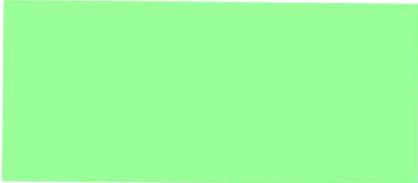


(b)(6)

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

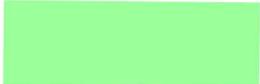


U.S. Citizenship
and Immigration
Services

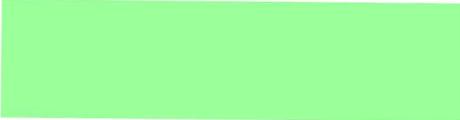


DATE: **MAR 10 2014** OFFICE: CALIFORNIA SERVICE CENTER

FILE:

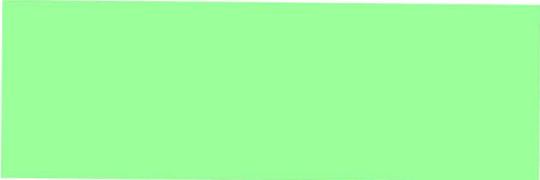


IN RE: Petitioner:
Beneficiary:



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:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A 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 California corporation, claims to be an affiliate office of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as a Technical Lead for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

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 for the petitioner submits a brief and supporting documentation.

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, Petition for a Nonimmigrant Worker (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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other

employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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 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.

II. Qualifying Relationship

The sole issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity.

A. Facts

The petitioner filed the Form I-129, on June 7, 2013. In the Form I-129, the petitioner indicated that “the Petitioner and the overseas entity, [REDACTED] share an affiliate relationship.”

In a letter of support, dated June 4, 2013, the petitioner explained that the petitioner and the foreign company have an affiliate relationship as “both entities are majority owned and controlled by the same three individuals.” The petitioner provided the following ownership structure:

[REDACTED] India percentage = 26.67%; U.S. percentage = 33.34%)
[REDACTED] (India percentage = 26.47%; U.S. percentage = 33.33%)
[REDACTED] (India percentage = 26.47%; U.S. percentage = 33.33%)

The petitioner provided three stock certificates issued to the individuals listed above for 200,000 shares each.

The petitioner also provided a document entitled, [REDACTED] In this document, the ownership of the foreign entity differs as it provides the following information:

[REDACTED] (29.94%); [REDACTED] (29.93%); [REDACTED] (29.93%); [REDACTED] 3.40%); [REDACTED] (3.40%); and, [REDACTED] (3.40%).

In response to a Notice of Intent to Deny, counsel for the petitioner further explained that the “remaining 20% in [REDACTED] India is issued to [REDACTED] Counsel also stated that this “shareholding does not accord [REDACTED] any control over [REDACTED] and merely entitles this shareholder to a share of the profits/losses of the corporation.” Counsel contends that the same three individuals own 100% of the petitioner and own 79.61% of the India entity.

The director denied the petition concluding that the petitioner did not establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

B. Analysis

The issue that will be addressed in this proceeding 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 also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

On appeal, counsel contends that both entities are owned and controlled by three members who are the controlling members for the petitioner and the foreign company.

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The evidence indicates that four member own the foreign company. The record further indicates that three members own the petitioning entity in the United States. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity" 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. For this reason, the petition may not be approved.

On appeal, counsel for the petitioner cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990) and *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) to assert that two companies may be affiliated even though they are not owned by the exact same individuals.

The *Sun Moon Star Advanced Power* decision is distinguishable from the facts of the present matter. First, the court relied heavily on *Matter of Tessel, Inc.* to conclude that the two entities were affiliates through indirect ownership. 17 I&N Dec. at 633. Although *Matter of Tessel* determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship, counsel has misconstrued the decision. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management" *Id.* It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.* The facts in the present matter can be distinguished from *Matter of Tessel*, however, because no one shareholder holds a majority interest in either

corporation. As later codified in 8 C.F.R. § 214.2(l)(1)(ii)(L)(1) and in part A of the definition of affiliate in 8 C.F.R. § 204.5(j)(2), the petitioner in the *Tessel* case would have qualified as an affiliate given that the beneficiary owned and controlled a majority of both entities. The record in the present matter, however, fails to demonstrate that there is a majority ownership and control, directly or indirectly, of both companies by any one person.

Second, although *Sun Moon Star Advanced Power, Inc.* stated that "affiliation should not depend [on] whether the individual owners are absolutely identical," this statement was made within the context of direct or indirect ownership, the central issue in that case. *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. at 1380. In other words, it appears the court meant that the exact same individuals should not be required to own both companies, considering that some individuals may only have an indirect ownership of one or both companies. This does not mean, however, that the ownership of both companies should not be the same when direct as well as indirect ownership has been considered. With the present matter, the petitioner has failed to demonstrate that one shareholder of the foreign entity, [REDACTED] owned, whether directly or indirectly, any part of the United States entity. Consequently, the petitioner did not meet the requirements of 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) or its counterpart, part B of the definition of affiliate in 8 C.F.R. § 204.5(j)(2).

Moreover, the definition of affiliate at the time of the *Sun Moon Star Advanced Power, Inc.* decision read, "Affiliate means . . . 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." 8 C.F.R. § 214.2(l)(1)(ii)(L) (1990). The court in *Sun Moon Star Advanced Power, Inc.*, however, did not directly address this regulation in its decision. See *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. at 1373. Instead, it only discussed an apparent mistake in the August 20, 1987 memorandum's interpretation of the regulation, in which the then Immigration and Naturalization Service (INS) added the word "exact" to describe the ownership required. *Id.* at 1376. When the word "exact" is added, it implies that the ownership must be "absolutely identical" and that indirect ownership will not be permitted or even considered. See *id.* at 1376, 1380. Specifically, the court in *Sun Moon Star Advanced Power, Inc.* stated that, based on the memorandum's interpretation of the regulation, "a determination of whether companies are affiliates depends upon finding that the companies are owned by the *exact* same individuals and excludes the possibility of indirect ownership of the affiliates by these individuals through a third company." *Id.* at 1376 (emphasis in original). Thus, as the word "exact" does not appear in the regulations, the court concluded that indirect ownership should also be considered when determining whether the same individuals own both entities. At the same time, by not directly addressing the regulation, the court implied that it did not have an issue with the plain meaning of affiliate in 8 C.F.R. § 214.2(l)(1)(ii)(L) and its requirement that the "same group of individuals" own and control, whether directly or indirectly, the same approximate share or proportion of each entity.

Moreover, counsel states on appeal that the petitioner is owned by a total of three individuals and the foreign entity is owned by a total of four individuals. Absent documentary evidence, such as

voting proxies or agreements to vote in concert so as to establish a controlling interest, this admission is sufficient in itself for the AAO to conclude that the petitioner is not an affiliate of the foreign entity. To establish eligibility in this situation, the burden is on the petitioner to show 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).

Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

III. Conclusion

The appeal will be 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.