U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6586487

Date: DEC. 27. 2019

Appeal of California Service Center Decision

Form I-129, Petition for L-1A Manager or Executive

The Petitioner, a restaurant, seeks to temporarily employ the Beneficiary as its president 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 that the Petitioner did not establish, as required, that it has a qualifying relationship with the Beneficiary's foreign employer.

On appeal, the Petitioner argues that the Director did not apply the correct standard of proof and further contends that the decision was legally unsound because the Director "ignored evidence" that was on record at the time the denial was issued.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Upon *de novo* review, we find that the Petitioner has not overcome the denial. Therefore, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1A nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. 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 petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. QUALIFYING RELATIONSHIP

The primary issue to be addressed is whether the Petitioner and [redacted] the Beneficiary's foreign employer, have a qualifying relationship. 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 Petitioner claims that it and the foreign entity are affiliates because they are majority owned "by the same group of people."

In order to establish an affiliate relationship, the Petitioner must demonstrate that its ownership scheme fits one of two scenarios: (1) the Petitioner and the foreign entity are subsidiaries that are owned and controlled by the same individual or parent entity; or (2) the Petitioner and the foreign entity are two legal entities that are owned and controlled by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L).

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. *See, e.g.*, *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.

In a supporting cover letter, the Petitioner provided a chart illustrating the ownership breakdowns for the Petitioner and the Beneficiary's foreign employer. According to the chart, the Petitioner is directly owned by three entities – 30% by [redacted], 20% by [redacted] and 50% by [redacted]. The chart also illustrates the ownership breakdowns of each of these entities indicating that [redacted] and [redacted] have a 50/50 ownership interest in [redacted], the Beneficiary wholly owns [redacted] and [redacted] wholly owns [redacted]. The Petitioner provided a membership certificate and operating agreement corroborating the Beneficiary's sole ownership of [redacted] thereby making him the indirect owner of 30% of the Petitioner's stock. However, the record contains no supporting evidence corroborating either [redacted]'s claimed ownership of [redacted] or the claimed shared ownership of [redacted] by [redacted] and [redacted]. Although the record includes [redacted]'s Articles of Incorporation, which lists [redacted] and [redacted] as the entity's "initial officer(s) and/or director(s)," no evidence was provided to show either individual's claimed ownership interest in [redacted].

With regard to the foreign entity, the Petitioner provided a translated Articles of Incorporation reflecting the foreign entity's ownership in April 2009. The Articles show that when the foreign entity was established, the Beneficiary and [redacted] each owned 350 shares and [redacted] owned the remaining 300 shares of a total 1000 registered shares. The foreign entity's July 2012 minutes of meeting shows an ownership change resulting from [redacted]'s sale of his ownership interest and the Beneficiary's purchase of that interest, thereby

increasing his ownership interest from 35% to 65%, while [redacted] maintained her ownership of 350 shares.

A change in this ownership distribution later took place and is reflected in the foreign entity's September 2018 minutes of meeting, which shows that [redacted] sold all of her shares in the foreign entity and the Beneficiary sold a portion of his ownership interest leaving him with a 50% ownership interest and adding two new shareholders – [redacted] and [redacted] – who each acquired a 25% ownership interest in the foreign entity.

In response to a request for evidence, the Petitioner offered an "Expert Opinion Letter" from an attorney who argued that the term "affiliate" can apply to entities that are not "**exactly** owned and controlled in the exact same proportion" and that depending on the legal context, e.g., bankruptcy, securities, or finance, entities can be deemed affiliates even if they have as little as 20% common ownership. (Emphasis added in original). The Petitioner also provided an undated shareholder agreement, which states that [redacted] is a capital investor with no voting rights and thus has no control over the U.S. entity, which, according to the undated agreement, is ultimately controlled by the Beneficiary, [redacted] and [redacted]; the agreement also states that the Beneficiary "shall make the deciding vote" in the event of a tie and that of the three voting shareholders, the Beneficiary is the "lead voter" whose vote counts as "2" while the vote of each of the other two shareholder's counts as "1." As this agreement was not dated, it is unclear when these terms went into effect or, more importantly, that they were in effect as of January 2019, when this petition was filed. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

Likewise, the Petitioner provided a translation of an undated document titled "Minutes of the Assembly on the Voting Rights of [redacted]." Although this document is undated, it is consistent with the foreign entity's September 2018 minutes of meeting, which states that the Beneficiary owns 50% of the foreign entity, while the remaining 50% is evenly divided between [redacted] and [redacted][1]

In the denial decision, the Director found that the Beneficiary owns 50% of the foreign entity and therefore controls that entity, but owns only 30% of the petitioning entity, which is 50% owned by [redacted], thereby giving it, not the Beneficiary, control of the Petitioner.[2] The Director therefore concluded that the Petitioner and the Beneficiary's foreign employer are not similarly owned and controlled and thus do not have a qualifying relationship.

On appeal, the Petitioner cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), and *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981), to support the argument that "the **majorities** of each entity[] are ultimately owned by the same group of people." (Emphasis added in original). In *Sun Moon Star*, former Immigration and Naturalization

[1] Although the translator provided April 29, 2019 as the date of translation, the document itself is not dated.

[2] In an analysis of the undated U.S. shareholder agreement, the Director discussed the weight of the Beneficiary's votes *with respect to* [redacted]. In fact, No. 11 of the undated agreement specifically refers to the Beneficiary's "voting rights regarding [redacted]," i.e., the Petitioner. Despite this error, the Director correctly denied the petition for lack of evidence of a qualifying relationship between the Petitioner and the Beneficiary's foreign employer. As such, we acknowledge, but need not take further action, to address this error.

Service (INS) 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 INS 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, INS amended the regulations so that the definition of "subsidiary" recognized indirect ownership. 52 Fed. Reg. 5738, 5741-2 (Feb. 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 former INS nor USCIS has ever accepted a 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.

As mentioned above, the Petitioner claims that it and the foreign entity are affiliates because they are majority owned "by the same group of people." In order to establish that a qualifying relationship exists between the Petitioner and the foreign entity, the Petitioner must demonstrate that it and the foreign employer share common ownership and control. However, no one shareholder owns a majority interest in the U.S. entity and documentary evidence of control has not been established as of the date of filing the petition.[3] The Petitioner has also not established that it and the foreign entity are owned and controlled by the same group of individuals with each owning and controlling the same share or proportion of each entity.

With respect to the *Tessel* case cited by the Petitioner, the beneficiary in that case 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 determined 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." 17 I&N Dec. at 633. In the instant case, however, the facts are not analogous to *Tessel* as no one shareholder owns a majority interest in the U.S. entity. Therefore, the record does not demonstrate that there is a high percentage of common ownership and management between the Petitioner and the foreign entity.

Lastly, although the Petitioner argues that the Director overlooked critical evidence and failed to apply the preponderance of the evidence standard of proof, it has not provided evidence to support either of these assertions and relies on precedent decisions that are not applicable to the facts presented herein. As noted earlier, the Petitioner must provide relevant, probative, and credible evidence to support its assertions. *See Chawathe*, 25 I&N Dec. at 376. In light of the above, we do not find that a qualifying relationship between the Petitioner and the Beneficiary's foreign employer existed at the time of filing.

ORDER: The appeal is dismissed.

[3] Although we acknowledge the Petitioner's submission of a shareholder agreement in response to the RFE, as noted earlier, that agreement did not contain a date of execution and therefore we cannot conclude that its terms were in effect at the time this petition was filed.