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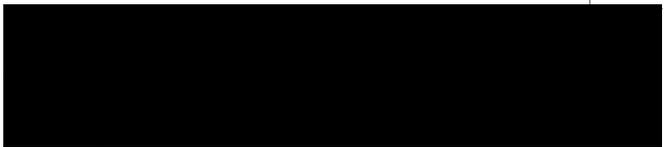
FILE: WAC 03 070 51945 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



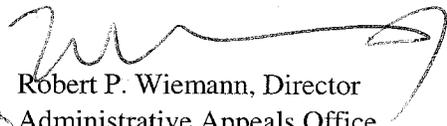
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this immigrant petition seeking to employ the beneficiary as its vice-president of corporate development and planning. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based multinational executive or manager 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 in the State of California that is operating as a restaurant.

The director denied the petition concluding that the petitioner did not demonstrate the existence of a qualifying relationship between the petitioning organization and the foreign entity as required in section 203(b)(1)(C) of the Act.

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 states that the record contained a discrepancy in the amount of shares issued and the financial information relating to the petitioner's capitalization. Counsel submits a brief and additional documentary evidence in support of the claim that a qualifying relationship exists between the two organizations.

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 his 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 foreign entity and the United States entity as required in section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C).

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 immigrant petition on December 30, 2002. In an attached letter from the petitioner, dated October 22, 2002, the president of the petitioning organization noted that the foreign entity is the parent of the United States corporation. The president stated that "[t]he [appended] documents include evidence of the required linkage between the Taiwan and U.S. corporations, including the direct cash investment of \$1,000,000 of Taiwan corporate funds for initial purchase of corporate shares." The petitioner further explained that the petitioning organization has since increased its capital to \$1,725,000.

As evidence of a qualifying relationship, the petitioner submitted a list of thirteen owners of the petitioner's 10,000,000 shares of issued stock, identifying the foreign entity as the owner of 52% of the corporation, or 5,200,000 shares. The petitioner provided a "Consent" by the petitioner's board of directors authorizing the issuance of the 10,000,000 shares of stock and a "Company Receipt" acknowledging funds paid either by wire transfer or check from the stockholders in exchange for each owner's respective shares. The petitioner also submitted stock certificates confirming the claimed ownership. In addition, the petitioner submitted two wire transfer receipts for funds transferred by the foreign entity to the petitioning organization on October 6, 2000 and October 10, 2000.

The director issued a request for evidence on May 12, 2003, yet did not request additional evidence relating to the issue of qualifying relationship.

In a decision dated January 30, 2004, the director determined that the petitioner did not establish the existence of a qualifying relationship between the foreign and United States entities. The director outlined the ownership of the petitioner's stock by the thirteen shareholders, noting that the record indicated that the petitioner received a total of \$1,000,000 in exchange for the 10,000,000 issued shares of stock. The director noted however, that the petitioner's 2001 corporate income tax return reflected an increase in capital at the end of the year to \$1,725,000. The director also identified an additional increase in capital reflected on the petitioner's 2002 corporate income tax return to \$2,225,000. The director stated "it appears that the petitioner has sold a total of \$1,225,000 in capital stock but there is no evidence of this transaction." The director

determined that the petitioner had therefore failed to clarify the inconsistencies related to a qualifying relationship. Accordingly, the director denied the petition.

In an appeal filed on March 2, 2004, counsel states "[t]here was an alleged discrepancy between the stated shares issued, and capitalization information appearing on the corporate tax returns of the Employing Organization/U.S. office." Counsel explains that additional shares were issued by the petitioning organization in the years 2001 and 2002 to the already existing stockholders, and notes that each shareholder's ownership interest remained the same following the additional issuance of stock. Counsel states that the foreign entity continues to own 52% of the petitioning organization, while the remaining 48% is owned by twelve individual shareholders. Counsel also states that "100% of the increases to capital . . . were in the form of cash wire transfers directly from the parent company to the corporate accounts of [the petitioning organization], and from no other source." Counsel claims that the director's denial therefore "identifies an alleged discrepancy where no real discrepancy exists." Counsel submits stock certificates reflecting the increase in capital stock during 2001 and 2002.

Counsel also claims that the petitioner was "blind-sided" because the director did not address the issue of qualifying relationship in his request for evidence. Counsel states that it is a long-standing Citizenship and Immigration Services (CIS) policy to issue a notice for evidence relating to issues of eligibility.

On review, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities as required in section 203(b)(1)(C) of the Act.

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 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate 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.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The instant record contains several discrepancies pertaining to the claimed parent-subsidary relationship. As noted previously, in order to establish ownership the petitioner should provide documentation of consideration given by the shareholders in exchange for stock. Here, the petitioner submitted two wire transfer statements and untranslated financial documents, which the petitioner claimed is evidence of the foreign entity's compensation in exchange for the stock owned by all thirteen shareholders. In other words,

the record indicates that the foreign entity paid the entire amount due as compensation for the stock. Likewise, the petitioner noted in its October 22, 2002 letter that the initial stock purchase in November 2000 resulted from "the direct cash investment of \$1,000,000 of Taiwan corporate funds." Clearly, the remaining twelve shareholders did not provide any consideration in exchange for stock ownership in the petitioning organization yet continue to be identified as stockholders on both the stock certificates and the corporate records. There is no documentation in the record evidencing an agreement that the foreign corporation would furnish the total amount of consideration for the benefit of the twelve shareholders. Consequently, the petitioner has failed to clarify ownership of the initial 10,000,000 shares of stock issued by the petitioner in November 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, despite counsel's assertions on appeal, counsel has not furnished evidence that the petitioner received compensation for the subsequent issuance of 12,250,000 shares of stock. Again, counsel states that the additional \$1,225,000 increase in capital was paid directly through wire transfers from the foreign entity. However, the financial documentation submitted by counsel, which includes untranslated statements, does not clearly identify the transfer of funds for stock issued in December of 2001 and 2002. While the bank statements reflect deposits made in May, July and August of 2001 and January, March, April, July, August, September, November, and December of 2002, it is unclear whether these were made as payment for stock ownership or as funding for the petitioner's business operations. Additionally, the cumulative amounts of the wire transfers in 2001 and 2002 represent a deficiency of approximately \$30,000 and \$60,000, respectively, from the total value of stock issued each year. Also, counsel again claims that the foreign entity furnished the entire amount of consideration for the subsequent issuances of stock to all thirteen shareholders, yet there is no documentation identifying an agreement between the parties that the remaining shareholders would retain ownership of the stock paid for by the foreign entity. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO also notes that because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Moreover, although counsel explains on appeal the issuance of 12,250,000 shares of stock to the thirteen already existing shareholders in the years 2001 and 2002, there is no indication that these subsequent issuances were authorized by the petitioning organization. The petitioner's Articles of Incorporation authorizes the petitioning organization to issue 20,000,000 shares of stock. This amount is further confirmed in Section 6 of a "Consent" by the petitioner's board of directors. However, as a result of the additional stock issued in both 2001 and 2002, the petitioner issued an aggregate amount of 22,250,000 shares. The record does not contain any supplemental agreements by the petitioner's board of directors authorizing the issuance of stock beyond the amount approved in its articles of incorporation. It is therefore unclear whether the stock transfers in 2002 are valid.

Furthermore, the stock certificates issued on appeal do not clearly identify ownership in the petitioning organization as the photocopies submitted for the record are too dark to identify the issuing corporation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the

burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Lastly, counsel contends on appeal that the director erred in failing to request further evidence of a qualifying relationship before denying the petition. Review of the regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence "in . . . instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Based on the above discussion, the record does not demonstrate that the petitioning organization and the foreign entity possess the claimed parent-subsidiary relationship. The petitioner has therefore failed to establish the existence of a qualifying relationship between the two organizations as required in section 203(b)(1)(C) of the Act. Accordingly, 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.