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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 241 56462 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in September 1997. It claims to be engaged in operating a wholesale seafood business. It seeks to employ the beneficiary as its executive director. Accordingly, it 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 overseas employer.

On appeal, counsel for the petitioner asserts that the Service'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. 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 overseas employer.

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 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 petitioner states that the beneficiary's overseas employer purchased 50 percent of the petitioner's shares pursuant to a joint venture agreement entered into on April 1, 2001. The director requested evidence to demonstrate that the foreign entity in this proceeding had actually paid for the shares allegedly issued.

The petitioner provided the following documents for the record:

1. A copy of a check issued by the beneficiary payable to the petitioner's counsel of record in trust in the amount of $10,000, dated February 27, 2001;

2. A copy of the petitioner's minutes of a director's meeting held on March 20, 2001 resolving that [redacted] and the beneficiary were elected directors of the petitioner;
3. A copy of a resolution of the petitioner's shareholders also dated March 20, 2001 resolving that [redacted] held 100 percent of the petitioner's shares and for consideration of $60,000 was transferring 50,000 of his shares to the foreign entity in this case;
4. A copy of the joint venture agreement dated April 1, 2001;
5. A memorandum of transfer signed on behalf of the petitioner and the foreign entity, dated April 1, 2001, indicating that [redacted] transferred 50,000 shares to the foreign entity;
6. A copy of a check issued by the beneficiary payable to the petitioner's counsel of record in trust in the amount of $50,000, dated April 26, 2001;
7. A copy of minutes of a meeting of the petitioner's directors held on May 11, 2001 resolving that the transfer of 50,000 shares by [redacted] to the foreign entity was approved and that "consideration of shares should pay to Hong Kong agent, Wong Lai Wan";
8. A copy of a resolution dated June 28, 2001 adopted by the foreign entity resolving that the beneficiary be reimbursed for the $60,000 paid on behalf of the company;
9. An undated stock certificate #5 issuing 50,000 shares of the petitioner to [redacted] and,
10. An undated stock certificate #6 issuing 50,000 shares to the foreign entity.

On appeal, counsel for the petitioner submits a copy of his trust account bank statement showing a wire transfer to Wong Lai Wan on May 21, 2001. Counsel asserts that the documents in the record demonstrate that the petitioner has a qualifying relationship with the foreign entity in this case.

Counsel's assertion and evidence is not persuasive. Also included in the record is the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1998. The petitioner's IRS Form 1120 for 1998 covers a fiscal year starting October 1, 1998 and ending September 30, 1999. The IRS Form 1120 reveals at Schedule E, line 1(d) that two individuals each own 20 percent of the petitioner's stock. The record does not reveal who owns the other 60 percent of the petitioner's stock during that time period. The petitioner has not provided the Service with stock certificates 1 through 4 or an explanation of who held the stock issued on those certificates. Thus, the petitioner has not established that the purported 100 percent

owner of the petitioner actually owned 100 percent of the petitioner in 2001.

In addition, the petitioner also has not established that the overseas entity actually paid for the stock purportedly issued to it. The checks issued clearly reflect that the beneficiary is purchasing the stock. It appears that sometime after the beneficiary issued funds to be held in counsel's trust account, the foreign entity resolved to repay the beneficiary. The repayment occurred two months after the petition was filed. At the time of filing the petition the overseas entity had not provided funds for the purchase of the stock. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the record contains no independent information that the individuals who signed the resolution on June 28, 2001 were in fact authorized signatories for the overseas entity.

Further, the record does not contain sufficient information to establish that the funds transferred from counsel's trust account to an unknown third party was to actually consummate the transaction between the petitioner's shareholder and the foreign entity. Counsel and petitioner have provided no information revealing the agency relationship of this third party to the petitioner, the beneficiary, or the overseas entity.

The record is insufficient to establish that the beneficiary's overseas employer legitimately owns and controls a portion of the petitioner. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not established a qualifying relationship with a foreign entity in this case.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage.

8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and

> continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner initially submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1998 covering the fiscal year October 1, 1998 through September 30, 1999. The IRS Form 1120 revealed a taxable income of $8,817. The petition was filed April 30, 2001. The Service does not have independent evidence of the petitioner's ability to pay the beneficiary the proffered wage at the time of filing the petition.

In addition, the petitioner has not established that the beneficiary will be performing in an executive or managerial capacity for the petitioner. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has not submitted a comprehensive description of the beneficiary's proposed duties. The record does not contain sufficient other information to conclude that the beneficiary will be performing managerial or executive duties for the petitioner.

For these additional reasons, the petition will not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.