

(b)(6)



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF R-, LLC

DATE: OCT. 1, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a Texas limited liability company, seeks to classify the Beneficiary as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner, established in [REDACTED] operates a “lemon distributor” business. It claims to be an affiliate of [REDACTED] located in Mexico. It seeks to employ the Beneficiary as the General Manager of its new office in the United States.

The Director denied the petition concluding that the Petitioner did not 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 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(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.

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

(b)(6)

Matter of R-, LLC

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, Petition for a Nonimmigrant Worker, on June 4, 2014. 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:

[REDACTED] (US Company) is 40% owned by [REDACTED]

[REDACTED] (foreign company) is owned 12.5% by [REDACTED]
[REDACTED]

The Petitioner submitted a qualifying relationship chart showing [REDACTED] at the top with direct links to the foreign entity and the petitioning U.S. company. The chart further states: [REDACTED] has both ownership and control of the foreign and U.S. entities. [REDACTED] is the Sole Administrator of the foreign company. . . . [REDACTED] owns 40% of [the Petitioner] and is the Managing Member. Please see a copy of the bylaws.”

The Petitioner submitted a Public Deed, demonstrating the establishment of the foreign entity on [REDACTED] by [REDACTED], [REDACTED]

and [REDACTED]. The translation of the document is not complete at Chapter 3, “Of the Shareholders”; it summarizes the topics of articles five through nine, such as “discuss the requirements to belong to the company; rights and obligations; the admission of new shareholders; any shareholder may separate from the company; [and] the company will exclude any members when in violation against the company,” but it does not include any of the content for each article. The document lists each of the shareholders of the foreign entity as follows:

(b)(6)

Matter of R-, LLC

Shareholders Name	Social Shares	Contribution
1.-	5	\$ 5,000.00
2.-	5	\$ 5,000.00
3.-	5	\$ 5,000.00
4.-	5	\$ 5,000.00
5.-	5	\$ 5,000.00
6.-	5	\$ 5,000.00
7.-	5	\$ 5,000.00
8.-	5	\$ 5,000.00
Total Sum:	40	\$40,000.00

The document discusses “The Organizational Structure and Assemblies” at Chapter 5, particularly Article 17, as follows:

Article 17.- general meeting of members is the highest decision making body of the company, will be integrated with all partners, which shall be entitled to one vote with a value equal to the percentage that corresponds to his contribution to the initial capital. The agreements are binding on the present, when absent or dissenting vote in favor of the shareholders representing seventy-five percent of the capital contributed, and this percentage corresponds to a single partner, will be required at least to vote for the third of partners.

....

Article 21.- When the majority do not meet, legally required, immediately there will be minutes taken where it is recorded that there was not a celebration of the assembly as well as the expedition of the second meeting the holding of the meeting also the second call forwarding and must contain the warning that the meeting will be held with the number of partners will be made to rise queue attend and that the agreements reached will be required even for absent [*sic*].

The document further discusses the powers of the Board of Administrators as follows:

Article 29.- The Board of Administration is the board of directors is the board of direction and representation of society as well as the executor of the decisions of the assembly. Will be composed of a Chairman, Secretary, Treasurer and Members and their alternates owners, will have the representation of the Company to third parties with THREE YEARS in its functions and shall have the following powers in any case MUST exercise together or form with the approval of at least two board members with the fundamentals established in Article 109 of the agrarian law. . . .

....

(b)(6)

Matter of R-, LLC

Article 31.- direct management of the company will be in charge of the management board chairman, who by the mere fact of their appointment, shall have the powers and duties Article 29 refers to these statutes, as well as general attorney for lawsuits and collections to manage the assets of the society, even for those who according to the law require a special clause, in addition to those provided for the assembly. . . .

....

TRANSITORY ARTICLES

....

Article Four-. Partners, at a general meeting agree that the corporation is governed by a board of directors consisting of a president, secretary, treasurer, and TWO MEMBERS owners, and subsequent meeting appoint alternate members of the council and the effect does such appointments fall in the following:

President: [REDACTED]
Secretary: [REDACTED]
Treasurer: [REDACTED]

(Emphasis in original.)

The Petitioner submitted its Certificate of Filing, dated May 29, 2014. The Petitioner also submitted a Certificate of Correction for its U.S. company, adding the following information to its company registration:

Each of the following provisions was omitted and should be added to the filing instrument. The identification or reference of each added provision and the full text of the provision is set forth below.

Article 3 – Governing Authority

Managing Member 1: [REDACTED]

The Petitioner submitted an Operating Agreement, dated May 20, 2013, between three Managing Members: [REDACTED], [REDACTED] and the Beneficiary, and four additional members identified simply as Member 1, Member 2, Member 3, and Member 4. The identities of these individuals are unknown, as the members names are all listed as “N/A.” The agreement indicates that the parties desire to form a limited liability company in Texas and to establish their respective rights and obligations in connection with the limited liability company. The document further lists each member, their capital contributions, percentage interests, and management role within the company as follows:

(b)(6)

Matter of R-, LLC

Managing Member 1-		\$400.00
Managing Member 2-		\$250.00
Managing Member 3-		\$350.00

.....

The term "Members' Percentage Interests" shall mean the percentages set forth opposite the name of each Member below:

Managing Members	Percentage Interest
	40.00%
	25.00%
	35.00%

.....

10. Management of the Limited Liability Company

The Members hereby designate [REDACTED] . . . [REDACTED] . . . and [REDACTED] . . . to serve as Managing Members for the Limited Liability Company.

.....

The Managing Members shall have responsibility for the day-to-day management of the business and affairs of the Limited Liability Company and shall devote such time and attention as the Managing Members deem necessary to the conduct and management of the business and affairs of the Limited Liability Company.

The Petitioner submitted three Membership Certificates, each dated September 19, 2013 and each signed by a different individual as President. The first certifies that [REDACTED] is the registered holder of a 40% interest of the petitioning U.S. company, the second certifies that [REDACTED] is the registered holder of a 35% interest of the petitioning U.S. company, and the third certifies that [REDACTED] is the registered holder of a 25% interest of the petitioning U.S. company. None of the certificates bear the signature of a witness.

The Director issued a request for evidence (RFE) on June 17, 2014, advising the Petitioner that the evidence in the record did not establish a qualifying relationship between the Beneficiary's foreign employer and 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.

(b)(6)

Matter of R-, LLC

In response to the RFE, the Petitioner submitted a letter, dated August 12, 2014, explaining the ownership and control of each entity as follows:

[The Petitioner] is an affiliate company that is owned and controlled by [REDACTED] [REDACTED] owns 12 ½ of the foreign entity and equal shares with 7 other owners and is the President/legal representative of the company. In the U.S. Company, [REDACTED] owns 40% of the company and is the managing member of [the Petitioner]. . . . In this case, [REDACTED] . . . controls both the foreign and U.S. companies.

The Petitioner submitted the same evidence as previously submitted with the petition, along with evidence that [REDACTED] retains his authority as President of the Board of Administrators of the foreign entity and is named on bank statements for both entities.

The Director denied the petition on August 28, 2014, concluding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer. In denying the petition, the Director observed that the Beneficiary is one of eight owners of the foreign entity, owning 12.5% of the foreign entity, and one of eight owners of the U.S. company, owning 40% of the U.S. entity; however, the seven other owners of the foreign entity are totally different from the seven owners of the U.S. company. Therefore, the Director found that the Beneficiary is a minority owner in both businesses and does not meet the criteria of control of both businesses.

On appeal, the Petitioner first notes that the Director was mistaken in identifying the Beneficiary as an owner of the foreign entity or the majority owner of its U.S. company. The Petitioner also points out that [REDACTED] not the Beneficiary, owns 40% of its U.S. company and is its managing member. The Petitioner further contends that [REDACTED], not the Beneficiary, owns 12.5% of the foreign entity in equal shares with seven other owners and is the President/Sole Administrator of the foreign entity. The Petitioner asserts that [REDACTED] controls the foreign entity because Article 31 of the foreign entity's bylaws demonstrates that "the direct management of the company will be the responsibility of the President of the Board of Administration, who by the mere fact of his appointment shall have all the powers and duties referred to in Article 29 of these statutes."

The Petitioner concludes by asserting that, as in *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982), ownership need not be majority if control exists, and in the instant matter, there is no danger of one group controlling the foreign entity and another the U.S. company, as the President/Sole Administrator of the foreign entity and the Managing Member of the U.S. company is [REDACTED] [REDACTED] who owns and controls both entities.

The Petitioner submits duplicate copies of evidence previously submitted in support of the appeal.

(b)(6)

Matter of R-, LLC

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)(I).

Citing *Matter of Hughes*, the Petitioner asserts that ownership need not be majority if control exists. *See* 18 I&N at 293. However, 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. *Id.*

In this case the U.S. company is owned by three individuals, and the largest percentage of individual ownership interest is 40%. Although the Petitioner has shown that [REDACTED] is a Managing Member of the U.S. company, the documentation also shows that the remaining two members also hold the title of Managing Member, and the Operating Agreement states that the Managing Members shall have responsibility for the day to day management of the business and affairs. It does not grant any one Managing Member a higher number of votes than another, and despite [REDACTED] ownership of the highest individual percentage interest in the company (40%), the remaining two Managing Members may vote in concert to override [REDACTED] vote by combining their interests for a total of 60%. Therefore, it is clear that [REDACTED] owns 40% of the U.S. company's interests, but absent documentary evidence such as voting proxies or agreements to vote in concert, the Petitioner has not established that he, or any one individual, effectively owns and controls the U.S. company in order to establish an affiliate relationship with the foreign entity.

Further, in this case, the foreign entity is owned by eight individuals, each equally owning 12.5% of the shares. Again, although the Petitioner has shown that [REDACTED] is the President of the Board of Administrators, the Public Deed states that the President of the Board of Administrators directs the management of the company and shall have the powers outlined in Article

(b)(6)

Matter of R-, LLC

29, which specifically states that the President will have the powers outlined therein but must exercise them together with or with the approval of at least two members. The Public Deed further states that each member will have one vote for each share owned and does not grant any additional votes to any one shareholder, and despite [REDACTED] ownership of a 12.5% interest of the company's shares, the remaining seven shareholders may vote in concert to override [REDACTED] vote by combining their interests for a total of 87.5%. It appears to be clear that [REDACTED] owns 12.5% of the foreign entity's shares and is the President of the Board of Administrators, but again, absent any documentary evidence such as voting proxies or agreements to vote in concert, the Petitioner has not established that any one individual effectively owns and controls the foreign entity in order to establish an affiliate relationship to the U.S. company. 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)).

Furthermore, while the evidence suggests that both companies share a common owner, [REDACTED] the Petitioner has not established that the companies are owned and controlled by the same individuals, with each individual owning and controlling approximately the same share or proportion of each entity. Rather, the evidence indicates that eight individuals own the foreign entity and three individuals own the petitioning company in the United States. 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). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates.

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; *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 R-, LLC*, ID# 11050 (AAO Oct. 1, 2015)