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

PUBLIC COPY

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 22 2005
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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

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based visa petition. Counsel for the petitioner submitted a timely filed I-290B, Notice of Appeal and additionally requested that the director reopen and reconsider his decision. The director reopened the matter and addressed additional documentation the petitioner had submitted. After consideration, the director determined that the grounds for denial had not been overcome. The director stated that because his decision remained adverse to the petitioner, the record would be forwarded to the Administrative Appeals Office (AAO). Although the director did not certify the decision to the AAO for review, the director's decision suggests that his intent was to do so. The AAO will consider this matter on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Ohio in May 2001. It offers consulting, engineering, testing, inspection, and analytical services. It seeks to employ the beneficiary as its international marketing 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 that a qualifying relationship existed with the beneficiary's foreign employer when the petition was filed.

On appeal, counsel for the petitioner asserts that the director's decision is in error.

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 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 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.

In a July 18, 2002 letter appended to the petition, the petitioner claimed that it purchased 51 percent of the "voting power" of the beneficiary's foreign employer on June 15, 2001. The petitioner submitted a June 26, 2001 shareholder agreement. The agreement provides that the beneficiary's foreign employer will issue 1,493 shares to the petitioner in installments and upon receipt of proper payment. The agreement indicates that the foreign entity's 1,493 shares constitute a 51 percent interest in the foreign entity. The record also contains copies of the foreign entity's share certificates numbered five through ten. Share certificates five through seven were issued to CTL of India Inc. (presumably a variation of the petitioner's name) prior to filing the petition substantiating a transfer of a total of 558 shares. Share certificates eight and nine were also issued to CTL of India Inc. (again presumably a variation of the petitioner's name), but subsequent to filing the petition. Share certificates eight and nine substantiate a transfer of an additional 372 shares. Finally, share certificate number ten was issued to CTL Engineering Inc. (again presumably a variation of the petitioner's name) subsequent to filing the petition, transferring an additional 187 shares.

The director determined that the evidence submitted did not establish a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director observed that as of July 29, 2002, the petition filing date, the petitioner owned only 558 shares of the petitioner. The director, based upon the representations in the shareholder agreement, determined that the petitioner owned less than a controlling interest in the foreign entity. The director also noted that the petitioner had not submitted any documentation reflecting that the petitioner would control the foreign entity prior to achieving the 51 percent ownership.

On appeal, counsel for the petitioner asserts that the petitioner and the foreign entity understood at the time the purchase agreement was executed that the petitioner assumed the full power to direct the management and policies of the foreign entity. Counsel notes that the foreign entity's gradual transfer of shares to the petitioner was to ensure that the petitioner paid the foreign entity for its shares. Counsel submits affidavits signed by officials of the petitioner and the foreign entity dated June 2003 attesting that both parties intended that the petitioner assume full power to direct the management and policies of the foreign entity when the shareholder agreement was signed.

The director reopened this matter and reconsidered the documentation the petitioner had submitted on appeal. The director observed that the foreign entity and petitioner's intentions had not been documented when the purchase agreement was entered into. The director declined to rely on the documentation created subsequent to his decision.

The AAO agrees with the director's decision. The petitioner has failed to establish that at the time the petition was filed, the petitioner owned and a 51 percent interest in the beneficiary's foreign employer or otherwise controlled the foreign entity. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The shareholder purchase agreement did not stipulate that the petitioner would obtain control of the foreign entity upon signing the document. The petitioner and foreign entity's "understanding" was not included in the very agreement addressing the transfer of interest. The creation of documents after Citizenship and Immigration Services (CIS) has pointed out a deficiency in the petition will not be considered independent and objective evidence. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has not submitted evidence sufficient to overcome the director's determination on this issue.

Moreover, the record does not contain the foreign entity's share certificates one through four, its stock transfer ledger, or minutes or resolutions relating to stock issuance. These documents 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 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Beyond the decision of the director, the petitioner has not submitted a comprehensive description of the beneficiary's day-to-day duties for the petitioner. The petitioner's description does not sufficiently explain whether the beneficiary's duties comprise primarily managerial duties or whether the beneficiary's duties comprise primarily non-qualifying operational duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Since the appeal will be dismissed for the reason stated above, this issue will not be discussed further.

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.