



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

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

MATTER OF 51H-, LLC

DATE: SEPT. 21, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a restaurant operator, seeks to temporarily employ the Beneficiary as its President 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 evidence of record did not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

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, Petition for a Nonimmigrant Worker, 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, a 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[.]
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- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

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- (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 August 22, 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 it is an affiliate of the foreign entity based on the following description of the stock ownership and control of each company:

[REDACTED] is owned by [REDACTED] 50% and [REDACTED] 50%

[Petitioner] is owned by [REDACTED] 40%, [REDACTED] 40%, and [REDACTED] 20%

In its letter of support, dated August 2, 2014, the Petitioner explained that the foreign entity is owned by the Beneficiary and [REDACTED] equally at 50% each, and the petitioning U.S. company is owned by the Beneficiary and [REDACTED] equally at 40% each and by [REDACTED] who owns the remaining 20%.

The Petitioner submitted the foreign entity's Commercial Registry, stating that [REDACTED] and the Beneficiary each own 2,500 shares of the company.

The Petitioner submitted its Articles of Organization, dated March 29, 2012, indicating that [REDACTED] was the initial member of the limited liability company.

The Petitioner submitted the following member certificates as evidence of its ownership:

- Certificate number four was issued to the Beneficiary for 40% interest on November 14, 2012.
- Certificate number five was issued to [REDACTED] for 40% on November 14, 2012.
- Certificate number six was issued to [REDACTED] for 20% on November 14, 2012.

The Petitioner did not submit its member certificates numbered one, two, or three.

The Petitioner submitted an "Agreement for Purchase and Sale of Stock," dated November 14, 2012, stating that [REDACTED] as the owner of a 100% interest of the petitioning U.S. company, sold 40% of that interest to the Beneficiary and another 40% of that interest to [REDACTED]

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The Petitioner also submitted its 2013 IRS Form 1120, U.S. Corporation Income Tax Return, indicating, at Schedule G, that the Beneficiary and [REDACTED] each own a 40% interest and [REDACTED] owns a 20% interest in the company.

The Director issued a request for evidence (RFE) on September 5, 2014, advising the Petitioner that the evidence currently in the record did not establish a qualifying relationship between the Beneficiary's foreign employer and the U.S. petitioning company. Specifically, the Director advised the Petitioner that the documentation submitted did not show that any one individual owns a majority interest in both the U.S. and foreign entities, nor did the documentation show that the U.S. and foreign entities are owned and controlled by the same group of individuals. The Director instructed the Petitioner to submit evidence demonstrating common ownership and control of both entities in order to establish a qualifying relationship.

In response to the RFE, the Petitioner submitted a letter, dated November 29, 2014, explaining the ownership and control of each entity as follows:

The foreign business entity . . . is majority-owned in equal parts by [the Beneficiary] (50%) and [REDACTED] (50%). The petitioning entity . . . is owned by [the Beneficiary] (40%), [REDACTED] (40%), and [REDACTED] (20%). . . . In the instant case, shareholders [Beneficiary] and [REDACTED] each own 50% of the foreign affiliate and 40%, respectively, of the U.S. affiliate. Further, while the resulting 100% and 80% ownership are not identical, they nevertheless result in approximately the same level of ownership, as well as resulting in control by the two same persons over both legal entities.

....

Also, the Regulations . . . do not require that ownership in affiliate entities be identical, but rather that the two legal entities be owned and controlled by the same group of individuals, each owning and controlling **approximately** the same share or proportion of each entity. This is exactly the situation in the instant case. The two majority shareholders of the foreign and US entities are the same individuals – [the Beneficiary] and [REDACTED]. Both of these individuals own the majority of the shares of the foreign and US business entities and through this direct ownership they control both legal entities. There is a 20% minority shareholder in the US entity who has no ownership interest in the foreign entity, but this does not negate the meeting of the affiliate definition by the two legal entities in the instant case. Both legal entities are owned and controlled in majority share by the same two persons.

(Emphasis in original.)

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The Petitioner concludes that the ownership structure of the two entities “falls squarely” within the definition of “affiliate,” noting that “[b]y virtue of this whole and vast majority share ownership, [the Beneficiary and ██████████] are legally empowered to control both legal entities.”

The Petitioner submitted the same evidence as previously submitted with the petition, along with the foreign entity’s stock ledger confirming the foreign entity’s ownership by the Beneficiary and ██████████ at 50% each.

The Director denied the petition on December 15, 2014, concluding that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary’s foreign employer. In denying the petition, the Director observed that the documentation submitted established that the foreign entity is owned, in equal parts, by two individuals, and the petitioning U.S. company is owned by three individuals, two with a 40% interest and one with a 20% interest. The Director acknowledged the Petitioner’s suggestion that ██████████ 20% ownership of the petitioning U.S. company is insignificant due to the higher percentages of ownership by the same two individuals who own the foreign entity. However, the Director found that the regulations state that the two entities should be owned by the “same group of individuals,” which is not the case in the instant petition. The Director found that Petitioner does not have a majority shareholder and negative control does not exist because no single owner has 50% ownership.

The Director further acknowledged the Petitioner’s claim that the collective majority ownership of the U.S. and foreign entities by the same two individuals satisfies the definition of “affiliate,” but found that finally found that there is no documentary evidence in the record to establish that the collective majority ownership of the U.S. entity by two individual shareholders constitutes a common parent shared by both the U.S. and foreign entities. Finally, the Director determined that the Petitioner’s reliance on *Matter of Tessel, Inc.*, 17 I & N Dec. 631 (BIA 1981), was misplaced, as the facts in that case are not similar to the circumstances of the instant petition in that the BIA was referencing a single individual as opposed to two individuals and collective ownership.

On appeal, the Petitioner first addresses the Director’s finding that *Matter of Tessel* does not apply in the instant case and notes that the current regulations did not exist at the time *Matter of Tessel* was decided. The Petitioner contends, therefore, that the decision should not be narrowly interpreted to single individuals rather than groups of individuals. The Petitioner further contends that *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm’r 1988), specifically contemplates multiple individuals owning a majority stake in both companies, and identifies whether such individuals own enough of both companies to exercise control. Consequently, the Petitioner concludes that the group of two individuals with majority ownership of the U.S. company and the foreign entity is sufficient to exercise control over both companies.

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; 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.

The Petitioner has submitted evidence that the foreign entity is owned by two individuals in equal proportions, while it is owned by three individuals with ownership interests of 40%, 40% and 20%, respectively.

If one individual owns a majority interest in the petitioner and in 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). The Petitioner has not established an affiliate relationship based on common ownership by one individual.

Citing *Matter of Hughes*, the Petitioner further asserts that ownership need not be majority if control exists. See 18 I&N Dec. 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.* The Petitioner has not submitted evidence to establish that any one of its three individual shareholders exercises control over the company based on his or her minority interest.

We next turn to the Petitioner’s reliance on *Matter of Tessel* for the proposition 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 either corporation.

The Petitioner asserts, however, that *Matter of Tessel* should not limit a review of majority ownership to one individual, and asserts that the majority ownership of both companies in this matter by two individuals meets the high percentage of common ownership contemplated in that decision. Specifically, the Petitioner claims that the qualifying relationship derives from the same group of shareholders who own or control each entity and that there is a common denominator of control in

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each company through the majority group. While two individuals have an ownership stake in both companies, and their combined interest amount to 100% of the foreign entity and 80% of the U.S. company, without evidence of voting agreements or proxies that legally bind the “majority group” as a unit within each company, control of the companies has not been demonstrated. Therefore, while the Petitioner’s assertion that the majority ownership of both entities by more than one individual should not be discounted under *Matter of Tessel* is noted, the issue before us is whether the majority owners also exercise control of both entities.

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 former Immigration and Naturalization Service (now 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. As pointed out by the Petitioner, 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.

In this case, the petitioning U.S. company is owned by three individuals and the largest percentage interest held by any individual is 40%. Although the Petitioner contends that two of the three members collectively own 80% of the petitioning U.S. company and 100% of the foreign entity, it has not shown that there are any agreements in place for them to always vote in concert in order to exercise the required control. In terms of the petitioning U.S. company, one of the individuals with a 40% interest may vote in concert with the individual owning the 20% interest in order to override the third individual owning a 40% interest by 60%. It has been established that the Beneficiary and [REDACTED] each own 50% of the foreign entity’s interests and 40% of the petitioning 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 any one individual, or group of individuals, effectively owns *and* controls the U.S. company in order to establish an affiliate relationship with the foreign entity. 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)).

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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 51H-, LLC*, ID# 13658 (AAO Sept. 21, 2015)