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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 14 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a New Jersey limited liability company engaged in professional software development. The petitioner states that it is an affiliate of [redacted] located in Russia. It seeks to employ the beneficiary as its chief executive officer. 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 denied the petition, finding that the petitioner had not established that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel asserts that the director's interpretation is erroneous and that the petitioner and the foreign employer qualify as affiliates.

I. The Law

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.

I. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner that is has a qualifying relationship with the beneficiary's former 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 also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines "affiliate" as follows:

> *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;

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 a letter accompanying the petitioner's initial evidence, former counsel for the petitioner stated that the petitioner "is a 75% owned

The petitioner provided evidence that the foreign employer is owned and controlled by the following individuals in the following percentages: (1) the beneficiary - 25%, (2) - 25%, (3) - 25%, and (4) - 25%. Further, the petitioner indicated that it is owned by the following individuals in the following percentages: (1) the beneficiary - 25%, (2) - 25%, (3) 25%, and (4) - 25%. The petitioner submitted a copy of its operating

agreement, including amendments thereto, as well as articles and memorandum of incorporation for the foreign employer to corroborate the stated ownership of both entities. According to the petitioner's operating agreement, its managing member is

In the denying the petition, the director noted that the petitioner had failed to demonstrate that it has an affiliate relationship with the foreign employer, as the two entities have only three individual members in common. As such, the director concluded that the petitioner had not established that the companies are owned and controlled by the same parent or individual or that they are owned and controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity.

On appeal, the petitioner asserts that the director's definition of affiliate was erroneous and contends that the United States Attorney General has rejected a definition of affiliates requiring that the two entities be entirely owned and controlled by the same exact individuals. Counsel further asserts that the beneficiary holds "de jure" control over both companies based on a power of attorney agreement in place between the owners of the foreign employer and a voting trust agreement made between petitioner's owners, both of which are submitted for the first time on appeal.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that it has an affiliate relationship with the foreign entity as defined in the regulations, nor has it established that the beneficiary holds "de jure" control over both entities despite owning only 25% of each company.

First, it should be noted that the petitioner has not established that it is an affiliate of the foreign employer according to the plain language of the regulatory definition of affiliate at 8 C.F.R. § 204.5(j)(2). As noted by the director and reflected in the statements of ownership described above, the foreign employer and petitioner have only three out of four owners in common and therefore are not companies owned and controlled by the *same group* of individuals, with each individual owning and controlling approximately the same share or proportion of each entity. Further, the assertions of ownership, on their face, do not establish that the entities are owned and controlled by the same individual or parent. Indeed, the stated ownership in both entities reflects that each company is owned in equal parts by four individuals.

Citing *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), counsel asserts that two companies may be affiliated even though they are not owned by the exact same individuals. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now USCIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held 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. Prior to the adjudication of the petition, the Immigration and Naturalization Service amended the regulations so that the definition of

"subsidiary" recognized indirect ownership. *See* 52 Fed. Reg. 5738, 5741-2 (February 26, 1987). Accordingly, the basis for the court's decision has been incorporated into the regulations. Neither legacy Immigration and Naturalization Service (INS) nor USCIS 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.

Therefore, 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'r 1982).

Accordingly, counsel's claim that the "Petitioner and the foreign entity share three common shareholders who possesses 'the same percentage of shares (25%) or proportion (75%) of each entity,'" does not support a finding that the petitioner and the foreign entity have a qualifying affiliate relationship. Further counsel's contention that the beneficiary and "are brothers and own collectively 50% of the shares of each entity and "essentially control the company" is similarly unpersuasive. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

Finally, counsel asserts that the beneficiary controls the operations of both the petitioner and the foreign entity through power of attorney agreements in Russia and through a voting trust agreement in the United States.

In support of the appeal, the petitioner submits power of attorney agreements dated January 2012 signed by three of the foreign entity's owners. In these power of attorney agreements, the other three owners of the foreign employer authorized the beneficiary to represent their interests at the foreign entity's general meetings and to "equally exercise any other authorities of [a] company partner on my behalf." The petitioner also submits copies of minutes of General Meetings of Members held by the foreign entity in Russia in June 2012 and January 2013, which indicate that the beneficiary was the only member present at the meeting, while the other members were represented by the beneficiary pursuant to the Power of Attorney documents. However, the record reflects that the beneficiary was admitted to the United States in April 2011 and had not departed as of the date the petition was filed in March 2013. It is thus not clear how he attended the referenced member meetings held in Russia. 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).

With respect to the beneficiary's claimed "de jure" control of the petitioning company, the petitioner submits on appeal a voting trust agreement dated May 12, 2011 which states that the three other "shareholders" of the petitioner "do not intend to take an active part in the management of the Corporation" and "desire to provide one of their own with a 'Controlling Interest' in the Corporation." To effectuate this intention, the three owners agree to "assign and deliver their stock certificates (representing voting shares of stock of the corporation to the Trustee [the beneficiary] who shall then cause the stock represented by the certification to be transferred to himself as a voting Trustee on the books of the corporation." However, the petitioner is not a corporation, but a limited liability company, and there are no shares to transfer as asserted in the voting trust agreement. Again, 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner also submits documentation which indicates that the beneficiary performs various acts on behalf of the company and asserts that such acts demonstrate his ability to bind the corporation. The petitioner documents the beneficiary's involvement in cancelling a health insurance plan, executing agreements with contractors for marketing and software development services, and executing a lease. However, the execution of contractual documents on the part of the beneficiary does not demonstrate his "de jure" control over the petitioner for the purposes of establishing a qualifying relationship. In fact, it is common for the chief executive officer to have the ability to sign for his company, and this alone cannot establish the beneficiary's "de jure" control for the purpose of establishing a qualifying relationship. In addition, the petitioner continues to identify another individual, [redacted] as its managing member. The petitioner has failed to submit consistent and sufficient documentation to establish that the beneficiary has "de jure" control of the petitioner and the foreign entity necessary to demonstrate that the two companies have an affiliate relationship. For this reason, the appeal must be dismissed.

III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.