MATTER OF W-O-M-, INC. DATE: NOV. 27, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a Florida corporation, endeavors to classify the Beneficiary as an employment-based immigrant. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The Director, Texas Service Center, denied the petition. The Petitioner subsequently filed a motion to reconsider and in response the Director affirmed the original decision. The matter is now before us on appeal. The appeal will be dismissed.

## I. ISSUE

The sole issue before us is whether the evidence of record establishes that the Petitioner has a qualifying relationship with the Beneficiary's former foreign employer.

## II. 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 the alien 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, Immigrant Petition for Alien Worker, 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.

In addition, 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;
>
> . . . .
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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.

## III. FACTS

The Petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on March 17, 2014, seeking to employ the Beneficiary in the United States as its production planning and control manager.[1] The Petitioner submitted various business and corporate documents as well as a supporting statement, dated March 10, 2014, claiming that it has a qualifying relationship with the Beneficiary's

[1] The record shows that the Petitioner filed an earlier Form I-140 petition on behalf of the Beneficiary on June 13, 2011. The Director, Texas Service Center, denied the petition on January 6, 2012 and the appeal stemming from that decision was dismissed by our office in a decision dated February 1, 2013.

former employer abroad, [redacted] The record demonstrates that [redacted] owns a majority interest (87%) in the foreign entity.

Regarding the Petitioner's ownership, the Petitioner asserted that previously, [redacted] owned 100% of its stock. However, the Petitioner noted that currently, its stock is "owned through the Limited Partnership, [redacted] which is owned by [redacted] and his children.

The Petitioner claimed that it is an affiliate of the foreign entity based on the claim that [redacted] controls the U.S. entity, and further contended that "ownership need not be majority if control exists." The Petitioner urged the Director to consider other factors, such as "common name, cross directorship, sharing of technical, financial and research skills, size and general recognition of the organization" to determine whether a qualifying relationship exists between the Petitioner and the Beneficiary's former employer abroad. The Petitioner provided a second supporting statement, dated December 3, 2013, explaining that a general and a limited partnership were formed for estate planning purposes and that [redacted] wholly owns the general partnership entity, which manages the limited partnership, despite the fact that [redacted] no longer holds a majority ownership interest in the U.S. entity. The Petitioner provided additional evidence and information pertaining to other factors concerning its eligibility for the immigration benefit sought herein.

On September 25, 2014, the Director issued a notice of intent to deny (NOID), informing the Petitioner that the record indicated that it does not have a qualifying relationship with the Beneficiary's former employer abroad. The Director pointed to Schedule 1125-E of the Petitioner's 2012 tax return (IRS Form 1120) in which the Petitioner indicated that [redacted] owns only 5% of its common stock. The Director instructed the Petitioner that it could overcome the intended denial by submitting evidence establishing that [redacted] is a majority shareholder of the petitioning organization.

In response, the Petitioner provided a statement, dated October 21, 2014, in which it stated that the same 2012 tax return, whose contents were addressed in the NOID, indicates that the [redacted] LP owns 100% of the Petitioner's voting stock. The Petitioner pointed out that [redacted] is the general partner of the limited partnership and thus has full control of its organization.

On January 16, 2015, the Director issued a notice denying the petition based on the determination that the Petitioner did not provide sufficient evidence to establish that it has a qualifying relationship with the Beneficiary's former employer abroad. The Director determined that while the Petitioner provided evidence to demonstrate that [redacted] controls its organization, he owns only 5% of the Petitioner's stock, thus indicating that the same person, i.e., [redacted] has both ownership and control of the Beneficiary's U.S. and foreign employers.

On February 13, 2015, the Petitioner filed a motion to reconsider, which was supported by a statement, dated February 10, 2015, reiterating statements it previously made in the NOID response.

Accordingly, the Director issued a decision, dated May 4, 2015, denying the Petitioner's motion, and cited the precedent decision of *Matter of Hughes* to support his consideration of ownership and control as the two factors that determine whether a qualifying relationship exists between the Petitioner and the Beneficiary's former employer abroad. *See* 18 I&N Dec. 289, 293 (Comm. 1982). On June 2, 2015, the Petitioner filed an appeal seeking to overturn the Director's decision.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the Petitioner has not provided sufficient evidence to overcome the grounds for denial.[2]

## IV. ANALYSIS

As indicated above, the sole issue to be addressed in this decision is whether the Petitioner's supporting evidence establishes that the Petitioner and the Beneficiary's former employer abroad have a qualifying relationship. As we previously stated in our February 1, 2013 decision regarding the Petitioner's previously filed Form I-140 petition, in order 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").

We further reiterate that both the regulation and case law confirm the need to examine ownership and control in determining whether a qualifying relationship exists between the 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 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289. 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 the present matter, the Petitioner dismisses the issue of ownership as a contributing factor in determining whether a qualifying relationship exists between a foreign and U.S. entity. In fact, the Petitioner cites *Matter of Hughes* to support the assertion that "ownership does not need to be a majority if control exists."[3] However, the Petitioner overlooks the reasoning relied upon in *Matter of Hughes,* where the decision expressly stated that when the element of control is "unaccompanied

[2] While we have considered all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the above listed grounds for denial.

[3] We note that the Petitioner also cites to an unpublished decision by our office in support of this contention. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

by significant ownership," the control "would not alone be considered as establishing affiliation." 18 I&N Dec. at 293. In other words, contrary to the Petitioner's assertions, [redacted] 5% ownership interest in the petitioning entity cannot be interpreted as "significant ownership." While Schedule G of the Petitioner's 2012 tax return indicates that the [redacted] owns 100% of the Petitioner's voting stock, the record lacks evidence establishing that the Petitioner authorized issuance of both voting and non-voting stock. 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)). The information offered in the 2012 tax return, without corroborating corporate documents establishing the issuance of two classes of stock, is insufficient to establish that [redacted] has the "significant ownership" necessary to support the Petitioner's claim that it has a qualifying affiliate relationship with the foreign entity based on common ownership and control by the same individual. Despite the Petitioner's numerous assertions, we cannot overlook the fact that while [redacted] owns a majority of the foreign entity's shares, the petitioning U.S. entity has no one individual holding a majority of the shares and that, in fact, [redacted] owns fewer shares than four of the Petitioner's shareholders.

Further, while we acknowledge that the limited partnership may have been an effective tool for the purpose of estate planning, it is the Petitioner's burden to establish that the partnership did not affect [redacted] majority ownership of the U.S. Petitioner, as common ownership and control, rather than control alone, must be established in order to determine the existence of a qualifying relationship between the two entities in question. Here, the evidence in the record does not establish that the Petitioner and the Beneficiary's foreign employer are similarly owned and controlled and on the basis of this conclusion, we find that the instant petition cannot be approved. Therefore, the appeal must be dismissed.

## V. 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.

Cite as *Matter of W-O-M-, Inc.* ID# 14854 (AAO Nov. 27, 2015)