

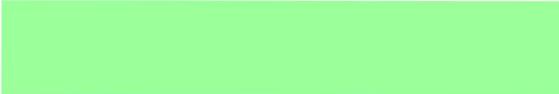
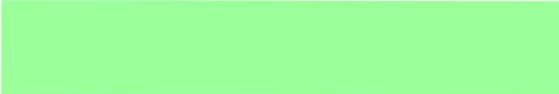


U.S. Citizenship
and Immigration
Services

(b)(6)

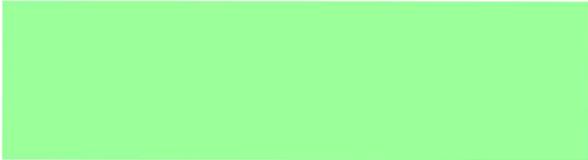


DATE: **DEC 11 2014** OFFICE: TEXAS SERVICE CENTER FILE: 

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 Texas Service Center Director denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a U.S. entity engaged in providing: import and export support, warehouse services and third party quality control services to manufacturers. It seeks to employ the beneficiary in the United States as its operations manager. 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, concluding that the petitioner failed to establish that the United States entity has a qualifying relationship with the foreign entity.

The petitioner filed a combined motion to reopen and motion to reconsider which the director denied. The petitioner filed an appeal. On appeal, the petitioner asserts that the director erred in applying the law. The petitioner filed a legal brief and documents.

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 or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

II. ISSUE ON APPEAL

The sole issue on appeal is whether the petitioner established a qualifying relationship with the entity where the beneficiary was employed 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 that the two entities are 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 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.

A. Facts and Procedural History

The petitioner filed a Form I-140, Immigrant Petition for Alien Worker, and included a letter that stated that the foreign entity, [REDACTED] (foreign entity) and the United States entity are affiliates since both companies are owned and controlled by the same identical shareholders and/or members. The petitioner's letter listed the shareholders as follows:

Foreign entity:

Shareholder	<u>No of shares %</u>
The Beneficiary	48%
[REDACTED]	48%
[REDACTED]	2%
[REDACTED] (beneficiary's wife)	1%
[REDACTED] (beneficiary's mother)	1%

The United States entity:

Shareholder	<u>No of shares %</u>
The Beneficiary	50%
[REDACTED]	50%

To establish the foreign entity's ownership and control claim, the petitioner submitted the foreign entity's articles of incorporation depicting the percentage holdings as indicated above. The articles of incorporation included a resolution with a chart that depicted the initial investments and indicated that the five holders of the foreign entity's capital were the entity's "Founding Partners." Article Nine stated that the entity was required to keep a "book of partners" that listed contributions and transfers. Article Ten provided that "the Corporation recognizes one vote per Partner, regardless of his contributions." The articles of incorporation's fourth clause identified the beneficiary as the Sole Administrator charged with administration of the entity while [REDACTED] was identified as the Statutory Auditor charged with oversight of the entity. [REDACTED] was appointed Conciliation and Arbitration commissioner.

To establish the United States entity's ownership and control, the petitioner submitted the United States entity's articles of incorporation, dated July 10, 2002, indicating that the company was authorized to issue one million shares having no par value. The petitioner provided additional documentation such as a Waiver of Notice of Annual Meeting of Members, dated November 2, 2010, signed by all shareholders and Minutes of Annual Meeting of Members, dated November 2, 2010, indicating the following ownership of shares: Beneficiary 33.33%, [REDACTED] 33.34%, and [REDACTED] 33.33%. In addition, the meeting minutes resolved that due to [REDACTED]'s resignation, the equity ownership would be redistributed to a 50/50 split between the beneficiary and [REDACTED]. The petitioner's Form 1120, U.S. Corporation Income Tax for tax year 2011 depicted the 50/50 stock split between the beneficiary and [REDACTED].

On March 7, 2013, the director denied the petition, concluding that the claimed ownership holdings of both the United States entity and the foreign entity do not meet the statutory requirements because each person does not own and control approximately the same share or proportion of each company.

In a combined motion to reopen and motion to reconsider the decision, the petitioner asserted that the director's facts are correct but he misapplied the law. The petitioner asserted that the statutory requirements for affiliates were met in this matter "because two individuals each own and control approximately the same share or proportion of each entity and these same two individuals combined own and control both entities. In support of the motion the petitioner resubmitted previous documents, unsigned by laws, and some additional documents relating to the foreign entity.

On May 14, 2014 the director denied the motion, reiterating his previous findings that the petitioner failed to establish the qualifying relationship. The director further stated that no one shareholder owns a majority interest in either company and that the petitioner did not demonstrate that the two shareholders have agreed to always vote their shares the same way for each entity in such a way that could establish de facto control.

On appeal, the petitioner asserts that an affiliate relationship between the foreign entity and the United States entity does not require "identical ownership." Alternatively, the petitioner asserts that each entity is majority owned by the same two individuals and both are controlled by the same two individuals, the beneficiary and [REDACTED]. Finally, the petitioner alternatively asserts that the beneficiary owns and controls both entities by virtue of his 50% ownership and control of the United States entity and his control of the foreign entity.

B. Analysis

Upon review, we concur with the director's determination that the petitioner failed to establish that it has a qualifying relationship with a foreign 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 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 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.

Citing *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F. Supp. 1373 (N.D. Cal 1990), the petitioner 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 Sun Moon Star 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. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service 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.

To establish eligibility in this case, it must be shown that the foreign entity and the United States 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).

In this case, the U.S. entity is equally owned by two individuals, and the foreign entity is owned by five individuals. The petitioner contends that the two companies share an affiliation because they are owned and controlled by the same individuals, specifically the beneficiary and [REDACTED]. Further, the petitioner suggests that the remaining three individuals holding 4% of the foreign entity's shares are family members and family members should be treated as the same group of shareholders. Such a family member relationship does not constitute a qualifying relationship under the regulations. In this matter, the claimed share holdings do not fall within the precise definition of affiliates as set out in the regulations. The

companies are not two subsidiaries both owned and controlled by the same parent or individual and they are not two entities owned and controlled by the same group of individuals. The shareholders of the foreign entity and the United States entity are not identical. They do not control approximately the same share or proportion of each entity. Here, no one shareholder holds a majority interest in either entity.

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 same legal entity or individuals control both entities. The petitioner did not provide voting proxies or voting agreements in this matter. Instead, the petitioner relies upon the appointment of the beneficiary as administrator of the foreign entity to demonstrate his control over that entity. This beneficiary's role within the company is insufficient to demonstrate control. Furthermore, the petitioner did not explain the nature of the other 48% shareholder's control in light of his responsibility for company oversight. Finally, the suggestion within the articles of incorporation that all five shareholders are founding partners entitled to one equal vote is unresolved. 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).

We find that the evidence is insufficient to establish that a qualifying relationship exists between the United States entity and the foreign entity.

We acknowledge that USCIS had approved a prior L-1A classification petitions filed on behalf of the beneficiary prior to denying the instant immigrant petition.

Each visa petition filing is a separate proceeding with a separate record and a separate burden of proof. 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).¹

We note that I-140 immigrant visa petitions are frequently denied after USCIS approves prior nonimmigrant visa 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 the present immigrant E-13 visa petition, which would permit the beneficiary 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*,

¹ In matters relating to an extension of nonimmigrant visa petition validity that involve the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988).

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).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.