



U.S. Citizenship
and Immigration
Services



B4

DATE: OCT 04 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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.

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 sustained.

The petitioner is a Nevada company engaged in the manufacture of adjustable patio covers, which seeks to employ the beneficiary as its Chief Executive Officer. 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.

On April 29, 2010, the director denied the petition concluding that the petitioner failed to establish the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. The petitioner subsequently filed an appeal. On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial. Counsel submits a brief and additional evidence in support of this assertion.

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 submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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.

The petitioner provided evidence to establish that the foreign company was established by [REDACTED] and [REDACTED] each holding 50% shares of the foreign company. The petitioner also submitted sufficient evidence to establish that the U.S. company is owned by [REDACTED] (40%), [REDACTED] (40%) and [REDACTED] (20%).

On appeal, counsel for the petitioner states the following regarding the qualifying relationship between the beneficiary's foreign employer and the U.S. entity:

Here, the US Petitioner and foreign business are affiliates within the meaning of the regulations. The two shareholders of the Israeli company own 80% of the U.S.

Petitioner. Their proportion of shares in [the foreign company] is similar. Further, in order to maintain control over the U.S. business, the two main shareholders entered into a Block Voting Agreement. . . . Pursuant to the terms of this Block Voting Agreement, Haim has the ultimate power to affect the main decisions impacting [the petitioner]. He controls [the petitioner]. Last, a review of [the foreign company's] Shareholder Agreement enclosed herein as Exhibit 16 confirms that once again [redacted] has the power to veto on all the major decision impacting [the foreign company]. He controls indirectly the company. Consequently, Haim has the ultimate control over both companies. As such, the Service should have recognized that an affiliate relationship existed between the two companies.

On appeal, counsel for the petitioner asserts that the director's conclusion is erroneous. Counsel contends that both entities are similarly controlled and provides a "Block Voting Agreement" between [redacted] and [redacted]. [redacted] stated, "the voting group member shall instruct the Proxy Agent how to vote on all issues at all membership meetings as a single block or unit. In case of disagreement between the voting group members the decision of [redacted] is controlling." The petitioner also submitted a Shareholders Agreement for the foreign company that states: "Each shareholder will have 1 (One) vote for each Stock he holds. Notwithstanding the aforesaid, it is agreed by the parties that [redacted] shall have the right to veto any decision of the general meeting."

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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999).

The petitioner submitted a document entitled, "Block Voting Agreement," dated January 1, 2007, between [redacted] and [redacted]. A block voting agreement is a contractual arrangement in which Shareholders agree their Shares will be voted as a unit. The document indicated that [redacted] and [redacted] each own 40% interest in the petitioner. According to this document, [redacted] will act as a proxy agent, a person who is authorized to vote another's Shares. The document stated that "it is the intention of the voting group members that together they always retain

control of [the petitioner]. Their capital and profits interest will always be voted together, and in this manner the undersigned members intend to avoid ever being out of control of [the petitioner]. In case of disagreement, the decision of ██████████ will be controlling.”

Thus, according to this block voting agreement, Haim Perez has de facto control of the petitioner since he has the controlling vote if a disagreement arises between the two shareholders that are in the voting agreement. As a holder of 50% of the foreign company and as the shareholder with de facto control of the petitioner, ██████████ has control over both the foreign company and the petitioner. Therefore, the petitioner has provided sufficient evidence to establish a qualifying relationship between the foreign company and the petitioner.

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 appeal will be sustained.

ORDER: The appeal is sustained.