U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-, LLC

DATE: JAN. 6, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a New York limited liability company engaging in the distribution and service of specialized machine tools, seeks to extend the Beneficiary's classification as an L-1B 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 seeks to extend the Beneficiary's employment as a Production Service Manager for a period of three years. The Director denied the petition on June 15, 2015, finding that the Petitioner did not establish that a qualifying relationship exists between the U.S. and foreign entities.

On appeal, the Petitioner submits a brief and cites to previously submitted evidence in the record disputing the denial and addressing the Director's adverse findings.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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, 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 February 12, 2015. On the L Classification Supplement to the Form I-129, the Petitioner identified the Beneficiary's last foreign employer as [redacted] located in Romania, stated that the U.S. company is an affiliate of the foreign entity, and described the percentage of stock ownership and managerial control of each company as follows:

> [redacted] President of [redacted] owns 100% of [redacted] brother, owns 95% [of] the affiliate foreign company – [redacted]

In its letter of support, dated January 22, 2015, the Petitioner described its qualifying relationship with the foreign entity as follows:

> The Petitioner . . . is a New York State authorized company and is owned equally by [redacted] and his brother [redacted] . . . . The foreign entity . . . is an authorized foreign company and is owned by [redacted] the joint owner of the Petitioner U.S. company.[1]

The Petitioner submitted copies of two membership interest certificates for (1) [redacted] for 50 units of its company on September 17, 2009, and (2) [redacted] for 50 units of its company on September 17, 2009. Both membership interest certificates are blank at the "number" of the certificate and do not contain any member signatures at the bottom.

The Petitioner submitted a single page of its IRS Form 1065 Schedule B-1, Information on Partners Owning 50% or More of the Partnership, for what appears to be 2009, listing [redacted] and [redacted] as each owning 50% of the Petitioner. The Petitioner submitted its IRS Form

[1] We note that, although [redacted] and [redacted] are brothers and share a common last name, they each use a different spelling for their last names. [redacted] spells his last name as [redacted] and [redacted] spells his last name as [redacted] The Petitioner has not provided any clarification for this inconsistency.

1065 Schedule K-1, Partner's Share of Income, Deductions, Credits, etc., for 2010, listing [redacted] as 50% partner and [redacted] as 50% partner. The Petitioner also submitted its IRS Forms 1120S Schedule K-1, Shareholder's Share of Income, Deductions, Credits, etc., for 2011, listing [redacted] as 50% shareholder and [redacted] as 50% shareholder.

The Petitioner submitted a document for the foreign entity titled "Synthetic Structure of the Consolidated Register," dated January 24, 2012, listing [redacted] as owner of 92.48416% of the foreign entity's shares, and "other shareholders" as owners of the remaining 7.51584% of the foreign entity's shares.

The Petitioner then submitted copies of a Sales Contract, dated February 1, 2010, and a Commercial Distribution Contract, dated April 12, 2010, copies of numerous invoices and purchase orders between its U.S. company and the foreign entity, and joint marketing and advertising samples.

The Director issued a request for evidence (RFE) on February 24, 2015, instructing the Petitioner to submit evidence demonstrating that the U.S. and foreign entities were currently doing business in their respective countries.

In response to the RFE, the Petitioner submitted additional copies of invoices and purchase orders between its U.S. company and the foreign entity, as well as a copy of a Commission Sales Agreement, dated January 22, 2015, and a Commercial Distribution Contract, dated September 25, 2013.

The Petitioner submitted its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2014, indicating at Schedule K-1 that [redacted] is the sole owner of its U.S. company owning 100% of its stock.

The Director issues a second RFE on April 23, 2015, instructing the Petitioner to submit evidence demonstrating that a qualifying relationship continues to exist between the U.S. and foreign entities.

In response to the second RFE, the Petitioner submitted a letter, dated May 5, 2015, attempting to demonstrate that "close affiliation between the U.S. company and the Romanian company." In its letter, the Petitioner asserts that it is the "exclusive distributor of machines and parts manufactured by the Romanian company" and that "having such a close business affiliation with the Romanian company, [its U.S. company] allow[s] the Romanian company to be the exclusive user of [its] trademark." The Petitioner then refers to its Commercial Distribution Contract and an Authorization Agreement, renewed January 2, 2015.

The Petitioner also submitted a letter, dated June 1, 2015, specifically stating that "[b]oth companies are connected legally and financially so they each can obtain financial benefits and service the U.S. client base. Affiliated companies are corporations that are in close associations with each other."

The Petitioner also submitted a copy of an Authorization Agreement, dated January 2, 2015, where the foreign entity authorizes the petitioning U.S. company to negotiate prices and initial technical and design modification on machines offered by the foreign entity on its behalf.

The Director denied the petition on June 15, 2015, 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 found that the contracts and agreements submitted demonstrate that the U.S. and foreign entities are mutually engaged in business activities but do not establish that common ownership and control exist between the U.S. and foreign entities. The Director found that the U.S. and foreign entities are not owned and controlled by a common parent nor are they owned and controlled by the same group of individuals, each owning approximately the same percentage of interest in each entity.

On appeal, the Petitioner submits a brief, dated June 29, 2015, conceding that the U.S. company and foreign entity are now separately owned by each brother, but the U.S. company has granted an exclusive right to the foreign entity for its trademark usage, the U.S. company is the exclusive distributor of the foreign entity's machines, and the foreign entity is the main supplier of machines for the U.S. company's customers. The Petitioner examines the relationship based on the federal guidelines for small business affiliations and states that the U.S. and foreign entities "are affiliated under the totality of circumstances test" as they have "exclusive contractual relationships with each other, possess common interest, and are in the identical industries." The Petitioner further examines the familial relationship between the owners of both companies and contends that they are "family working for a common goal within the same industry" and may "be treated as though they are one person for purposes of making the affiliation decision."

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.

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

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.

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)(*1*). In order 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. *See Matter of Hughes*, 18 I&N Dec. at 293.

Here, both the petitioning U.S. company and the foreign entity are owned, and thus controlled, by two different individuals. The Petitioner's contentions about familial relationships, contractual relationships, and other factors examined by federal guidelines for small business affiliations are not recognized for the purposes of meeting the requirements of an affiliate relationship in these proceedings. The Petitioner contends that it and the foreign entity are both majority owned and controlled by two brothers; however, this familial relationship does not constitute a qualifying relationship 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"). Based on the evidence on record, and the Petitioner's statements, one individual does not own a majority interest or control either entity and thus, the Petitioner has not established that an affiliate relationship exists with the foreign entity.

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, 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, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of W-, LLC*, ID# 15684 (AAO Jan. 6, 2016)