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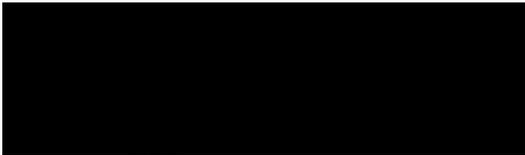
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U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

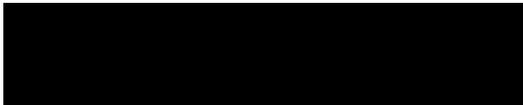
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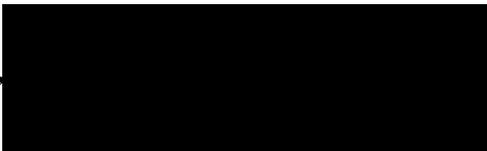
Petitioner:

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 Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Florida in April 2001. It claims it was incorporated to develop trade and travel between the United States and the People's Republic of China. It seeks to employ the beneficiary as its president. 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 its ability to pay the beneficiary the proffered annual wage of \$25,000.

On appeal, counsel for the petitioner asserts that: (1) the petitioner is not required to establish its ability to pay the proffered wage for this visa classification; (2) the petitioner has paid the beneficiary a total of \$18,500 in the year 2003; (3) the \$18,500 when coupled with the foreign entity's remuneration of the beneficiary exceeds the proffered annual wage of \$25,000; and, (4) "the petitioner and the beneficiary are essentially the same person who has merely opted to own the US entity through a corporate structure to minimize [sic] personal liability." Counsel submits a copy of *Matter of Pozzoli*, 14 I&N Dec. 469 ((Reg. Comm.1974) and 9 FAM 41.54 N9.1 in support of his assertions.

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 its ability to pay the beneficiary the proffered annual wage of \$25,000.

The regulation at 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.

Counsel's assertion that the regulations do not require the petitioner to establish its ability to pay the proffered wage is in error. The Form I-140, Immigrant Petition for Alien Worker is an employment-based immigrant petition that requires an offer of employment. The petitioner must establish its ability to pay the proffered wage.

Counsel's implied assertion that *Matter of Pozzoli* 14 I&N Dec. 469 ((Reg. Comm.1974) and 9 FAM 41.54 N9.1 are relevant to this matter is not persuasive. *Matter of Pozzoli* and 9 FAM 41.54 N9.1 explicitly relate to L-1 nonimmigrant intracompany transferees, not to employment-based immigrant petitions. Citizenship and Immigration Services (CIS) does not consider a wage paid by a foreign entity when determining whether a petitioner of an employment-based immigrant petition has the ability to pay the proffered wage.

When determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. As the petition's priority date falls on February 4, 2003, the petitioner must establish that it had the ability to pay the proffered wage on that date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner provides a 2003 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement issued to the beneficiary by Shogun International Inc. in the amount of \$18,500. The AAO observes, however, that the petitioner and the beneficiary entered into an investment agreement in August 2003 to invest in Shogun International, Inc. Prior to that date, the record reveals no relationship between Shogun International, Inc. and the petitioner. The record contains no evidence that the petitioner paid the beneficiary all or a portion of the beneficiary's salary in 2003.

As an alternate means of determining the petitioner's ability to pay, the AAO next examines the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the

proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

The petitioner has only provided its 2001 IRS Form 1120, U.S. Corporation Income Tax Return, covering the petitioner's fiscal year beginning April 1, 2001. The petitioner's 2001 IRS Form 1120 shows a negative net income of \$2,418. The petitioner has not provided any other relevant IRS Form 1120. Likewise the petitioner has not provided annual reports or audited financial reports. The AAO cannot determine that the petitioner had the ability to pay the proffered wage when the petition was filed. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's foreign employer. 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. See section 203(b)(1)(C) of the Act.

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 this matter, the petitioner claims that it has an affiliate relationship with the foreign entity, based on common ownership by an individual, [REDACTED]. The petitioner avers that Liu Jun owns 100 percent of the foreign entity and owns 50 percent of the United States entity. However, the petitioner has submitted evidence that casts doubt on the qualifying relationship between the petitioner and the foreign entity. The record contains: (1) a stock certificate dated April 10, 2001 issued by the petitioner to the beneficiary for 500 shares; (2) a stock certificate dated April 10, 2001 issued by the petitioner to [REDACTED] for 500 shares; (3) the petitioner's 2001 IRS Form 1120 showing the beneficiary and [REDACTED] each owning a 50 percent interest in the petitioner; (4) a copy of a business license indicating that [REDACTED] is the investor in the Shenyang Rectifier Electric Furnace Transformer Factory; (5) a statement signed by [REDACTED] indicating that the beneficiary had been employed by Shenyang Rectifier Electric Furnace Transformer Factory from October 1996 to March 2001 and, (6) counsel's statement that "the petitioner and the beneficiary are essentially the same person who has merely opted to own the US entity through a corporate structure to minimize [sic] personal liability."

The record does not independently establish that the beneficiary's foreign employer is the petitioner's affiliate. The regulations and applicable precedent decisions 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. 8 C.F.R. § 204.5(j)(2); *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *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.

The record does not contain sufficient evidence to establish the relationship between the beneficiary's foreign employer and the individual, [REDACTED], who purportedly owns 50 percent of the petitioner. Moreover, counsel's explanation that the petitioner and the beneficiary are essentially the same person, casts doubt on the legitimacy of the petitioner's corporate structure. This statement makes it appear that the beneficiary has created a "shell" corporation to enable the transfer of the beneficiary to the United States pursuant to this visa classification. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

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).

The petitioner has not established a qualifying relationship between the petitioner and the beneficiary's foreign employer.

Also beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in primarily a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When the petition was filed, the petitioner described the beneficiary's duties in the United States as:

. . . [involving] the continued development of the U.S. affiliate. The beneficiary has begun to identify U.S. purchasers for the products manufactured by the foreign affiliate and the exportation of U.S. manufactured goods to the PRC, he is negotiating sales, coordinating the actual transactions, and assuring the arrival of the goods into the U.S. or into the PRC in compliance with all applicable customs requirements. Finally, he is still trying to develop travel programs between the U.S. and PRC. This has taken longer to develop due to the events of September 11, 2001.

The petitioner's description of the beneficiary's duties when the petition was filed indicates that the beneficiary is providing the petitioner's daily operational services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, the petitioner has not submitted evidence that it employed individuals other than the beneficiary when the petition was filed on February 4, 2003. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As observed above, the petitioner and the beneficiary's purchase of an interest in Shogun International, Inc.,¹ some time subsequent to filing the petition, is not relevant to the petitioner's eligibility when the petition was filed.

The petitioner has not established that the beneficiary performed primarily managerial or executive duties for the United States petitioner when the petition was filed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For these additional reasons the petition may 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.

¹ The AAO also observes that § [REDACTED] filed IRS Form 1120S, U.S. Income Tax Return for an S Corporation in 2002. However, to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See Internal Revenue Code*, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation or individual owns it in any part.