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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

DATE: DEC 0 8 2011 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its vice president and CEO. 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 failed to meet the regulatory filing requirement cited at 8 C.F.R. § 204.5(j)(3)(i)(C), which states that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer. The director denied the petition on the basis of this conclusion.

On appeal, counsel disputes the denial of the petition asserting that the beneficiary and his wife, together, own the majority of the shares issued by the petitioner and by the beneficiary's employer abroad, thus indicating that the two entities are affiliates.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 which 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.

The primary issue in this proceeding is whether the petitioner has a qualifying relationship with the entity that employed the beneficiary abroad. 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 and agency precedent 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, the term "ownership" refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control. *Matter of Church Scientology International*, 19 I&N Dec. at 595. The term "control" means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Id.*

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;
>
> * * *
>
> *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.

(Emphasis added.)

Control is generally "de jure" by reason of the parent entity's ownership of 51 percent of the subsidiary's outstanding stocks. *Matter of Hughes*, 18 I&N Dec. at 289. Control may also be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Id.*

The record shows that in support of the Form I-140, the petitioner provided a statement dated June 3, 2009 claiming to be an affiliate of the foreign entity that previously employed the beneficiary. In support of this claim, the petitioner provided the following:

1. A document titled, "Statement of Ownership," executed on May 28, 2009 by [redacted], who stated that she has an ownership interest in the foreign entity. [redacted] indicated that ownership of the foreign entity, [redacted] is divided among four individuals with the beneficiary and his wife each owning 248 out of 620 shares, or 40% of that entity, and [redacted] and one other individual each owning 62 out of 620 shares, or 10% of the same entity.

2. The U.S. petitioner's certificate of incorporation dated November 4, 2003, showing that the petitioner was authorized to issue 1,500 shares.

3. An undated copy of the petitioner's minutes of first meeting showing that each of four individuals was issued 100 shares of the petitioner's stock thus indicating that each shareholder had a 25% interest in the U.S. entity. The shareholders were identified as the beneficiary, his wife, [redacted].[1]

4. The petitioner's 2008 tax return with IRS Form 5472 attached reiterating the shareholder information discussed in No. 3 above.

It is noted that the documents discussed at Nos. 3 and 4 above are not consistent with the claims made by the petitioner in its June 3, 2009 statement and with the ownership breakdown provided by [redacted] her ownership statement dated May 28, 2009.

Accordingly, in an attempt to fully gather all relevant information regarding the ownership and control of the beneficiary's foreign employer and the U.S. petitioner, the director issued a request for additional evidence (RFE) on July 29, 2009. The director instructed the petitioner to provide its own articles of incorporation, copies of stock certificates and a stock ledger establishing ownership of the U.S. entity, and evidence that the petitioner was compensated for the stock issued.

In response, counsel provided a statement dated August 29, 2009 in which counsel restates the ownership breakdown of the foreign entity as originally presented in the initial support documentation and further asserts that the ownership of the U.S. entity has been restructured such that the beneficiary and his wife own 100% with each individual owning 50% of the petitioning entity. In support of counsel's statement, the petitioner provided the following documentation:

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[1] Although the minutes of meeting indicated that the date and place of the said meeting was disclosed in a written waiver of notice, the latter document was not included among the petitioner's submissions and thus the date and place of the meeting could not be established from the documentation submitted.

1. A document titled, "Amended Statement of Ownership," executed by [redacted] on August 26, 2009 to establish that the original 400 shares that the petitioner issued were surrendered back to the petitioner and were issued to [redacted] a limited liability company established in the [redacted]

2. A certificate of formation pertaining to [redacted] showing that the entity was established on March 24, 2009, accompanied by the company's detail page and membership certificates showing that 10,000 units was issued to each of two individuals—the beneficiary and his wife.

3. A certificate of incumbency pertaining to [redacted] showing that the beneficiary and his wife each hold a 50% ownership share.

4. A waiver of notice of special meeting dated March 24, 2009 accompanied by a minutes of special meeting pertaining to the petitioner showing the surrender of shares, and thus cancellation of stock certificate nos. 5 and 6, which were originally issued to the beneficiary and his wife. The minutes further indicated that certificate no. 7 was issued giving [redacted] ownership of the 400 shares that belonged to the beneficiary and his wife, the prior owners of 200 shares each.

5. Cancelled stock certificate nos. 1-4, which issued 100 shares to each of four individuals as discussed in [redacted] "Statement of Ownership," executed on May 28, 2009.

In view of the documents submitted by the petitioner, the AAO finds that the facts in this case are not in dispute. Namely, the director and counsel both agree that the ownership of the petitioner is evenly split between the beneficiary and his wife while the ownership of the beneficiary's foreign employer, [redacted] is divided among four individuals with the beneficiary and his wife each owning 40% of that entity and each of two other individuals owning 10%. However, after applying subsection (B) of the 8 C.F.R. § 204.5(j)(2) definition for the term *affiliate,* the director concluded that the foreign employer and the U.S. petitioner are not owned and controlled by the same group of individuals. The director specifically stated that the petitioner has not shown that the crucial element of common control is present among the two entities.

On appeal, counsel disputes the director's application of the regulatory definition and asserts that the director imposed additional requirements that are not present in either statute or regulation. Specifically, counsel objects to the last sentence on the third page of the denial where the director stated, "A petitioning entity must disclose all agreements relating to the voting shares, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity."

Contrary to counsel's assertion, the director's statement is not unsupported. Rather, *Matter of Siemens Medical Systems, Inc.* properly acknowledged the need for full disclosure of all relevant documents, in order to allow U.S. Citizenship and Immigration Services (USCIS) to determine whether the key element of control has been satisfied. 19 I&N Dec. 362 (Assoc. Comm'r 1986). Similar to *Siemens'*

contemplation of a 50/50 joint venture, the ownership of the petitioner similarly involves two parties where each owns 50% of the entity and neither owns a majority of the shares. In a joint venture context, the Associate Commissioner determined that the power to prevent action through 50/50 split ownership by two parties was sufficient to constitute negative control through veto power. *Id.* at 364; *see also* 8 C.F.R. § 204.5(j)(2) ("50 percent of a 50-50 joint venture and has equal control and veto power over the entity").

Furthermore, the AAO does not find that the director created an additional evidentiary requirement as counsel contends. Rather, 8 C.F.R. § 204.5(j)(3)(ii) allows the director the discretionary authority to determine when additional evidence is required and to request that the petitioner submit such evidence. Moreover, in keeping with the section 291 of the Act, which expressly places the burden of proof on the petitioner, the director specified which types of documents are material to the petitioner's eligibility and may serve as evidence for the purpose of establishing the critical element of control.

The petitioner maintains the burden of establishing eligibility, which requires that the petitioner provide evidence showing that there is a specific and minimum degree of common ownership and control between the U.S. entity and the beneficiary's foreign employer such that would satisfy the regulatory definition of the term affiliate. In other words, merely establishing that the same two individuals own considerable portions of both entities is not enough and may not rise to the level of a qualifying relationship.

In the present matter, the director properly determined that the petitioner and the beneficiary's foreign employer are not owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. While the beneficiary and his spouse each owns 50% of the petitioning entity, the same cannot be said of their ownership and control of the foreign entity, which is owned by a total of four individuals and where neither the beneficiary nor his wife have the same control as they have with regard to the U.S. petitioner. Thus, without further documentation showing that the beneficiary and his wife control the foreign entity in the same capacity that they control the petitioning entity, it cannot be said that the U.S. petitioner and the beneficiary's foreign employer are similarly owned and controlled.

Moreover, the director's finding—that the petitioner failed to submit evidence in the form of agreements regarding voting of shares, distribution of profit, or the management or direction of the foreign entity—must be viewed in the context of the specific facts presented in this case. Namely, the petitioner seemingly claims that it and the beneficiary's foreign employer are similarly owned and controlled despite the distinctly different ownership. It is noted, however, that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As the petitioner has not submitted evidence in the form of agreements regarding voting of shares, distribution of profit, or the management or direction of the foreign entity, it appears that the petitioner's claim, which implies that the petitioner and the foreign entity are similarly owned and controlled, is entirely unsupported.

Additionally, counsel asserts that the director's analysis is not applicable to majority owned businesses, thus implying that the two entities in question are majority owned. However, counsel has offered no evidence to support the implied claim. Rather, counsel bases his assertion on the spousal relationship between the owners of the U.S. and foreign entities. Counsel's interpretation of the regulatory provisions is incorrect, as the spousal relationship described herein does not constitute a qualifying relationship under the regulations. The beneficiary and his wife are not viewed as a single party such that their combined shares establish majority ownership and control of the petitioner or the foreign entity. Rather, the husband and the wife are two separate individuals with each one owning his or her respective share of the entities in question. Although it is possible for a husband and wife to establish de facto control by means of an agreement regarding voting of shares, distribution of profit, or the management or direction of either entity, the director properly determined that the petitioner failed to submit such evidence.

While counsel is correct in pointing out that such evidence is not expressly required by statute or regulation, the relevant statutory and regulatory provisions expressly state that the petitioner must establish that it has a qualifying relationship with the beneficiary's foreign employer and further allow the director to request additional evidence. As previously noted, the petitioner's claims must be supported by documentary evidence. *See Matter of Soffici*, 22 I&N Dec. at 165.

In conclusion, the record indicates that a group of two individuals owns the petitioning entity in the United States. The record further indicates that a group of four individuals own the foreign company. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 204.5(j)(2) (definition of affiliate) (emphasis added). In addition, there is no parent entity with sufficient ownership and control of both companies that would qualify the two as affiliates. *Id.* (definition of subsidiary). Based on the record that is currently before us, the AAO affirms the director's finding and concludes that the petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.