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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 14 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 petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of Delaware in 1985. It manufactures and sells gypsum products. It seeks to employ the beneficiary as its energy manager – ceiling tile. 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 a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner submits documentation and a brief.

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.

Preliminarily, the AAO observes that the record in this matter establishes that the petitioner is a multinational, multibillion-dollar company. The record contains information that the petitioner in late 2001 and later began to downsize, in part due to litigation and potential liability regarding asbestos lawsuits as well as other economic factors. Despite the downsizing of the petitioner's operations, it clearly retained its multinational status. However, whether the petitioner is a multinational organization is not the primary test, but rather whether the petitioner can establish a relationship with the foreign employer when the petition was filed.

The focus of the director's decision in this matter is on the fact that the beneficiary's foreign employer was liquidated in August 2003, four months prior to the petitioner filing the petition in January 2004. The director observed that: "if a previous connection to the beneficiary's foreign employer has been severed, the petitioner cannot submit evidence that it is the same employer or an affiliate or subsidiary of the beneficiary's foreign employer." The director did not request additional evidence in this matter. The director required that the qualifying relationship be ongoing at the time the petition is filed.

Counsel contends that neither the Act nor the regulations in the context of this employment-based classification require that the petitioner submit evidence that it has a qualifying relationship with the beneficiary's foreign employer at the time the petition is filed. Counsel argues that in this matter, the petitioner was ultimately the beneficiary's foreign employer because of its ownership and control of, not only

the liquidated company where the beneficiary had been employed, but also a foreign holding company that had owned and controlled the liquidated company. Counsel's interpretation of the Act and regulations suggests that any petitioner who at one time had a qualifying relationship with a foreign employer has established a qualifying relationship by virtue of its past ownership, even if the foreign employer has ceased to exist, as long as the petitioner continued to operate in at least one country other than the United States. Counsel re-submits a certificate of the petitioner's corporate secretary on appeal, which certifies that the petitioner wholly-owned and controlled the beneficiary's foreign employer from December 1997 until August 2003 when the company was liquidated.

Counsel's argument is not persuasive. The AAO declines to expand this immigration classification to include past qualifying relationships. The petitioner must establish a qualifying relationship with the beneficiary's foreign employer when the petition was filed. When the petitioner's connection to the beneficiary's foreign employer was severed, the beneficiary could no longer claim to enter the United States in order to render services to the same employer or to a subsidiary or affiliate thereof. The petitioner in this matter is not the "same employer" as the beneficiary's previous foreign employer because the beneficiary's foreign employer was a distinct legal entity separate and apart from the petitioner which ceased operations in August 2003.

The AAO acknowledges counsel's reference to the discussion notes accompanying the intracompany transferee classification under 8 C.F.R. § 214.2 (l)(1)(ii)(D) and case law interpreting "same employer" in the context of an intracompany transferee classification context. Counsel asserts that "same employer" is the identical entity having the same Federal Employer Identification Number but not necessarily the same location, for example a branch office of the employer. In this matter the beneficiary's foreign employer does not have the same Federal Employer Identification Number as the petitioner, nor does the petitioner claim that it was a branch office. Further, the AAO declines to include in the definition of "same employer" a corporation and all entities that were once owned by the corporation. The dissolution of a separate and distinct entity does not automatically cause all components of the dissolved entity to merge into its shareholders. An employment-based immigration classification can be based on an *ongoing* qualifying relationship between a parent and branch office, a parent and subsidiary, or two affiliates possessing the required common ownership and control. The AAO again emphasizes that in the context of this immigrant visa classification, the qualifying relationship must exist when the petition was filed.

Of note, the AAO also observes that the record lacks certain supporting documentation relevant to the claimed qualifying relationship. The petitioner's Securities and Exchange Commission Form 10-K, Annual Report for the year 2000, at page 9 shows that one of the petitioner's operating segments, [redacted] leased property in Taipei, Taiwan. However, the record does not contain documentation establishing that the leased property was inclusive of a subsidiary company. The AAO finds that the petitioner's certification by its named corporate secretary is probative in this matter and should be given substantial weight. However, the petitioner's 2002 annual report does not list the beneficiary's foreign employer as a subsidiary and only lists the property in Taipei, Taiwan as leased. Moreover, the petitioner has provided: (1) its fact sheet listing [redacted] as one of its six principal subsidiaries; and (2) [redacted] fact sheet indicating, among other things, that it has numerous joint venture plants and distribution facilities worldwide that manufacture and stock ceiling panels, grid, joint compound, cement board, and gypsum fiber panels. In addition to the beneficiary's foreign employer's dissolution, the lack of legal documentation substantiating the petitioner's

certification of its legal relationship with the beneficiary's foreign employer and the seemingly contradictory evidence that the beneficiary's foreign employer may have only had a contractual relationship with the petitioner also undermine counsel's argument that the petitioner was ultimately the beneficiary's foreign employer because of its ownership and control of, not only the liquidated company where the beneficiary had been employed, but also a foreign holding company that had owned and controlled the liquidated company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has not established that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

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.