MATTER OF CARBALLE

In Exclusion Proceedings

A-22788430

Decided by Board February 13, 1986

(1) An alien is barred from the relief of withholding of deportation if he, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.

(2) Once a finding is made that an alien has been finally convicted of a particularly serious crime, it necessarily follows that the alien is a danger to the community of the United States.

(3) Because the proper focus is on the serious nature of the crime and not on the likelihood of future serious misconduct on the part of the alien, the contention that the statute requires two separate and distinct findings as to "seriousness of the crime" and "danger to the community" is rejected.

(4) If an applicant is statutorily ineligible for withholding of deportation because he is a danger to the community of the United States, having been finally convicted of an inherently particularly serious crime, *e.g.*, armed robbery, background evidence including the circumstances of the crime is not relevant to the determination of statutory eligibility.

EXCLUDABLE: Act of 1952—Sec. 212(a)(9) [8 U.S.C. § 1182(a)(9)]—Crime involving moral turpitude

Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

ON BEHALF OF APPLICANT:
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ON BEHALF OF SERVICE:
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BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated February 6, 1985, the immigration judge found the applicant excludable on the grounds set forth above, denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1982), and ordered that he

be excluded and deported from the United States.[1] The applicant appeals the denial of asylum and withholding of deportation. The appeal will be dismissed.

The applicant is a 22-year-old native and citizen of Cuba. After departing Cuba and arriving at Key West, Florida, in April 1980 as part of the Mariel boatlift, the applicant was paroled into the United States.

On February 18, 1983, in the Circuit Court for Dade County, Florida, the applicant was convicted, on his plea of guilty, of (1) robbery with a firearm, to wit, a pistol (two counts), (2) attempted robbery with a firearm, to wit, a pistol (two counts), (3) grand theft second degree, and (4) accessory after the fact, in violation of sections 812.13, 812.014, and 777.03 of the Florida Statutes. The applicant was sentenced to terms of 15 years each on the robbery and attempted robbery counts with the sentences to run concurrently. He also was sentenced to terms of 5 years each on the grand theft and accessory counts with the sentences to run concurrently with the robbery counts. He was incarcerated at the time of the exclusion hearing.

At his hearing, the applicant, through counsel, conceded excludability under section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20) (1982), and did not contest excludability under section 212(a)(9) of the Act. He requested asylum and withholding of deportation. The applicant submitted that he would be imprisoned and singled out for disparate treatment by Cuban authorities because he was one of the first Cubans to enter the Peruvian Embassy in Havana in 1980. The record includes a "Safe Conduct Definitive," issued by the Cuban Government, which essentially authorized the applicant's safe conduct from the Peruvian Embassy to any country that offered him a visa. Also, the applicant stated that he would be persecuted in Cuba because of his robbery convictions in the United States.

The immigration judge denied the applicant's applications for asylum and withholding of deportation without reaching the merits of the claim or submitting any documents to the State Department for an advisory opinion. *See* 8 C.F.R. § 208.10(b) (1985). In view of the nature of the offenses that had been committed, the immigra-

[1] In his decision, the immigration judge refers to the applicant as Lazarro Caraballe. Inasmuch as there is no issue regarding the applicant's identity, we find that the reference is an inadvertent error and that the decision does, in fact, relate to the applicant. *See Corona-Palomera* v. *INS*, 661 F.2d 814 (9th Cir. 1981); *United States* v. *Rebon-Delgado*, 467 F.2d 11 (9th Cir. 1972); *Valeros* v. *INS*, 387 F.2d 921 (7th Cir. 1967); *Vlisidis* v. *Holland*, 245 F.2d 812 (3d Cir. 1957); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

tion judge found that the applicant was ineligible for relief under section 243(h) of the Act as one who had been convicted of a particularly serious crime and constituted a danger to the community of the United States. For the same reason, the immigration judge denied asylum.

In pertinent part, section 243(h)(2)(B) of the Act provides that withholding of deportation "shall not apply to any alien if the Attorney General determines that the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."

On appeal, the applicant contends that the immigration judge erred in his interpretation of section 243(h)(2)(B) of the Act. Through counsel, he submits that section 243(h)(2)(B) requires two separate factual findings. First, it must be determined that an applicant has committed a particularly serious crime. Then, there must be a second, distinct finding that the applicant constitutes a danger to the community of the United States. The applicant submits that "the use of the present tense verb 'constitutes' in section 243(h)(2)(B) indicates that this second question should be appraised in light of present circumstances and the record should therefore be carefully scrutinized for evidence of rehabilitation or other factors indicating that [the] applicant may not now be a danger to the community."

The Service, however, argues that both the language of section 243(h)(2)(B) of the Act and its legislative history make clear that only one test is required. It is submitted that section 243(h)(2)(B) "establishes a cause and effect relationship between the two clauses." If Congress had "intended to establish two separate criteria," the Service argues, "it could have easily done so by its use of the conjunction 'and.' Instead, the grammatical structure shows that a conviction for a particularly serious crime is the sole factor which Congress has made determinative of whether the alien constitutes a danger to the community."

The Service contends that the legislative history of this statutory provision supports the contention that only one finding is required. The present provisions of section 243(h) of the Act were enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The House Judiciary Committee Report, in reviewing the provisions of section 243(h), noted that an exception to eligibility for such relief included "aliens . . . who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added). The Service submits that this language reflects the congressional understanding of how section 243(h)(2)(B)

is properly read. The phrase "danger to the community" is an aid to defining a "particularly serious crime," not a mandate that administrative agencies or the courts determine whether an alien will become a recidivist.

We find that section 243(h)(2)(B) of the Act does not require that two separate and distinct factual findings be made in order to render an alien ineligible for withholding of deportation. It must be determined that an applicant for relief constitutes a danger to the community of the United States to come within the purview of section 243(h)(2)(B). However, the statute provides the key for determining whether an alien constitutes such a danger. That is, those aliens who have been finally convicted of particularly serious crimes are presumptively dangers to this country's community. The clauses of section 243(h)(2)(B), nevertheless, are inextricably related. We have noted that the phrase "particularly serious crime" is not defined in the statute. *Matter of Frentescu*, 18 I&N Dec. 244, 246 (BIA 1982). In determining whether a conviction is for such a crime, the essential key is whether the nature of the crime is one which indicates that the alien poses a danger to the community. As we noted in *Matter of Frentescu, supra*, there are some crimes that are inherently "particularly serious" while others clearly are not. There will be cases, however, where the seriousness of a crime will have to be judged by considering the nature of the conviction, the circumstances and underlying facts of the conviction, the sentence imposed, and whether the type and circumstances of the crime indicate the alien will be a danger to the community. The focus here is on the crime that was committed. If it is determined that the crime was a "particularly serious" one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative. We do not find that there is a statutory requirement for a separate determination of dangerousness focusing on the likelihood of future serious misconduct on the part of the alien. *See Crespo-Gomez* v. *Richard*, 780 F.2d 932 (11th Cir. 1986); *Zardui-Quintana* v. *Richard*, 768 F.2d 1213 (11th Cir. 1985) (Vance, J., concurring).

Has this applicant been convicted of a particularly serious crime? In addition to two other offenses, the applicant was convicted in the State of Florida, on February 18, 1983, of two counts of armed robbery and two counts of attempted armed robbery. The offenses involved the use of a firearm. They were felonies, as well as offenses against individuals. On their face, they were dangerous.

Robbery is a grave, serious, aggravated, infamous, and heinous crime. *See Matter of Rodriguez-Palma*, 17 I&N Dec. 465 (BIA 1980). We have previously found a California conviction for armed rob-

bery to be a crime rendering an alien statutorily ineligible for withholding of deportation. *See Matter of Rodriguez-Coto*, 19 I&N Dec. 208 (BIA 1985). We have little difficulty concluding that the applicant herein has been convicted of a particularly serious crime and, therefore, constitutes a danger to the community of the United States within the meaning of section 243(h)(2)(B) of the Act. Moreover, the same reasons that lead us to conclude this applicant has been finally convicted of such a crime satisfy us that his request for asylum properly warrants denial in the exercise of discretion.

The applicant complains that the immigration judge erred by refusing to admit background information, including the circumstances of the armed robberies, into evidence. We conclude that there has been no error on the part of the immigration judge as the crimes at issue in this case are inherently "particularly serious."

In *Matter of Saban*, 18 I&N Dec. 70 (BIA 1981), we stated that, pursuant to 8 C.F.R. § 208.10(b) (1981), when an applicant files an application for asylum after he has been placed in exclusion proceedings, the immigration judge must adjourn the hearing for the purpose of requesting an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs, Department of State. *See* 8 C.F.R. § 236.3(a) (1985).

This case is distinguishable from *Matter of Saban, supra.* In *Saban*, it did not appear that the alien was statutorily precluded from withholding of deportation; nor was it evident that asylum would be denied in the exercise of discretion.

In these proceedings, on the other hand, it is clear that the applicant is statutorily ineligible for withholding of deportation. Even if we assume that the applicant established the merits of his claim, no purpose would be served by obtaining an advisory opinion if the ultimate result, as here, is to statutorily preclude the applicant from relief. Similarly, the merits of the applicant's asylum claim need not be addressed. *See INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Bagamasbad*, 429 U.S. 24 (1976). *See generally Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982). It is evident, based on the applicant's convictions for armed robbery and attempted armed robbery, that asylum would be denied as a matter of discretion. Therefore, no purpose is served by obtaining an advisory opinion when, notwithstanding a favorable recommendation, relief is denied on discretionary grounds.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

MATTER OF SIEMENS MEDICAL SYSTEMS, INC.

In Visa Petition Proceedings

DEN-N-8540

Decided by Commissioner March 31, 1986

(1) Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents for purposes of section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L) (1982). *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) clarified.

(2) Each parent, through ownership and control of 50 percent of the voting shares of the joint venture, has the power to prevent action by that company through exercise of its veto power; hence, each parent "negatively" controls that company.

(3) All agreements between the parents relating to voting of the shares, distribution of profits, management and direction of the subsidiary, and similar factors which affect actual control over 50 percent of the subsidiary must be identified. Unless such agreements restrict the actual control of one parent, the 50-percent ownership will be deemed per se control.

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This appeal is before the Commissioner from the February 27, 1985, decision of the district director denying the visa petition to classify the beneficiary under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 101(a)(15)(L) (1982). The district director found that the petitioner had failed to establish an affiliation with the beneficiary's foreign employer. The appeal will be sustained.

I. *FACTS*

The petitioner, Siemens Medical Systems, Inc., seeks to classify the beneficiary as an intracompany transferee under section 101(a)(15)(L) of the Act to enable the beneficiary to provide services as a senior technical representative for medical x-ray equipment for its operation in the United States. Section 101(a)(15)(L) requires the beneficiary to be coming to the United States to continue em-

ployment in a managerial, executive, or specialized knowledge capacity with the same employer, its parent, branch, subsidiary, or affiliate with which the beneficiary was continuously employed abroad for the immediate prior year.

The petitioner is a United States wholly-owned subsidiary of Siemens AG, a multinational corporation headquartered in West Germany, and is involved in the development and sale of medical and dental equipment and systems. The beneficiary was employed as an x-ray engineer by wholly-owned subsidiaries of Siemens AG from 1975 until 1982. In July 1982, the beneficiary was transferred to Hospitalia International GmbH, a 50–50 joint venture between Siemens AG and Phillips International, to work on an x-ray maintenance project at King Hussein Medical Center, Amman, Jordan. After the project terminated in January 1985, he was reassigned to Siemens AG headquarters.

II. *CASE HISTORY, DECISION, AND APPEAL*

The petition was filed on February 14, 1985. On February 27, 1985, the district director denied the petition after determining, following *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982), that the petitioner submitted no evidence that Siemens AG controls Hospitalia International and, therefore, failed to establish that affiliation exists between Siemens Medical Systems and Hospitalia International. On April 15, 1985, the petitioner filed a motion to reopen and reconsider in which it argued that the beneficiary's identity as an employee of Siemens AG was not terminated or otherwise affected by his assignment to Hospitalia. The district director denied the motion, noting that there is nothing in the record to indicate that the beneficiary should be considered an employee of Siemens during the time he was at Hospitalia; nor is there evidence that Siemens exercises control over the management or policies of Hospitalia, which is required for affiliation.

On appeal, the petitioner contends that a qualifying affiliation under the statute exists between itself and Hospitalia through Siemens AG and makes the following argument:

> Control does not nor should not mean *total* control. In the case at hand, it has previously been documented that Siemens AG supplies most of the technical personnel to Hospitalia International and owns 50% of the assets and 50% of the outstanding shares of stock in Hospitalia International. These three items, as indicated in the above section, should be sufficient to show control in order to establish affiliation as is defined under the immigration laws. However, it should be further noted that Siemens AG also participates in profits from Hospitalia International on a 50–50 basis; Hospitalia International's board of directors is comprised by 50% of people from Siemens AG; Hospitalia International does not man-

ufacture equipment, but installs all necessities used in hospitals—to wit, beds, x-ray machinery, and other diagnostic equipment. The medical equipment used by Hospitalia International in the equipping of these hospitals is manufactured by Siemens AG.

The petitioner also notes that the beneficiary's identity as an employee of Siemens AG remained constant despite the beneficiary's assignment to Hospitalia. When the beneficiary went to Hospitalia International, he was *assigned* by Siemens AG and did not seek employment with Hospitalia International on his own volition and, at the end of his term with Hospitalia International, remained an employee of Siemens AG.

III. *ANALYSIS AND CONCLUSION*

Classification under section 101(a)(15)(L) of the Act requires consideration of several factors including, among others, whether or not there is a qualifying relationship between the petitioner and the entity from which the beneficiary will be transferred; whether or not the beneficiary has been employed abroad continuously for the immediate prior year in a managerial, executive, or specialized knowledge capacity by a parent, branch, subsidiary, or affiliate of the petitioner; and whether the proposed employment in the United States will be in a qualifying capacity.

A. *RELATIONSHIP BETWEEN THE ENTITIES*

In this case, it must be established that there is a qualifying relationship between Siemens Medical Systems, Inc. (a wholly-owned subsidiary of Siemens AG) and Hospitalia International GmbH (a 50–50 joint venture established by Siemens AG and Phillips International).

The Service will accept the interpretation that a 50–50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents. There is no majority control, but where each parent through ownership and control of 50 percent of the voting shares of the joint venture has the power to prevent action by that company through exercise of its veto power, it "negatively" controls that company. That company is, therefore, properly regarded as a subsidiary of each parent.

The petitioner has the burden of establishing that the parent owns and controls 50 percent of the claimed subsidiary. To enable the Service to determine whether de facto control exists, the peti-

tion must identify all agreements between the parents relating to voting of the shares, management and direction of the subsidiary, and similar factors which affect actual control over 50 percent of the subsidiary. Unless such agreements restrict actual control of one parent, the 50-percent ownership will be deemed per se control.

The petitioner has provided sufficient evidence to establish that Hospitalia is a subsidiary of Siemens AG. The evidence shows that Siemens AG has de facto control over 50 percent of the voting shares. It jointly manages the joint venture, shares equally in its profits, and manufactures the equipment sold and installed by Hospitalia. Since Siemens Medical Systems, Inc. is a subsidiary of Siemens AG, it is an affiliate of Hospitalia. The subsidiary and affiliate relationships in this case conform to the holdings of *Matter of Hughes, supra*, where it was held that (1) the term "subsidiary" is a more specific form of affiliation in which the company so described is subordinate to the control of another, and (2) the term "affiliate" is sometimes more specifically used to describe the relationship between two companies which have no direct linkage, but are directed, controlled, and at least partially owned by the same parent corporation. We conclude that there is a qualifying relationship for purposes of section 101(a)(15)(L) of the Act between the petitioner and the beneficiary's employers abroad.

B. *BENEFICIARY'S EMPLOYMENT*

It is evident from the facts of the case that the beneficiary had been employed abroad continuously by subsidiaries of the same parent corporation since 1975 until his reassignment to that parent in January 1985. His employment was in a specialized knowledge capacity and the proposed employment in the United States will be in a specialized knowledge capacity. It has been established that the beneficiary's employment qualifies him for classification under section 101(a)(15)(L) of the Act.

ORDER: The appeal is sustained. The decision of the district director is withdrawn and the petition is approved.