U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30850771

Date: APR. 16, 2024

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (L-1A Manager or Executive)

The Petitioner, a wholesale business, seeks to temporarily employ the Beneficiary as the vice president of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director of the California Service Center denied the petition, concluding the record did not establish that: (1) the Petitioner has a qualifying relationship with the Beneficiary's claimed foreign employer; (2) the Beneficiary had one year of continuous employment with a qualifying organization abroad within the three years preceding the filing of the petition; (3) the Beneficiary was employed abroad in a managerial or executive capacity; (4) the Petitioner's new office would employ the Beneficiary in a managerial or executive capacity within one year; (5) the Beneficiary is qualified to perform the intended services in the United States; and (6) the Beneficiary, who is claimed to be an owner of the U.S. company, will be transferred abroad after completion of his temporary U.S. assignment. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility for the L-1A nonimmigrant visa classification in a petition involving a new office, a qualifying organization must have employed the beneficiary in a managerial or executive capacity for one continuous year within three years preceding the beneficiary's application for admission into the United States. 8 C.F.R. § 214.2(l)(3)(v)(B). 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 or executive capacity. *Id*.

The term "new office" refers to an organization which has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F). A petitioner seeking approval of an L-1A new office petition must submit evidence to demonstrate that the new office will be able to support a managerial or executive position within one year. This evidence must establish that the petitioner secured sufficient physical premises to house its operation and disclose the proposed nature and scope of the entity, its organizational structure, its financial goals, and the size of the U.S. investment. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

II. QUALIFYING RELATIONSHIP

The first issue we will address is whether the Petitioner established that it has a qualifying relationship with the Beneficiary's foreign employer.

To establish a "qualifying relationship," 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* section 101(a)(15)(L) of the Act; *see also* 8 C.F.R. § 214.2(l)(1)(ii) (providing definitions of the terms "parent," "branch," "subsidiary," and "affiliate").

On the L Classification Supplement to Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it is a subsidiary of S-P- LLP, an Indian company. A "subsidiary" is a legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; owns directly or indirectly half of the entity and controls the entity; or owns, directly or indirectly, less than half of the entity but in fact controls the entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K).

Where asked to describe the ownership and control of both entities, the Petitioner stated on the Form I-129 that the foreign entity is 100 percent owned by "P-C- & Family" while the ownership of the U.S. company is distributed among five individuals as follows:

A-H-: 49% P-C-: 36% V-C-: 5% B-C-: 5% Y-C-: 5%

Although the Petitioner indicates that it is a subsidiary of S-P- LLP, it does not claim the foreign entity holds any direct or indirect ownership interest in the U.S. company. Therefore, we will evaluate whether the Petitioner established, in the alternative, an affiliate relationship with S-P- LLP. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L) an "affiliate" is (1) one of the legal entities 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, with each individual owning and controlling approximately the same share or proportion of each entity.

Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between two entities. *See, e.g.*, *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). 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 Int'l*, 19 I&N Dec. at 595.

As evidence of S-P- LLC's ownership, the Petitioner submitted a "Supplementary Deed" identifying its partners and their respective ownership interests as follows:

V-B-C-:	20%	P-R-C-:	19%
Y-C-:	20%	B-C-:	15%
P-H-C-:	15%	V-M-C-:	11%

As evidence of its ownership, the Petitioner initially submitted a copy of its operating agreement dated November 3, 2022. Although the agreement indicates on page 1 that it was made between A-H- (the Beneficiary) and five owners of the foreign entity (P-R-C-, V-M-C-, B-C-, Y-C-, V-B-C-), it was executed by only five members, with ownership distributed 49% to the Beneficiary, 36% to P-R-C-, and 5% each to B-C-, Y-C- and V-B-C-, the same ownership structure described on the Form I-129.

In response to a request for evidence (RFE), in which the Director noted the inconsistency between the number of stated parties to the operating agreement and the number of members who signed it, the Petitioner submitted a "corrected" operating agreement dated November 3, 2022, The Petitioner asserted that the previously submitted agreement was "incomplete," "not proofed for typographical errors," and "not intended for submission." The revised operating agreement identified the Petitioner's members and their respective ownership interests as follows:

A-F-:	49%	P-H-C-:	8%
V-B-C-:	10%	B-C-:	8%
Y-C-:	10%	V-M-C-:	5.5%
P-R-C-:	9.5%		

In addition to the "corrected" operating agreement, the Petitioner provided copies of seven membership certificates which are dated October 28, 2022, and therefore pre-date the submitted operating agreements. The certificates reflect the same ownership stated in the corrected operating agreement but were not signed by the company's officers.

The Director determined that the Petitioner did not provide sufficient explanation for its submission of the corrected operating agreement, noted that the newly submitted membership certificates were not executed, and overall found the evidence inadequate to corroborate the Petitioner's actual ownership as of the date of filing. The Director, citing, *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998), emphasized that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements.

On appeal, the Petitioner explains that initially, not all members of the foreign entity agreed to invest in the U.S. market, so the initial operating agreement included "only the joining members." It explains that the "remaining members" decided to invest by the time the company was incorporated in [redacted] 2022, so the operating agreement was revised. The Petitioner emphasizes "there was no intention to create any deception or misconstrue the ownership of the foreign or the U.S. business."

Upon review, the Petitioner has not resolved the inconsistencies in the record regarding its ownership. The Petitioner's explanation on appeal, which suggests that the initially submitted operating agreement

was prepared at an earlier date, does not account for the fact that both submitted operating agreements bear the same date of [redacted] 2022. The Petitioner claims that only some of the foreign entity's six owners had agreed to invest in the U.S. company prior to that date, but it has also submitted membership certificates ostensibly issued to all six owners of the foreign entity on October 28, 2023. This discrepancy has also not been explained. Finally, the Petitioner has not addressed the fact that it expressly stated on the Form I-129 that it had only five (not seven) members as of April 6, 2023, when it filed the petition. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, even assuming arguendo that the record supported the Petitioner's claim that all six members of the foreign entity have an ownership interest in the U.S. company, the evidence would be insufficient to establish a qualifying relationship between the two entities. As noted, the Petitioner must establish that it shares the requisite common ownership and control with the foreign entity. Control may be "de jure" by reason of ownership of more than 50 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 (Comm'r 1982).[1]

The ownership structure documented in the record does not establish that the two entities are both owned and controlled by "the same parent or individual" as the record does not show that any one individual has de jure control over both companies based on majority ownership. Nor has the Petitioner claimed or shown that both entities have irrevocable proxy agreements or other binding voting agreements in place giving one individual de facto control over both companies. The Petitioner has neither claimed nor established an affiliate relationship based on common ownership and control by one individual or entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K)(*1*).

Further, the record does not establish that both entities, one of which has six partners and one of which is claimed to have either five or seven members, are owned and controlled by "the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." *See* 8 C.F.R. § 214.2(l)(1)(ii)(K)(*2*).

The regulatory definition of affiliate does not state that the two entities may be owned and controlled by *approximately* the same group of individuals, or by the same subset of individuals within a larger group of individual shareholders. Here, it appears that the Petitioner is attempting to establish that the partners of the foreign entity also own a 51% interest in the U.S company, thus establishing an affiliate or parent-subsidiary relationship. However, USCIS cannot accept a combination of single shareholders as a single entity, such that the group may claim majority ownership, unless the group are legally bound as a unit through voting agreements or proxies.

For the reasons discussed above, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's claimed foreign employer. Accordingly, the appeal will be dismissed.

[1] In *Matter of Hughes*, proxy voting was raised in the context of control separate from majority ownership; however, control may also be obtained in other types of binding voting arrangements, such as through specific voting provisions in equity holder agreements, voting trusts, etc.

III. ONE YEAR OF EMPLOYMENT ABROAD

The next issue we will address is whether the Petitioner established that the Beneficiary has at least one continuous year of full-time employment abroad within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii). The Petitioner filed the petition on April 6, 2023, and therefore must establish that the Beneficiary was employed by a qualifying foreign entity for one continuous year in the three years preceding this date.

This foreign employment requirement is only satisfied by the time a beneficiary spends physically outside the United States working full-time for a qualifying entity; a petitioner cannot use any time that the beneficiary spent in the United States to meet the one year of foreign employment requirement, even if a qualifying foreign entity continued to employ and pay the beneficiary. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A) (providing that periods spent in the United States shall not be counted toward fulfillment of the one year of continuous employment abroad requirement); *see generally* 2 USCIS *Policy Manual* L.6(G), https://www.uscis.gov/policy-manual.

On the Form I-129 and in a supporting letter, the Petitioner stated that S-P- LLP has employed the Beneficiary since January 2020. The Petitioner also submitted a letter from S-P- LLP confirming his employment "since 2020." The Petitioner indicated on the Form I-129 that the Beneficiary was last admitted to the United States on July 1, 2022, as an F-2 spouse of an F-1 nonimmigrant student, and that he was seeking a change of status from F-2 to L-1A.

In the RFE, the Director acknowledged the Petitioner's and foreign entity's statements, but emphasized that the record did not include supporting documentary evidence, such as earning statements or other personnel records, to corroborate the Beneficiary's foreign employment. Further, the Director advised the Petitioner that USCIS records indicate that the Beneficiary was admitted to the United States in B-2 status in December 2016, granted a change of status to F-2 classification in May 2017, and had not departed the United States since his initial admission. In response to the RFE, the Petitioner resubmitted the foreign entity's employment letter stating that it hired the Beneficiary in 2020.

In the decision denying the petition, the Director concluded that the Petitioner's response to the RFE did not include sufficient evidence, such as payroll or personnel records, demonstrating that the Beneficiary had the required one year of continuous full-time employment abroad in the three years preceding the filing of the petition in April 2023. The Director also emphasized the Beneficiary's ongoing physical presence in the United States in F-2 status, noting that any periods spent in the United States could not be counted towards his one-year of continuous employment abroad.

On appeal, the Petitioner asserts that it is submitting "copies of the beneficiary's payroll documents to support his employment with the foreign company for the year 2021, outside the United States." The attached documents include monthly pay statements issued by the foreign entity for the period February 2020 through January 2021. Because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence, we will not consider it for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because

"the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial").

Further, the Petitioner does not address the Director's determination that the Beneficiary has not spent a full year physically present outside the United States in the three years preceding the filing of the petition. In fact, as noted in the RFE, Department of Homeland Security records reflect that he spent the entire period between April 2020 and April 2023 in the United States without departing. Even if the Petitioner had submitted the payroll documentation in response to the RFE, any salary he may have received from the foreign entity while physically present in the United States in F-2 status cannot be counted towards his employment abroad. As discussed, the foreign employment requirement is only satisfied by the time a beneficiary spends physically outside the United States working full-time for a qualifying entity. Here, the Petitioner did not establish that the Beneficiary met this requirement at the time of filing. For this additional reason, the appeal will be dismissed.

IV. RESERVED ISSUES

Since the two issues discussed above are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve its appellate arguments regarding the four remaining grounds for denial addressed in the Director's decision. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

V. CONCLUSION

For the reasons discussed, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's claimed foreign employer and that the Beneficiary 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. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.