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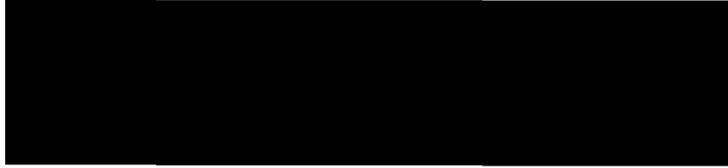
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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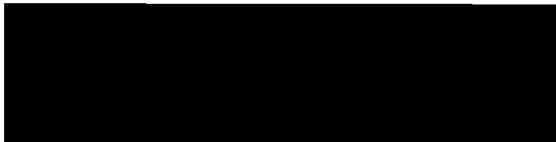


FILE:  OFFICE: NEBRASKA SERVICE CENTER Date: NOV 15 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Nevada corporation that seeks to employ the beneficiary as its chairman/CEO. 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 does not have a qualifying relationship with the beneficiary's foreign employer and denied the petition on that basis.

On appeal, the petitioner challenges the director's decision and underlying analysis, asserting that the ownership breakdown previously described is sufficient to establish that a qualifying relationship exists between the beneficiary's foreign and U.S. employers.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 the petitioner has a qualifying relationship with the beneficiary's foreign employer.

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 support of the Form I-140, the petitioner submitted a letter dated April 24, 2008 claiming that the beneficiary and one other individual own the U.S. entity and the foreign entity where the beneficiary was previously employed. As additional supporting evidence, the record also includes separate diagrams describing the ownership breakdowns of the petitioner and the beneficiary's foreign employer. One of the diagrams, undated and titled "Ownership & Control," shows that 25% of the foreign entity is owned by a group of investors, while the beneficiary and [REDACTED] share ownership of the remaining 75%. With regard to the U.S. entity, the diagram shows that a group of investors own 33% while the beneficiary and Mr. [REDACTED] share ownership of the remaining 67%. In another diagram, which illustrates the ownership breakdown of the petitioner and foreign entity as of February 18, 2008, a different ownership scheme was presented. Specifically, with regard to the foreign entity, the dated diagram indicates that the beneficiary owns 67% while [REDACTED] owns the remaining 33%; and with regard to the petitioning entity, the diagram indicates that the beneficiary and [REDACTED] individually own an equal 50% share. No mention was made of an investor-owned portion of the U.S. entity.

The petitioner also provided stock certificates B-1 and B-2 dated September 30, 2002 showing that the beneficiary owns four million Class B shares and that [REDACTED] owns two million Class B shares, respectively. The foreign entity's list of shareholders further listed all of the holders of the Class A and Class A Common Voting stock. The list shows that the Class A shares were issued to a total of 198 shareholders, while Class A Common Voting shares were issued to another 310 shareholders. A document titled "Central Securities Registry" reiterates the disbursement of the foreign entity's Class B Common Voting shares, showing the beneficiary and [REDACTED] as owners of four million and two million shares, respectively.

The supporting documents with regard to the U.S. petitioner also include a shareholders/subscribers list, which shows that the petitioner issued a total of 441 stock certificates and that of those 441 certificates, Nos. 1-198 and No. 436 issued Class A Common shares. The list does not indicate the class of the stock that the remaining 242 stock certificates purportedly issued. The petitioner also provided its own Articles of Incorporation in which Article Four indicates that the company is authorized to issue 25 million shares of common stock. The Articles of Incorporation did not indicate that the petitioner was authorized to issue more than one class of common stock. Additionally, the petitioner provided its business plan, which identified the

beneficiary and [REDACTED] as its two principal stockholders, each owning five million or 50% of all Class B Shares.

On March 11, 2009, the director issued a request for evidence (RFE) informing the petitioner that the respective ownership schemes of the beneficiary's foreign and U.S. employers do not equate to a qualifying relationship pursuant to the definitions of affiliate and subsidiary as defined at 8 C.F.R. § 204.5(j)(2). The petitioner was asked to provide evidence to establish that it was controlled by the beneficiary at the time the Form I-140 was filed.

In response, counsel provided a letter dated April 20, 2009, asserting that the petitioner is holding itself out as an affiliate of the beneficiary's foreign employer. Counsel likens the ownership scheme in the present matter to the one discussed in *Matter of Tessel*, 17 I&N Dec. 631, (Act. Assoc. Comm. 1980), where the foreign entity and the U.S. petitioner were deemed affiliates by virtue of being majority owned by the same individual. Counsel referred to subsection B of the definition for affiliate as found at 8 C.F.R. § 204.5(j)(2), asserting that the petitioner and the foreign entity are owned and controlled by the same group of individuals where each individual owns the same or similar portion of each entity. Counsel claimed that the two individuals who own the petitioner and the foreign entity also control both entities.

The director reviewed the documentation submitted in support of the petition and in response to the RFE and denied the petition in a decision dated May 18, 2009. The director determined that a qualifying relationship between the U.S. petitioner and the beneficiary's foreign employer does not exist and did not exist at the time of filing the petition. The director addressed counsel's reference to *Matter of Tessel*, stating that the matter at hand does not describe an ownership scheme where one individual owns a majority of both the petitioning entity and the beneficiary's foreign employer. The director pointed out that while the beneficiary owns a majority of the foreign entity and therefore has control over that entity, ownership of the petitioner is evenly split 50/50 between the beneficiary and [REDACTED] and that the beneficiary therefore does not control the U.S. entity. The director goes on to clarify subsection B of the definition of affiliate as found at 8 C.F.R. § 204.5(j)(2), pointing out that each individual—in this case [REDACTED] and the beneficiary—must own approximately the same share or proportion of each entity. The director further points out that counsel's comparison of the beneficiary's ownership of one entity to his ownership of the other entity is misplaced, explaining that the beneficiary's two thirds ownership of one entity is not similar to his 50% ownership of the other entity.

After reviewing the petitioner's submissions, the AAO finds that the director's analysis of the facts and clarification of the term *affiliate* are accurate and properly point out the flaws in counsel's interpretation of the regulatory definition.

On appeal, the petitioner submits a brief asserting that the definition for the term affiliate does not require that the proportions of ownership be exactly the same for each owner, but rather that they be approximately the same. The petitioner argues that the beneficiary's 66% ownership of one entity is approximately the same in proportion to his 50% ownership of the other entity. This argument, however, is without merit and does not overcome the director's sound reasoning.

First, counsel incorrectly applies the term *approximate*, which is defined as “[n]early exact.” *Webster's New College Dictionary – 3rd ed.* 57 (2008). The petitioner's claim that 66% ownership and 50% ownership are nearly exact is simply erroneous. Where 66% ownership conveys "de jure" control by reason of ownership of

more than 50 percent of outstanding stocks, ownership of exactly 50% of an entity does not establish control over that entity unless the petitioner provides evidence of proxy votes to establish "de facto" control by reason of controlling the voting shares through partial ownership and possession. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

As the director properly determined, neither the beneficiary nor [REDACTED] have proportionally the same ownership of each entity. In other words, in order to successfully meet the criteria set forth in subsection B of the definition for affiliate at 8 C.F.R. § 204.5(j)(2), the beneficiary would have to have majority ownership in the petitioning entity as he has in the foreign entity. The beneficiary has majority ownership of only one of the two entities. Similarly, [REDACTED] has a considerably greater ownership in the petitioning entity than he does in the foreign entity. Therefore, the petitioner has failed to meet the applicable regulatory criteria.

Additionally, the AAO notes that there are certain anomalies that remain unexplained with regard to the types of shares issued by the foreign entity. More specifically, the documents with regard to the foreign entity indicate that that entity was entitled to issue three different classes of stock—Class A, Class A Common Voting Shares, and Class B. The petitioner provided no clarification as to how the issuance of Class A Common Voting Shares impacts the beneficiary's control over the foreign entity. With regard to the U.S. entity, no information was provided to establish that the petitioner was authorized to issue more than one class of stock. Therefore, the petitioner's issuance of more than one class of stock is inconsistent with the provisions of the Articles of Incorporation. Furthermore, the diagrams used to illustrate the two entities' ownership breakdowns are also inconsistent, with the undated diagram indicating that the foreign entity is 25% investor-owned with the beneficiary and [REDACTED] sharing ownership of the remaining 75%, while the February 18, 2008 diagram showing the beneficiary as 67% owner of the foreign entity with [REDACTED] owning the remaining 33%. The two diagrams are equally inconsistent in their illustrations of the petitioner's ownership breakdown with the undated diagram showing a group of investors owning 33% of the petitioner while the beneficiary and [REDACTED] share ownership of the remaining 67%. In the February 18, 2008 diagram, however, the beneficiary and [REDACTED] are shown as individually owning an equal 50% share.

With regard to the anomalies described above, the AAO notes that 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). Here, the record contains no evidence to reconcile the inconsistencies nor has the petitioner even acknowledged that such inconsistencies exist.

In summary, 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. 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.

In the present matter, the record provides inconsistent evidence with regard to the classes of stock the petitioner is authorized to issue and generally fails to establish that the petitioner and the beneficiary's foreign

employer are similarly owned and controlled. Therefore, the AAO concludes that the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer and for this reason the petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.