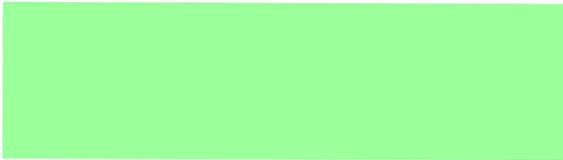




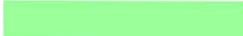
U.S. Citizenship  
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Services

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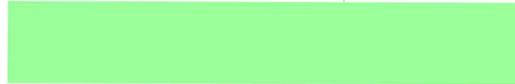


DATE: JAN 11 2013

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware limited liability company established in 2010, engages in investment in oil and gas opportunities in the continental United States. The petitioner claims to be an affiliate of the beneficiary's foreign employer [REDACTED] located in South Africa. The petitioner seeks to employ the beneficiary in the position of Vice President of Geoscience and Exploration Investment for a period of three years.

The director denied the petition on the sole ground that the petitioner failed to establish that it 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, the petitioner asserts it has demonstrated common ownership and common control, thereby establishing a qualifying relationship. The petitioner submits a brief in support of the appeal.

#### **I. The Law**

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(K) *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.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (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.

**I. The Issue on Appeal**

The sole issue to be addressed is whether the petitioner established 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. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

*Procedural History*

The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it is an affiliate of the beneficiary's foreign employer, [REDACTED] ("the foreign entity"), located in South Africa, based upon common ownership.

In a letter dated January 30, 2012, the petitioner claimed the U.S. and foreign entities share the same controlling shareholders, [REDACTED] ("the partners"), whom the petitioner claimed operate together in an unincorporated contractual partnership called [REDACTED]. Regarding [REDACTED] owns 55.04% in the partnership, [REDACTED] owns 30.83%, and [REDACTED] owns 14.13%. The petitioner claimed that the partners collectively own 100% of [REDACTED] with each partner's shares in [REDACTED] equal to his share in [REDACTED] and that [REDACTED] owns 100% of the petitioner. The petitioner further claimed that the partners collectively own a 59.12% share of [REDACTED] which in turn owns 100% of the foreign entity. The petitioner claims that [REDACTED] own the remaining 40.89% of [REDACTED].

In support of the petition, the petitioner submitted, *inter alia*, the following documents regarding the ownership structure of the U.S. and foreign entities:

1. Certificate of Formation of [REDACTED] reflecting the members as [REDACTED]
2. Share Certificate of the foreign entity, reflecting that it issued 1000 shares to [REDACTED] on May 17, 2006;
3. "Partnership Agreement – [REDACTED]" effective June 1, 2010, entered into between [REDACTED] "for the purpose of holding shares in the [REDACTED]" This partnership agreement reflects each partner's interest in the non-South African businesses of the [REDACTED] as the following: [REDACTED] 55.04%, [REDACTED] 30.83%, and [REDACTED] 14.13%. This partnership agreement reflects each partner's interest in the South African businesses of the [REDACTED] as the following: [REDACTED] 45.49%, [REDACTED] 30.83%, and [REDACTED] 23.68%. Furthermore, this partnership agreement specifically states the following:

With respect to the assets held in the Republic of South Africa, it is hereby agreed that the Partners will individually vote their effective shareholding at any general meeting of members of any company that the Partnership holds shares in. For the avoidance of doubt, it is specifically recorded that this agreement does not form a voting pool arrangement of any sort in respect to the South African holdings.

4. Presentation by [REDACTED] stating that [REDACTED] is: "privately owned by the 6 director-principals" [REDACTED] "53% black owned;" and has "30% shareholding by black directors";
5. The petitioner's Annual Financial Statements for the year ending on December 31, 2011 listing the following three directors: [REDACTED];

On February 13, 2011, the director issued a request for additional evidence ("RFE") in which she requested, *inter alia*, additional evidence to establish that the U.S. and foreign entities have a qualifying relationship including federal income taxes, proof of capital contribution, and a detailed list of owners.

In response to the RFE, the petitioner submitted a letter dated February 21, 2012 providing further information regarding the qualifying relationship. In this letter, the petitioner reiterated that it is owned 100% by [REDACTED] which is owned 100% by UCP made up of [REDACTED]. The petitioner stated that UCP also owns a controlling majority 59% interest in the foreign entity. The petitioner further stated:

Although the Partners' interests in [REDACTED] are lower than their interest in the Petitioner, they still hold technical and practical control of [REDACTED] and the bulk of the remainder of the interest in [REDACTED] is held by local [REDACTED] partners as a requirement of effectively conducting business in the South African regulatory environment . . .

[REDACTED] partners are an important requirement to operate effectively in South Africa, especially in the mining and minerals industry. Specifically, mining projects require a minimum of 25% [REDACTED] participation, and in order for [REDACTED] to be considered [REDACTED] and therefore to enable it to participate in this role, it requires a minimum of 50% black ownership; Exhibit 12g is a certificate attesting to [REDACTED] qualifying states. Therefore, a significant proportion of [REDACTED] has been allocated to [REDACTED] in the form of two charitable trusts and two black directors (one of whom, [REDACTED] is also one of the Partners) to each a black shareholding of 50.5%, as showing in Exhibit 12f. However, the Partners retain control of the company, with 50% shareholding and three of the six Board seats; the Beneficiary holds one of the three remaining Board Seats and small equity interest in [REDACTED]

Since the [REDACTED] partners are a practical requirement to operate in South Africa, their holding should be excluded in comparing the Partners' interest in [REDACTED] with their interest in [REDACTED] . . . [O]nce the shareholding of the [REDACTED] partners (apart from [REDACTED] who is a Partner) are discounted, the Partners hold approximately the same interest in both [REDACTED]

The petitioner submitted as "Exhibit 1" a document listing the membership of [REDACTED] as the following:

<u>Shareholders:</u>	<u>Number of Shares:</u>	<u>Percentage of ownership:</u>
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The petitioner also submitted, *inter alia*, the following documents regarding the ownership structure of the U.S. and foreign entities in response to the RFE:

1. Agreement on the Formation of [the Petitioner] effective June 25, 2010, stating, in pertinent part, the following: "While it is the intention that [REDACTED] shall in the fullness of time be the sole member of [the petitioner], [REDACTED] (the "Original Members") shall in the interim be registered with the State of Delaware as the members of [the petitioner]." The agreement further states that the Original Members "shall, nonetheless, remain as the Directors of [the petitioner]."
2. Action of Sole Organizer of the petitioner electing the beneficiary, [REDACTED] as members of the petitioner;
3. Assignment of Shares of Membership Interest in the petitioner, in which the beneficiary assigned one (1) share of membership interest to [REDACTED] on July 25, 2011;
4. Assignment of Shares of Membership Interest in the petitioner, in which [REDACTED] assigned one (1) share of membership interest to [REDACTED] on July 25, 2011;
5. Assignment of Shares of Membership Interest in the petitioner, in which [REDACTED] assigned one (1) share of membership interest to [REDACTED] on July 25, 2011;
6. Certificate of Membership Interest number 100, dated July 25, 2010, reflecting that [REDACTED] is the "fully paid-up owner" of 250,000 shares in the petitioner;

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<sup>1</sup> The 55.12% appears to be a typo. Based upon other documentation in the record, the correct ownership interest held collectively by [REDACTED] is 59.12%.

7. 2010 IRS Form 1065, U.S. Return of Partnership Income, for the petitioner. According to Schedule K-1 accompanying Form 1065, the petitioner listed its partners/members as [redacted] (0.41%), [redacted] (1.04%), and [redacted] (95.55%);
8. 2010 IRS Form 1065, U.S. Return of Partnership Income, for [redacted] According to Schedule K-1 accompanying Form 1065, the petitioner listed its shareholders as: [redacted] (45.49%), [redacted] (30.83%), and [redacted] (23.68%);
9. Loan Assignment and Capital Subscription Agreement between [redacted] and the individual partners of [redacted] dated June 1, 2010. Through this assignment, [redacted] assigned the loans it made to [redacted] equal to \$1,000,000 "to Partners and thereby to the specific benefit of the Private Holders," which were converted to equity capital in the following proportions: [redacted] (45.49% ownership), [redacted] (30.83% ownership), and [redacted] (23.68% ownership);
10. Share Sale Agreement dated April 15, 2011, in which [redacted] sold 9.55% interest in [redacted] for an adjusted ownership structure in [redacted] as follows: [redacted] (55.04% ownership), [redacted] (30.83% ownership), and [redacted] (14.13% ownership);
11. Membership Interest Certificates numbers 7, 8, 10, 11, 12, 13, and 14 corresponding to the above Loan Assignment and Capital Subscription Agreement and Share Sale Agreement dated April 15, 2011;
12. Letter dated February 12, 2012 from [redacted] company secretary confirming the shareholding in [redacted] as follows:

<u>Shareholders:</u>	<u>Number of Shares:</u>	<u>Percentage of ownership:</u>
[redacted]	[redacted]	[redacted]

The director denied the petition on March 8, 2012, concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship. The director concluded that the petitioner and the

foreign entity did not qualify as “affiliates,” as the evidence in the record did not establish that both organizations are owned and controlled by the same individual or by an identical group of individuals who each own a proportionate share of each organization. The director also concluded that the evidence did not show that an individual or identical group of individuals has effective de jure or de facto control of both organizations.

On appeal, the petitioner asserts that the three individuals, namely [REDACTED] (“the partners”), own a majority interest in both the U.S. and foreign entities. In addition, the petitioner asserts that the three above individuals “exert material and substantial control over both companies both through their equity holdings and the positions they hold on the boards of all of the aforementioned companies.” The petitioner asserts that the partners collectively own 100% of [REDACTED] which owns 100% of the petitioner, and through this ownership they exert 100% control over the petitioner. The petitioner also asserts that the partners collectively own 59.12% of [REDACTED] which owns 100% of the foreign entity. The petitioner asserts: “Therefore, the Partners have a majority, and therefore controlling, stake in the direct parent of [REDACTED] and so exerts indisputable control over 100% of the voting rights in [REDACTED]. Again, this is a stronger form of control than the proxy control mandated by [REDACTED].”

The petitioner asserts that in addition to common control by means of common ownership, the U.S. and foreign entities “are linked by substantial overlap of Board-level control,” as illustrated below:

	[REDACTED]			
	CEO	CEO	Chairman	Chairman
	Chairman	Chairman	Managing Director	Managing Director
	Director	Director	Director	Director
	Director	Director		Director
	1	0	2	2

The petitioner asserts that the “degree of commonality” demonstrates the “commonality of Board composition across the entire group of companies- though not identical, the commonality of the various Boards is overwhelming.” The petitioner further states that the partners, despite not owning 100% of the foreign entity, have material and substantial control in that they are (indirect) majority shareholders, and “represent half of the Board of [the foreign entity].” Finally, the petitioner asserts that a third avenue linking the U.S. and foreign entities “is the manner in which all management of the [REDACTED] worldwide is conducted, through the [REDACTED] comprised of six individuals: [REDACTED] overseeing the worldwide activities of the [REDACTED].”

*Discussion*

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish the qualifying relationship between the U.S. and foreign entities. Specifically, the AAO finds that the petitioner failed to establish common ownership by the same group of individuals or by the same parent. Furthermore, the petitioner failed to establish that the U.S and foreign entities are controlled by the same group of individuals or by the same parent.

The record reflects that the petitioning company does not have a qualifying "affiliate" relationship with the foreign company based upon common ownership by the same group of individuals. The record reflects that three individuals, namely [REDACTED] indirectly own the U.S. petitioner. In contrast, the evidence indicates that ten individuals and entities, namely [REDACTED]

[REDACTED] Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning and controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) (emphasis added).

The AAO acknowledges that the U.S. and foreign companies have the same three individuals, [REDACTED] who own larger percentages of both companies. However, these three individuals do not constitute a "group" within the regulations. The United States Citizenship and Immigration Services (USCIS) does not accept a combination of individual shareholders to constitute a "group," *unless* the individual members have been shown to be legally bound together as a unit within the company by evidence such as voting proxies or agreements to vote in concert. In this instant matter, the petitioner has not submitted evidence establishing that the partners have been legally bound together as a unit.

While the petitioner submitted evidence establishing that [REDACTED] have entered into an unincorporated contractual partnership, [REDACTED] which collectively owns 100% of the petitioner and a majority interest in the foreign entity, USCIS cannot consider this type of unincorporated partnership to be a legal entity separate and apart from its owners. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984) (a partnership is not a legal entity apart from its owner or owners). USCIS may only consider the ownership interests held by the individual partners of [REDACTED]. The record reflects that no one individual partner owns a majority interest in either the petitioner or the foreign entity. The partner with the most significant membership interests in both the U.S. and foreign entities is [REDACTED] who owns a 55.04% interest in the petitioner and a 26.8% interest in the foreign entity.

Moreover, the partnership agreement entered into between [REDACTED] and [REDACTED] specifically states that each partner "will individually vote their effective shareholding at any general meeting of members of any company that the Partnership holds shares in" and again reiterates that "this agreement does not form a voting pool arrangement of any sort in respect to the South African holdings." Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish that the partnership will always act as a single unit, the petitioner has not established that the same group of individuals or parent owns and controls both entities.<sup>2</sup>

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<sup>2</sup> Even if the petitioner were able to establish that the three partners could be considered a "group," the petitioner failed to establish that each individual within the group owns and controls approximately the same share or proportion of each entity. The petitioner cited to no legal authority to support to its assertion that the "[s]ince the [REDACTED] partners are a practical requirement to operate in South Africa, their holding should be excluded in comparing the Partners' interest."

On appeal, the petitioner asserts that the U.S. and foreign entities “are linked by substantial overlap of Board-level control.” Specifically, the petitioner asserts that [REDACTED] and the beneficiary are all members of the boards of both the U.S. and foreign entities, and collectively constitute the majority on both boards. The petitioner states: “By noting the number of other directors on each board, it is clear that the Partners together with the Beneficiary exert outright control of the Boards of all four companies.”

However, the petitioner failed to establish that [REDACTED], and the beneficiary are all members of both boards. In particular, the evidence in the record reflects that the U.S. petitioner is comprised of only three directors: [REDACTED]. The petitioner provided no evidence establishing that [REDACTED] serve on the board of directors of the U.S. petitioner. The record further reflects that the foreign entity has six directors: [REDACTED].

As such, there are only two common board members between the two entities: [REDACTED] and the beneficiary. This does not establish that both boards are “linked by substantial overlap of Board-level control.”

Nevertheless, even if the petitioner were able to establish that [REDACTED] and the beneficiary are all members on both boards, the fact that the partners and the beneficiary all serve on both boards does not establish that the same *group* controls both entities. As discussed above, the three partners plus the beneficiary do not constitute a “group,” absent a showing that they are legally bound together as a unit.

Finally, the petitioner asserts the U.S. and foreign entities share common control through the [REDACTED] comprised of six individuals who oversee the worldwide activities of the [REDACTED]. However, the petitioner failed to provide any evidence establishing the existence of the [REDACTED] as a separate legal entity, and the extent of its authority over both the U.S. and foreign entities. 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 the reasons discussed above, the petitioner failed to establish that the U.S. and foreign entities meet the definition of “affiliates” as defined in 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Therefore, the AAO will affirm the director’s decision and dismiss the appeal.

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, that burden has not been met.

**ORDER:** The appeal is dismissed.