



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

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

MATTER OF I-P-H-, LLC

DATE: OCT. 1, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a short line railroad holding company, seeks to temporarily employ the Beneficiary as its “Director International Equipment Utilization” under the nonimmigrant L-1A intracompany transferee classification. *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 Director determined that the record did not establish that a qualifying relationship exists between the U.S. entity and the Beneficiary’s foreign employer. On appeal, the Petitioner asserts that it controls the limited liability company that owns the parent company of the Beneficiary’s foreign employer and thus has established a qualifying relationship between itself and the Beneficiary’s foreign employer.¹

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.

¹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Also, in light of the Petitioner’s references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the “preponderance of the evidence” standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides the following pertinent definitions:

- (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; and
 - (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

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- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (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, . . .

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).

II. THE ISSUE ON APPEAL

The sole issue to be addressed is whether the Petitioner established a qualifying relationship with the Beneficiary’s foreign employer.

A. Facts

On the Form I-129 Supplement L, the Petitioner states that it owns 100 percent of [REDACTED] and identifies itself as the parent company of this entity.² The Beneficiary identifies the Beneficiary’s foreign employer as [REDACTED], which does business as [REDACTED]. The Petitioner submitted documentation showing that it was organized in [REDACTED] as an Illinois Limited Liability Company with six members. The Petitioner also submitted a statement dated and signed by its General Counsel on August 15, 2014. The statement reads, in part, that the Petitioner “ultimately

² As will be discussed below, this statement is inconsistent with the documentation submitted by the Petitioner. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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wholly-owns (100%) [of the ██████████] in the United Kingdom.” The initial record also included the Petitioner’s corporate structure chart and consolidated financial statements for the year ended December 31, 2012 for the Petitioner and its subsidiaries.³

The Petitioner’s December 31, 2012, consolidated financial statement includes numerous notes regarding the Petitioner and its interests. Note 2, page 12, of the Petitioner’s submitted consolidated financial statements, reads in pertinent part:

In 2008, [the Petitioner] became a partial owner of ██████████ ██████████) and its wholly owned subsidiary ██████████ ██████████, which owns and operates various railroad businesses in the United Kingdom (collectively ██████████). As of December 31, 2012, [the Petitioner] owned 25.051% of ██████████ and [the Petitioner] has determined that ██████████ is a variable interest entity. Variable interest entities (“VIEs”) are entities that do not have sufficient equity at risk to finance their own activities without additional subordinated financial support from other parties. VIEs are generally required to be consolidated by the party with the power to direct activities of a VIE and obligation to absorb losses or receive benefits of a VIE (“primary beneficiary”). [The Petitioner] has determined, through both qualitative and quantitative analysis of expected losses, power to direct activities, and structure of the entity, that during 2011 it became the primary beneficiary of ██████████ [The Petitioner] obtained increased implicit power over ██████████ through its enhanced collateral position over the assets of ██████████ and through ██████████ reliance on [the Petitioner’s] funding to cover operating deficits. As a result, the accounts and balances of ██████████ are consolidated into [the Petitioner].

The Petitioner also included printed copies of VAT (value added tax) returns submitted to the United Kingdom tax authorities by ██████████ for a one-year period beginning December 1, 2012 to November 30, 2013. The record also included a print out from the Beneficiary’s foreign employer’s website and various other documents to demonstrate that the Petitioner and the Beneficiary’s foreign employer are operating businesses.

In response to the Director’s request for evidence (RFE), the Petitioner submitted the amended and restated limited liability company operating agreement for ██████████ ██████████, an Illinois limited liability company, with an effective date of May 16, 2011. The Exhibit “A” to the operating agreement identified the voting members and their share percentages. The Petitioner is listed as owning a 24.598% interest in ██████████ and the remaining outstanding percentages are owned by 13 other members in various amounts.

³ An independent auditors’ report accompanies the Petitioner’s 2012 consolidated financial statement. The auditor notes that it is expressing its opinion on these financial statements based on its audit; however, it did not audit the financial statements of ██████████ ██████████, rather those financial statements were audited by others whose reports were furnished to the independent auditor for review. The auditor opines, based on its audit and the report of other auditors, that the consolidated financial statements present the financial position of the Petitioner and its subsidiaries as of December 31, 2012.

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Based on the information in the record, the Director determined that the Petitioner had not established that it had a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner asserts it is the parent company of [REDACTED], even though it only owns 24.086% of [REDACTED] units. The Petitioner references the previously submitted consolidated financial statement and contends that because it has determined that [REDACTED] is a VIE and because it has obtained implicit power over [REDACTED], it in fact controls the entity.⁴ The Petitioner claims that it satisfies the definition of a parent company because it is a legal entity that owns, directly or indirectly, less than half of the entity, but in fact controls the entity. The Petitioner further claims that [REDACTED] owns 100 percent of [REDACTED]. The Petitioner submits a certificate signed by the Registrar of Companies for England and Wales on May 30, 2013, certifying that [REDACTED] is the shareholder of the company [REDACTED],

The record on appeal also includes company information for Company Number [REDACTED], [REDACTED] – the Beneficiary's foreign employer), indicating that [REDACTED] owns the outstanding voting shares of [REDACTED] Limited.

B. Analysis

Upon review, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. The term "qualifying organization" refers to a United States or foreign legal entity which meets *exactly one* of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary. See 8 C.F.R. § 214.2(l)(1)(ii)(G)(I).

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 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 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.

Here, the record must establish that the Petitioner has a qualifying relationship with [REDACTED], the Beneficiary's foreign employer based on common ownership and control. The Petitioner has

⁴ On appeal, the Petitioner submits an updated version of its consolidated financial statements apparently including information on year 2013. However, the independent auditor's report does not include page 2, the page that includes their opinion and signature. Accordingly, this report cannot be considered an audited report and lacks significant probative value.

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provided sufficient evidence on appeal to establish that [REDACTED] is wholly owned by [REDACTED] and that [REDACTED] is wholly owned by [REDACTED]

However, the Petitioner submitted conflicting statements regarding its ultimate ownership interest in [REDACTED]. The Petitioner stated on the Form I-129 and in its supporting Certificate of Corporate Ownership stating that it “ultimately wholly owns (100%)” of [REDACTED]. However, the operating agreement for [REDACTED] identifies 14 members who own voting units in various percentages, including the Petitioner. According to the operating agreement, the Petitioner does not own a controlling interest in [REDACTED] and there are no provisions in the operating agreement that indicate that it enjoys voting control over the entity based on its minority ownership interest.

We have reviewed the Petitioner’s assertion that although it does not own a controlling voting interest in [REDACTED], it indirectly controls [REDACTED] because it has established that collectively [REDACTED] and [REDACTED] is a VIE.

As background on the definition and purpose of VIEs, we note that the Financial Accounting Standards Board (FASB) recognized that “the application of voting control based consolidation accounting models to certain types of entities and structures did not result in the most meaningful financial presentation” and thus an accounting model was created to specifically address variable interest entities. [REDACTED]

[REDACTED] According to [REDACTED] a respected authority on accounting practices a “VIE is different from a voting interest entity because it is designed in a manner where voting rights held by equity holders are ineffective in determining which party has a controlling financial interest in the entity” and “[t]he VIE model is based on the fundamental concept that the voting interest model may not identify the party with the controlling financial interest in a VIE, because control of an entity may be achieved through arrangements that do not involve voting equity.” [REDACTED]

[REDACTED] (last visited Sep. 18, 2015). Further, [REDACTED] notes that the FASB has made significant changes to the VIE consolidation model and may further amend the model. Thus, it appears that the VIE consolidation model used for accounting purposes is fluid.

Here, in the Petitioner’s consolidated financial statement, the Petitioner stated that it determined based on its own analysis that it obtained increased implicit power over [REDACTED] (collectively [REDACTED]) during 2011. The Petitioner does not, however, submit evidence of explicit arrangements demonstrating that it exercises actual control despite its lack of a controlling voting equity. 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’l Comm’r 1972)). The record in this matter includes one accounting document indicating that the Petitioner, on its own, determined that [REDACTED] is a VIE and that for its accounting purposes it is the entity that has implicit control over [REDACTED]. While this may be the case for the Petitioner’s financial accounting purposes, it is insufficient to establish that more likely than not, the Petitioner has actual control of this entity as required when demonstrating a qualifying relationship. That is, the Petitioner has determined for its

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accounting purposes that it has a controlling financial interest in [REDACTED]. This determination, absent documentary evidence demonstrating that other members of [REDACTED] have explicitly relinquished their voting authority to the Petitioner, does not establish the Petitioner's control of [REDACTED] and its subsidiaries.

LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control of [REDACTED] and thus its subsidiaries. In this matter, as actual control of [REDACTED] has not been established, the requisite qualifying relationship between the Petitioner and the Beneficiary's foreign employer has also not been established.

The Petitioner also refers to the "commonality of ownership" between the Petitioner and [REDACTED]. However, these two entities are not affiliates as they 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, as required by the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Accordingly, the claimed "commonality of ownership" is insufficient to establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer, as the Petitioner has not satisfied the "affiliate" definition.

Upon review of the totality of the record, the record of evidence is insufficient to establish a qualifying relationship between the Petitioner and the Beneficiary's foreign employer and for this reason 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. § 136; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of I-P-H-, LLC*, ID# 13919 (AAO Oct. 1, 2015)