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

(b)(6)

DATE: MAY 13 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: 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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a Texas corporation organized in April 1993. The petitioner states on the Form I-140, Immigrant Petition for Alien Worker, that it is engaged in freight forwarding, employs four personnel, and reported a gross annual income of $1,585,410 when the petition was filed. It seeks to employ the beneficiary as its general manager of operations. 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.

On August 22, 2012, the director denied the petition determining that the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes the beneficiary's eligibility for the requested classification.

I. The Law

To establish eligibility for the employment-based immigrant visa classification, the petitioner must meet the criteria outlined in section 203(b) of the Act. 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.

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 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.

The regulation at 8 C.F.R. § 204.5(j)(2) provides in pertinent part:

> "Affiliate" means:
>
> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual;,
>
> *(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. . . [.]

II. The Issue on Appeal

The issue to be discussed in this matter is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. 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 above* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

In this matter, the ownership of the petitioner and the foreign entity is not in dispute. The petitioner distributed shares and issued stock to the following individuals in the amount listed next to their names:

- – 363 shares (33 percent)
- – 352 shares (32 percent)
- – 187 shares (17 percent)
- 176 shares (16 percent)
- – 22 shares (2 percent)

The foreign entity that previously employed the beneficiary, in an Annual Declaration of "Partners or Shareholders Who Had Shares or Participation," depicted the ownership of shares in 2011 as:

- – 33.16 percent
- 33.97 percent
- – 32.61 percent
- – .18 percent
- .18 percent
- .18 percent
- - .18 percent

- .18 percent
- - .18 percent
- .18 percent.

In the director's request for evidence, the director identified the major shareholders of each entity and noted that it did not appear that the petitioner had established an affiliate relationship between the two entities.

In response, the petitioner provided supporting documentation establishing the ownership as listed above. The director determined that the petitioner had not established that both the petitioner and the foreign entity are owned by the same group of individuals, each owning and controlling approximately the same share or proportion of both the petitioner and the foreign entity.

On appeal counsel for the petitioner observes that two of its individual shareholders, (33.3 percent) and (31.4 percent), together own 64.7 percent of the petitioner. Counsel notes that these same two individual shareholders, (33.16 percent) and (31.97 percent) hold 67.13 percent of the foreign entity. Counsel asserts that the petitioner has established that a group of individuals in both entities own and control approximately the same share or percentage in each entity. Counsel contends, accordingly, that the petitioner has established that these two individuals have a sufficient interest to control the management and operations of both companies and thus the two companies satisfy the definition of affiliate as set out in the regulations.

III. Analysis

To establish that the two entities are affiliates, the petitioner must establish that it is one of two subsidiaries both of which are owned and controlled by the same parent or individual or it is 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. *See* 8 C.F.R. § 204.5(j)(2).

The regulation and case law 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, 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.

In this matter, the petitioner is owned by five individual shareholders and the foreign entity is owned by ten individual shareholders, with no individual holding a majority interest in either company. While the two companies have four shareholders in common, they are clearly not owned by the same group of individuals.

Counsel assumes that the two shareholders each holding approximately a one-third interest in the petitioner and the foreign entity will always vote in concert and accordingly their combined two-third interest in both entities will result in common control of both entities. However, United States Citizenship and Immigration Services (USCIS) has never accepted a 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 in this case, it must be shown that the foreign employer and the petitioning entity 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*, 18 I&N Dec. 289 (Comm. 1982).

However, the petitioner has not provided any agreements between these two shareholders or any other shareholders that require shareholders to vote on any issue in concert. As the record does not include any agreements relating to the voting of shares, the distribution of profit, the management and direction of either entity, or any other factor affecting the actual control of either entity, the petitioner has not satisfied the criteria found in the definition of affiliate. *See Matter of Siemens Medical Systems, Inc., supra.*

Without full disclosure of all relevant documents, USCIS is unable to determine that the petitioner is one of two legal entities owned and *controlled* (emphasis added) by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. The record does not support counsel's claim that collectively exercise de facto control over both companies based on their minority interests in each company.

Counsel failed to submit any additional evidence on appeal to establish the qualifying relationship and overcome the director's concern. 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)). For this reason, the appeal will be dismissed.

The AAO acknowledges that USCIS previously approved an L-1A nonimmigrant petition filed on behalf of the beneficiary, a classification which also requires the petitioner to establish a qualifying relationship with the beneficiary's foreign employer. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions,

some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Moreover, in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner had not established a qualifying relationship with the foreign employer. In both the request for evidence and the final denial, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous nonimmigrant petition(s) was approved based on the same evidence of the qualifying relationship as submitted in this matter, the previous approval(s) would constitute gross error on the part of the director. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reason. 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 the petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.