire transfer of \$280,000, and the deposited check, bank receipt, and bank statement verifying the transfer; (3) a January 6, 2001 wire transfer of \$400,000, and the deposited check and bank statement confirming the transfer; and (4) a letter of declaration from the president of Pacific Galley (USA) Group, Inc., the third party used by the foreign entity to transfer funds to the petitioner.

Counsel stated:

[I]n order to invest money from China to overseas countries, it was a common business practice and implicitly permitted by law that private business entities in China to use an indirect route (e.g. via a third party) to transfer money for overseas investment. In other words, a Chinese private company will use a third party, which has no relationship with either the Chinese or the overseas company and whose sole function is to act as a middleman to facilitate the money transfer. This is how [the foreign entity] transferred money to [the petitioner] prior to December of 2001, before China's admission to the [World Trade Organization (WTO)].

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It should be noted that before the [investment] fund was able to be directly transferred from [the foreign entity] to [the petitioner], [the foreign entity] had undertaken many efforts to gain the Chinese government's approval of the money transfer since December of 2003. After a long and complex process and through the review of various hierarchies of government agencies, the investment was eventually approved by the Department of Commerce of the People's Republic of China on February 12, 2004. Attached as Exhibit O, please see the Certificate of Approval issued by the Department of Commerce of the People's Republic of China and documents related to the entire process for the application of the said investment.

Counsel provided the additional documentation requested by the director, including the petitioner's most recently issued stock certificate, its stock transfer ledger, Notice of Transaction Pursuant to Corporations, amended articles of incorporation, and year 2003 corporate tax return.

In a decision dated November 1, 2004, the director determined that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. The director noted that the petitioner's two stock certificates and the wire transfers were not sufficient to demonstrate that the foreign entity owns the United States company. The director stated:

The petitioner has not provided evidence to show that the foreign company has paid for the 1,000,000 shares of stock. The wire transfers provided are not from [the foreign entity] and they are not around the date when the stock certificate was issued – December 5, 2002. The petitioner does not provide unerring and concise evidence to substantiate the claim of qualifying foreign company ownership [of] the U.S. entity. The petitioner has not established through the submission of independent, objective evidence that the claimed parent-subsiary relationship exists.

Consequently, the director denied the petition.

The petitioner's former counsel filed an appeal on November 20, 2004 claiming that the petitioner had submitted substantial evidence to establish the parent-subsiary relationship. Counsel claims in his December 14, 2004 brief that the petitioner's previously submitted stock certificate, by itself, should be considered the best evidence in establishing a shareholder's ownership interest. Counsel notes that the requested wire transfers are secondary evidence, and are neither necessary nor relevant to establishing the existence of the parent-subsiary relationship. Counsel states that the record contains independent and objective evidence of a cash transaction between the foreign organization and the United States entity, and claims that the fact that the funds were indirectly transferred is "meaningless."

On April 15, 2005, the petitioner's current counsel submitted a brief on appeal, noting that the petitioner had obtained additional evidence of the parent-subsiary relationship. Counsel addresses the manner in which the funds were transferred from the foreign entity, stating that "it is common business practice" for a private company that is 100% Chinese-owned to use an unrelated third-party broker to transfer funds for foreign investment. Counsel states that in addition to the evidence previously provided to demonstrate the foreign entity's investment, the petitioner has obtained wire transfers, bank statements, cancelled checks, a letter of declaration from the broker, and a translated and authenticated certificate of approval from the Ministry of

Foreign Trade and Economic Cooperation of the People's Republic of China. Counsel notes that the evidence was acquired from parties who have no interest in the outcome of the present matter. Counsel provides a detailed "schedule of fund transfer" identifying the three transactions made by the foreign entity to transfer money to the petitioner. For each of the three transactions, which took place in November and December 2000, and January 2001, counsel submits wire transfer vouchers from the foreign entity to the third party broker, the broker's bank statements reflecting receipt of funds from the foreign entity, checks from the broker to the petitioner, in which counsel highlighted the corresponding account number with the broker's account, and the petitioner's bank statements reflecting receipt of the transferred amounts.

Counsel explains that with regard to the petitioner's stock certificates, the petitioner has issued six since its establishment in order to allow for a change in its name and to account for an increase in the petitioner's authorized shares of stock. Counsel details the transactions and explains that although "the fund transfers do not coincide exactly with the stock issuance dates . . . , it is nevertheless clear that the funds were transferred[,] and ultimately[,] in exchange for those funds[,] the certificates were issued." Counsel submits the petitioner's stock transfer ledger, the petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f), and copies of the petitioner's void and valid stock certificates.

As additional evidence, counsel provides a "declaration" from the former director and general manager of the third party brokerage company attesting to its involvement in transferring funds from the foreign entity to the petitioner. Counsel also submits an approval certificate from the People's Republic of China approving the foreign entity's plan to establish the United States company as its subsidiary.

Upon review, the petitioner has demonstrated the existence of a qualifying relationship.

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 regulations specifically allow the director the discretion to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature may include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Although the AAO does not condone the violation of any nation's laws, the AAO accepts counsel's assertion that "it is common business practice" for a private company in the People's Republic of China to use an

unrelated third-party broker to transfer funds for foreign investment in order to circumvent the nation's restrictive foreign exchange regulations. Counsel submits a translated copy of the Chinese regulations governing commercial foreign investment, titled "Procedures for the Administration of the Foreign Exchange for Investment Abroad." Regulations of the People's Republic of China, State Administration of Foreign Exchange Control (promulgated March 6, 1989). The regulations require Chinese corporations and enterprises to receive approval from the Department for Control of Foreign Exchange prior to making an investment abroad and to make a deposit as a guarantee that they will remit the profit back to China. According to Article Three, the Department for Control of Foreign Exchange is "responsible for the risk examination of the foreign exchange earmarked for investment abroad and for the examination of the source(s) of the funds." The regulations also provide at Article Eight that the profit and other income from the foreign investment shall be repatriated to China and may not be diverted to other uses or kept abroad without approval of the Department for Control of Foreign Exchange. *Id.*

Here, the record supports the petitioner's claim of a parent-subsidiary relationship. To establish ownership and control, the petitioner presented copies of all stock certificates issued by the organization, including those that are void, and its stock transfer ledger, which identified the foreign entity as the sole shareholder. The petitioner submitted copies of its articles of incorporation and amended articles of incorporation as verification of its name change and its increase in the number of authorized shares of stock. These documents clarified the stock distributions made by the petitioner following its establishment.

In addition, the petitioner provided ample evidence of the funds transferred by the foreign entity to the United States corporation. Although the petitioner was not able to supply documentation of the foreign entity's initial investment, it exercised due diligence in providing wire transfer vouchers of each subsequent transfer and bank statements confirming the petitioner's receipt of the funds. Particularly relevant to this issue were the wire transfer vouchers from the foreign entity to the third party broker, which confirmed that the funds originated with the foreign company. Also, the record contains the broker's bank statements and its checks to the petitioner, both of which contain the broker's account number, thereby confirming the sequence of the foreign company's investment in the United States company. Because the petitioner has demonstrably traced the money from the claimed parent company to the United States petitioner, the petitioner has sufficiently demonstrated the consideration furnished to the entity in exchange for stock ownership.

Generally, regarding the petitioner's credibility, the integrity of the submitted evidence will not be enhanced by the claim that the transfer of funds was effected through a third-party accommodator so that the company could circumvent the currency transfer laws of the People's Republic of China. Although a petitioner may submit secondary evidence if the required documents do not exist or cannot be obtained, CIS will not accept a petitioner's illegal or illicit activity as an excuse. *See* 8 C.F.R. § 103.2(b)(2)(i). The petitioner cannot hide financial transactions from its home country and then expect the AAO to accept the activity as an excuse for the lack of evidence. The non-existence or unavailability of required evidence creates a presumption of ineligibility. *Id.*

In the present matter, however, the petitioner has provided the previously discussed evidence of the transferred funds and secondary evidence in the form of certificates from the Chinese government recognizing the foreign company as the parent of the petitioning entity. The certificates from the People's Republic of China Ministry of Foreign Trade and Economic Cooperation show that the petitioner ultimately complied

with the foreign investment regulations and received approval to open a foreign office prior to the filing of the instant petition. The translated certificates, which were authenticated by the Chinese Consulate in Los Angeles, sufficiently demonstrate that the petitioner is engaged in a lawful enterprise in accordance with the laws of the People's Republic of China and corroborate the petitioner's claim that the foreign company, as the sole shareholder, exercises ownership and control of the United States entity.

Although the appeal will be sustained, the AAO addresses former counsel's incorrect claim that the stock certificate, itself, demonstrates the foreign entity's ownership and control of the petitioning organization. Contrary to the claims of the petitioner's former counsel, an examination of documentation beyond the stock certificates is both necessary and relevant in establishing the petitioner's claim of a qualifying relationship. As general evidence of a petitioner's claimed relationship, a stock certificate by itself does not demonstrate whether that stockholder maintains majority ownership and control of a corporate entity. *See, e.g.* 8 C.F.R. § 204.5(j)(2) (defining "subsidiary," in part, as 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.") The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, 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. at 365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The numerous bank statements, wire transfer vouchers, certificates of approval, and declarations, as well as counsel's detailed explanation in his April 14, 2005 letter of the funding of the United States entity, constitute sufficient evidence to establish a qualifying parent-subsidiary relationship in this matter. The record confirms the existence of a qualifying relationship as required in Section 203(b)(1)(C) of the Act.

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. Accordingly, the director's decision is withdrawn and the petition is approved.

ORDER: The appeal is sustained.