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**U.S. Citizenship
and Immigration
Services**

D7

FILE: SRC 03 009 50908 Office: TEXAS SERVICE CENTER Date: **APR 15 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner operates retail stores in the United States. It seeks to temporarily employ the beneficiary as an accountant, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee with specialized knowledge. The director denied the petition concluding that the foreign and U.S. entities did not possess the requisite qualifying relationship pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(1).

On appeal, counsel asserts that a qualifying relationship exists in that the U.S. petitioning organization "is majority owned and controlled" by a U.S. affiliate of the beneficiary's foreign employer.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Moreover, if the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(vi) the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The business entity in the United States is and will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

The issue is whether a qualifying relationship exists between the U.S. petitioning organization and the beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *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.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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.

The petitioning entity is a Texas organization incorporated on January 28, 2002. In a letter submitted with the petition, the petitioner stated that the petitioning organization "is majority owned" by a second U.S.

corporation, B.D.H. Enterprises, Inc. The petitioner further claimed that B.D.H. Enterprises, Inc. is an affiliate of the beneficiary's foreign employer, as both companies have common shareholders.

In regards to the ownership of the beneficiary's foreign employer and B.D.H. Enterprises, the petitioner provided the following information:

Beneficiary's Foreign Employer:

Hussein A.K. Balwa	25%
Ismail A.K. Balwa	25%
Umar A.K. Balwa	10%
Sakina A.K. Balwa	5%
Shamim Suleman Hafizi	10%
Mariam Ashfaq Selia	5%
Safika S. Patel	5%
Noaman A.R. Maknojia	5%
Feroza Altaf Mitha	5%
Nasim Yusuf Mitha	5%

B.D.H. Enterprises:

Hussein A.K. Balwa	32.5%
Ismail A.K. Balwa	32.5%
Umar A.K. Balwa	10%
Sakina A.K. Balwa	5%
Shamim Suleman Hafizi	10%
Mariam Ashfaq Selia	5%
Safika S. Patel	5%

The petitioner explained that "B.D.H. Enterprises is majority owned and controlled by Mr. Hussein A.K. Balwa, Ismail A.K. Balwa, Umar A.K. Balwa and Shamim S. Hafizi," and that the beneficiary's foreign employer "is also majority owned and controlled by Hussein A.K. Balwa, Ismail A.K. Balwa, Umar A.K. Balwa and Shamim S. Hafizi; therefore, the Petitioner and [the beneficiary's foreign employer] are affiliates."

In a request for evidence, the director outlined the regulation at 8 C.F.R. § 214.2 as it pertains to establishing a qualifying relationship. The director, noting "the documentation submitted appears to show different ownership between the companies," asked that the petitioner provide evidence to show a qualifying relationship exists between the foreign and U.S. entities.

In response, the petitioner supplied two affidavits outlining the ownership of B.D.H. Enterprises and the beneficiary's foreign employer as noted above. The chairman of the beneficiary's foreign employer also attested that B.D.H. Enterprises' seven shareholders own and control 85% of the issued and outstanding shares of the foreign corporation. The petitioner also provided the list of shareholders' interests previously submitted with the petition, and stock certificates for the foreign corporation.

In her decision, the director noted that the affidavits submitted in response to the director's request indicate that "the ownership of the United States company was different that the foreign company." The director consequently denied the petition concluding that the petitioner failed to demonstrate a qualifying relationship between the U.S. and foreign companies.

On appeal, counsel asserts that the petitioning organization is a subsidiary of B.D.H. Enterprises, as "B.D.H. Enterprises owns majority shares of the petitioner . . ." As proof of this ownership, counsel refers to Exhibit 13 of the petition, which contains four stock certificates for the petitioning organization, and reflects the shareholders as: Balwas Food, Inc., 600 shares; Aziz Virani, 250 shares; Mohammed Hemani, 50 shares; and, Feroz Lalani, 100 shares.

Counsel also claims that "B.D.H. Enterprises, Inc. and its affiliate in India, [the beneficiary's foreign employer], are both majority owned and controlled by Hussein Balwa, Ismail Balwa, Uner Balwa, and Shamim Hafizi." Counsel states that "the material issue" in establishing the affiliate relationship is not that B.D.H. Enterprises is owned by seven individuals, where as the beneficiary's foreign employer is owned by ten shareholders. Rather, counsel claims that "[t]he real issue is if both companies are owned and controlled by the same group of individuals, where each individual owns and controls approximately the same share or proportion of each entity." Counsel refers to *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F. Supp. 1373 (N.D. Cal 1990), and asserts that "the court held that the definition of affiliate does not require the U.S. and foreign [companies] to be owned by the same individual or group of individuals," or that "each individual owns the same proportion of both companies." Counsel also refers to *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) in support of his assertion that B.D.H. Enterprises and the beneficiary's foreign employer are affiliates.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) requires the petitioner to submit evidence that the petitioner and the organization which employed the beneficiary are qualifying organizations. On review, it appears that the petitioner and counsel are attempting to establish a qualifying relationship through an indirect affiliate relationship between a second U.S. company, B.D.H. Enterprises, and the beneficiary's foreign employer. The petitioner's assertions, however, are not persuasive.

The AAO will first address the petitioner's failure to establish a parent-subsidiary relationship between the claimed U.S. affiliate, B.D.H. Enterprises, and the petitioning organization. The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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*, *supra* at 595.

On appeal, counsel refers to exhibit 13 of the petition, and states that the petitioner is a subsidiary of B.D.H. Enterprises because B.D.H. Enterprises owns a majority share of the petitioning company. As noted above, the four stock certificates in exhibit 13 identify three individuals and "Balwas Food, Inc." as shareholders of the petitioning corporation. There is no evidence in the record that B.D.H. Enterprises owns any interest in the petitioning organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14

I&N Dec. 190 (Reg. Comm. 1972). Additionally, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the petitioner has failed to demonstrate ownership and control of the petitioning organization by B.D.H. Enterprises, the AAO cannot conclude that a parent-subsidiary relationship exists between the two organizations.

Although it has already been determined that the petitioning organization is not a subsidiary of B.D.H. Enterprises, for purposes of consistency, the AAO will address the issue of whether an affiliate relationship exists between the beneficiary's foreign employer and B.D.H. Enterprises.

Citing *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), counsel asserts that the beneficiary's foreign employer and B.D.H. Enterprises are affiliated even though they are not owned by the exact same individuals. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who hold shares of the company as individuals through a holding company. The decision further noted that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. See 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility, it must be shown that the foreign employer and the petitioner, or in this matter, B.D.H. Enterprises, 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, supra*.

In the present matter, counsel claims that a majority stock ownership exists in both companies because four of the ten shareholders of the foreign company collectively hold 70% of the stock issued, and the same four shareholders collectively hold 85% of the shares issued for the U.S. company. Counsel mistakenly concludes that this proposed combined ownership creates an affiliate relationship between the two companies. Simply because the two entities have four stockholders in common does not prove that the two entities are "owned and controlled by the same group of individuals." See 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Separately, each of the four shareholders holds a minority interest in both companies. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the four shareholders can act as one shareholder in order to create a common ownership or control in both entities. Thus, the companies are not affiliates.

¹ The AAO notes that B.D.H. Enterprises' seven shareholders are also shareholders of the foreign company. However, counsel chooses to identify the interests of only four shareholders common to both organizations.

Although counsel also cites on appeal that *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (AAC 1981) determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship, counsel is misconstruing the decision. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management . . ." It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Matter of Tessel, Inc.*, *id.* at 633. The facts in the present matter can be distinguished from the *Tessel* decision because no one shareholder holds a majority interest in either corporation. The record, therefore, fails to demonstrate that there is a high percentage of ownership and common management between the two companies.

For the foregoing reasons, it cannot be determined that a qualifying relationship exists between the petitioning organization and the beneficiary's foreign employer.

An additional issue not addressed by the director is whether the beneficiary possesses specialized knowledge for employment in the United States in a specialized knowledge capacity. The petitioner asserted in a letter submitted with the petition that it "requires the services of a specialized knowledge employee," and that the beneficiary's employment abroad and his understanding of the foreign company's processes and procedures qualifies him for the position. The record, however, does not contain evidence sufficient to substantiate the petitioner's claim that the beneficiary possesses specialized knowledge as defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D). For this additional reason, the appeal will be dismissed.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.