



U.S. Citizenship
and Immigration
Services

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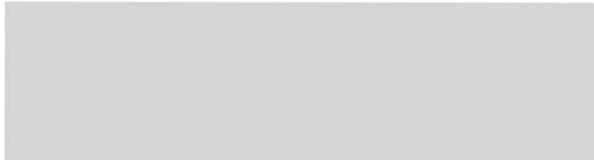
DATE: **JUN 08 2015**

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), 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 Pennsylvania corporation established in [REDACTED] states that it operates an "orthopedic and medical design" business. The petitioner claims to be an affiliate of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as its vice president of business development for a period of three years.

The director denied the petition concluding that the evidence of record did not establish that the petitioner 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 our office for review. On appeal, the petitioner contends that the beneficiary's foreign employer and the U.S. petitioning company have an affiliate relationship based on common ownership and control. The petitioner submits a brief and additional evidence 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(i)(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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary's foreign employer and the U.S. company are qualifying organizations. 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).

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[.]

* * *

- (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.

A. Facts

The petitioner filed the Form I-129 on December 20, 2013. On the L Classification Supplement to the Form I-129, the petitioner identified the beneficiary's last foreign employer as [REDACTED] and stated that the U.S. company is an affiliate of the foreign entity based on the following description of the

stock ownership and control of each company: "Both affiliates ultimately owned by [REDACTED] itself owned by [REDACTED], 33.3% each."

In its letter of support, the petitioner describes its ownership structure and its relationship to the beneficiary's foreign employer as follows:

The ultimate owners are three brothers, [REDACTED] who own [REDACTED], which wholly owns [REDACTED] which in turn owns [REDACTED] [the beneficiary's] current employer. [REDACTED] and [REDACTED] both part of [REDACTED] also own [REDACTED] 100% through their shared subsidiary, [REDACTED]

Thus, there is a qualifying relationship as both [beneficiary's] current Indian employer and his prospective US employer are ultimately owned by the same three [REDACTED] brothers in roughly the same proportions through [REDACTED]

The petitioner submitted evidence of ownership for the beneficiary's foreign employer, its U.S. petitioning company, and each of the companies in between leading to their ultimate ownership. The petitioner, however, did not submit any evidence of voting agreements or proxy votes to establish actual control over the U.S. petitioning company.

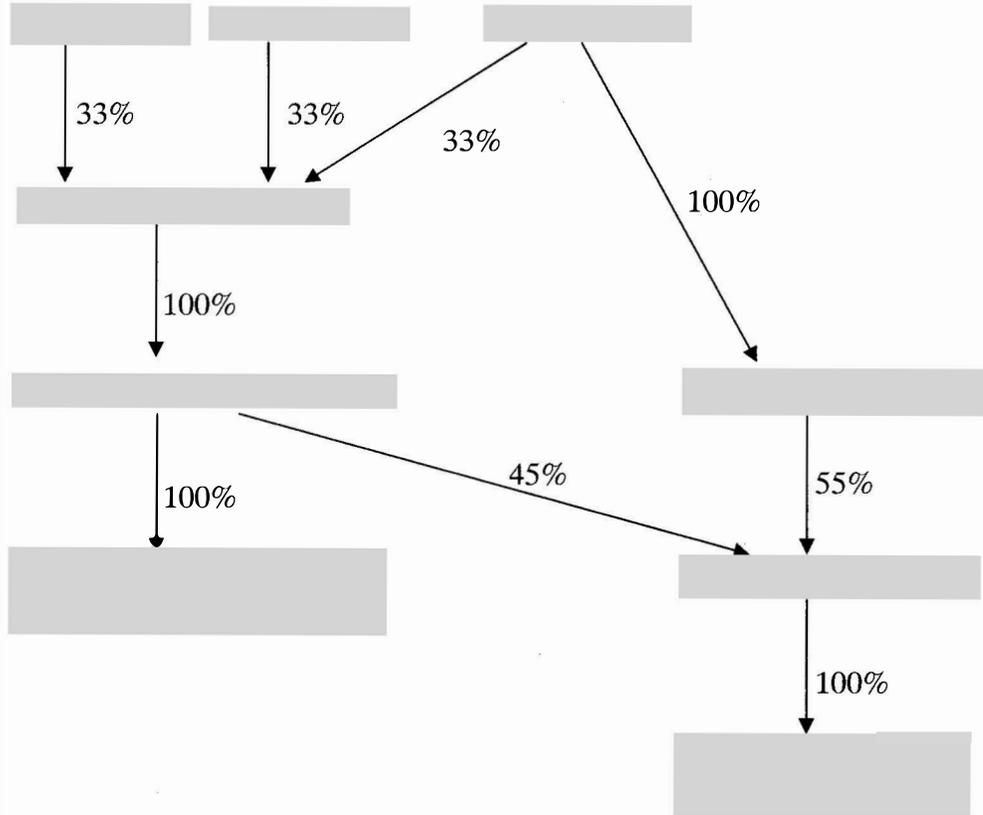
The petitioner did submit evidence that [REDACTED] issued 5,000,000 preference shares to [REDACTED] on September 4, 2012, but failed to explain the significance of the preference shares issued and how they affect [REDACTED]'s 45% ownership stake in [REDACTED] whole owner of the U.S. petitioning company.

The director issued a request for evidence ("RFE") on April 14, 2014, advising the petitioner that the evidence currently in the record does not establish a qualifying relationship between the beneficiary's foreign employer and the U.S. petitioning company. The director specifically outlined the ownership of the U.S. petitioning company and stated that common ownership and control of both companies has not been established, as [REDACTED] ultimately owns 55% and [REDACTED] owns the remaining 45% of the U.S. petitioning company. The director instructed the petitioner to submit evidence demonstrating common ownership and control of both companies in order to establish a qualifying relationship.

In response to the RFE, the petitioner provided the same description of its ownership structure.¹ The petitioner specifically stated that both entities "are owned and controlled by three brothers in approximately the same percentages." The petitioner submitted additional documentation to sufficiently demonstrate the ownership structure illustrated below, including copies of the share certificates issued to the brothers which

¹ We have created the illustration shown on page 5 of this decision in order to better visualize the relationship between the beneficiary's foreign employer and the U.S. petitioning company.

identified them as the holders of equal numbers of equity shares in the foreign entity.² The petitioner also submitted a copy of certificate number PS1 issuing [REDACTED] 5,000,000 preference shares of [REDACTED] on September 5, 2012, but again failed to provide clarification as to the significance of the preference shares.



The director denied the petition on July 30, 2014, concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. In denying the petition, the director found that the petitioner demonstrated that three brothers own the foreign entity in equal shares at 33.3% each and the same three brothers own the U.S. petitioning company in very different percentages at 70% one brother and 15% each remaining brother. The director found that common ownership and control has not been established as one brother owns a majority of the U.S. petitioning company, while all three brothers share the

² In response to the RFE, the petitioner for the first time stated that the foreign entity was "100% owned by three separate trusts." However, documentation submitted in response to the RFE demonstrates that the equity shares of the foreign entity are issued to the brothers in their individual capacities. Moreover, the record contains no documentary evidence, such as copies of trust agreements or related declarations, to corroborate the petitioner's claims. 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)).

same ownership of the foreign entity. Concluding that both entities are not owned and controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity, the director denied the petition.

On appeal, the petitioner describes the same ownership structure illustrated above and correctly asserts that the director based his decision solely on the difference in ownership percentages by the three brothers for each entity. However, the petitioner states that the director erred in focusing on the percentage of ownership of each individual instead of the three brothers as a group, who collectively own 100% of both entities.

B. Analysis

Upon review, the petitioner has not established that it has a qualifying affiliate relationship with the 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'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.

If one individual owns a majority interest in the petitioner and the foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. *See* 8 C.F.R. 214.2(l)(1)(ii)(L)(1).

Citing *Sun Moon Star Advanced Power, Inc. v. Chappel*, 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 U.S. Citizenship and Immigration Services (USCIS)) refused to recognize the indirect ownership of the petitioner by three brothers, owning shares of the company as individuals through a holding company. The decision stated 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 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 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.

In this case the U.S. and foreign entities are both owned by the same three individuals; however, the foreign entity is owned by the three individuals equally at 33.3% each and the U.S. entity is owned by one individual at 70% and the remaining two individuals at 15% each. It appears to be clear that the one individual controls the U.S. entity, but absent documentary evidence such as voting proxies or agreements to vote in concert, the petitioner has not established that the same individual or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned *and controlled* by the same individuals. 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 petitioner also cites *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981) on appeal, stating that the Commissioner determined that common majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign entity and 60% of the petitioner, thereby establishing a "high percentage of common ownership and common management. . . ." The decision further stated 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.* at 633. However, the facts in the present matter can be distinguished from *Matter of Tessel* as no one shareholder holds a majority interest in the foreign entity, while one specific shareholder holds a majority interest in the U.S. entity. Therefore, the record fails to demonstrate that there is a high percentage of common ownership and common management between the two companies and the required qualifying relationship.

While the evidence demonstrates that both entities are wholly owned by the same three individuals, [REDACTED], the petitioner has not established that the entities are controlled by the same individual or group of individuals. Rather, the evidence indicates that one individual majority owns, and thus controls, the U.S. petitioning company, and three individuals equally own the foreign entity, no one individual having more control than the other.

On appeal, the petitioner states that we "must also recognize that family-owned businesses possess an element of family unity and common focus that is not seen in public companies or companies with many shareholders." Familial relationships, however, do not constitute qualifying relationships under the regulations. 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"). Here, the evidence of record does not establish that the two entities are "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).



Based on the evidence in the record, the petitioner has not established that the two entities qualify as affiliates as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(L). Accordingly, the appeal will be dismissed.

III. CONCLUSION

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.