U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G- INC.

DATE: JUNE 8, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a technology equipment distributor,[1] seeks to temporarily employ the Beneficiary as its chief technology officer under the L-1B 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-1B classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee with "specialized knowledge" to work temporarily in the United States.

The Director of the Vermont Service Center denied the petition, concluding that the record did not establish, as required, that (1) the Petitioner has a qualifying relationship with the Beneficiary's claimed foreign employer; and (2) 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.

On appeal, the Petitioner submits additional evidence and asserts that the Director misapplied the applicable law pertaining to both L-1 qualifying relationships and the one year foreign employment requirement.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a managerial or executive capacity, or in a capacity involving 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

[1] On the Form I-129, Petition for a Nonimmigrant Worker, the provided name of the Petitioner is '[redacted]' We note for the record that the Petitioner's actual name is '[redacted]' We also note that the Form I-290B, Notice of Appeal or Motion, provides the following incorrectly spelled name: '[redacted]' The appeal brief provides another variation of the Petitioner's name: [redacted]

to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity. *Id.*

An individual L-1B classification petition must be accompanied by evidence that: the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge for at least one continuous year in the three years preceding the filing of the petition; the beneficiary is coming to work in the United States in a specialized knowledge capacity for the same employer or a subsidiary or affiliate of the foreign employer; and the beneficiary's prior education, training and employment qualifies him/her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

II. QUALIFYING RELATIONSHIP

The Director found that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary's foreign employer at the time the petition was filed.

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.

The Petitioner claims to be an affiliate of the Beneficiary's foreign employer, a Russian company. To establish eligibility, the Petitioner must show that this relationship existed when it filed the petition in June 2016.[2] Further, 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).

The term "affiliate" is defined in relevant part, as (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 by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(K).

The Petitioner submitted an "Amendment to Corporate Founders Shareholders Agreement" executed in October 2015, which sets forth its ownership structure as follows:

[redacted]	35%
[The Beneficiary] -	35%
[redacted]	10%
	20%

[2] The Petitioner marked on the Form I-129 that it is a subsidiary of the foreign entity. However, the Petitioner has otherwise consistently claimed that the two companies are affiliates. We note that the record does not establish that the foreign entity owns any interest in the petitioning company and there is no parent-subsidiary relationship. *See* 8 C.F.R. § 214.2(l)(1)(ii)(I) and (J) (defining "subsidiary' and "parent").

This shareholding structure was in place at the time of filing. Prior to this amendment, Ms. [redacted] and the Beneficiary each owned 45% of the company and Ms. [redacted] owned 10%.

In addition, the Petitioner submitted the foreign entity's certificate of registration with the Russian state authorities. This document showed the following ownership structure, which remained in place at the time of filing:

[redacted]	45%
[The Beneficiary] -	45%
[redacted]	10%

Later, in response to a request for evidence, the Petitioner provided a "Contract for sale and purchase of a share of limited liability company" executed on July 14, 2016, one month after the petition was filed. This contract indicates that Ms. [redacted] purchased a portion of the shares held by Ms. [redacted] and the Beneficiary, with the resulting ownership being identical to the Petitioner, with Ms. [redacted] and the Beneficiary each owning 35%, Ms. [redacted] owning 10% and Ms. [redacted] owning 20%.

In denying the petition, the Director determined that the two entities were not owned by the same group of individuals, with each individual holding approximately the same share of each entity, at the time the petition was filed. The Director acknowledged that the two entities had identical ownership prior to October 2015 and subsequent to July 14, 2016. However, the Director emphasized that the Petitioner must establish that the qualifying relationship existed when the petition was filed.

On appeal, the Petitioner asserts that, while the ownership structures of the two entities were not identical at the time of filing, the companies nevertheless had a qualifying relationship, as the three individuals who owned 100% of the foreign entity also owned 80% of the petitioning company. The Petitioner emphasizes that its fourth shareholder with 20% of shares "shall not disestablish a qualifying relationship as both companies were effectively and fully controlled by the same set of majority shareholders and the minority shareholder had no legal or practical way to effect any changes of the corporate policies, strategies or any other corporate matters."

Upon review, we agree with the Director's finding that the Petitioner did not have a qualifying relationship with the foreign entity when the petition was filed in June 2016. The two entities were not owned by the same individual or parent entity, nor were they "owned and controlled by the *same group of individuals*, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(*2*). Therefore, the ownership structure in place did not meet the definition of "affiliate" that is applicable to this petition.

On appeal, the Petitioner states that in *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981), the Commissioner determined that common majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship. Specifically, the

Petitioner notes that, in *Tessel*, "control of both companies was 63% and 90% respectively in the same hands."

In the *Tessel* case, the beneficiary solely owned 93% of the foreign entity and 60% of the petitioner 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 here can be distinguished from *Tessel* as no one shareholder holds a majority interest in either the Petitioner or the foreign entity. Also, *Tessel* pre-dates the current regulatory definition of "affiliate." Under that definition, the facts presented in *Tessel* would establish an affiliate relationship based on common ownership by the same individual, which is not the claim being made in this case.

The Petitioner also relies on *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm'r 1982), noting that the Commissioner stated that "[i]n examining control, the Service may take into consideration one company's ownership of patents, processes, copyrights, or other elements which are used by a related company."

The Petitioner's reliance on *Hughes* is also misplaced. The Petitioner is asking us to find common ownership and control based on the common business purpose and activities between the foreign and U.S. entities, and the fact that the two entities have the "same set of majority shareholders." However, neither the former Immigration and Naturalization Service nor U.S. Citizenship and Immigration Services (USCIS) has accepted a combination or "set" 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. The fact that the same three shareholders formed both companies for a common business purpose is not sufficient to establish these shareholders as a group legally bound to vote together.

The Petitioner must establish that it and the foreign employer 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. *Hughes*, 18 I&N Dec. 289.

In this case, at the time of filing, the U.S. entity was owned by four individuals, and the foreign entity was owned by four individuals. Absent documentary evidence such as voting proxies or agreements to vote in concert, the Petitioner has not established that the same individuals controlled both entities.

Finally, the Petitioner relies on *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986), in which the Commissioner recognized that a 50 percent owner of a 50-50 joint venture exercises "negative" control through veto power. The Petitioner emphasizes that its 20 percent shareholder exercises no such "negative control" and therefore cannot influence the control of the petitioning company.

However, as discussed above, none of the remaining three individual shareholders has *de jure* control as none owns at least 50 percent of the company, and the Petitioner did not establish *de facto* control by the "set" of three individual shareholders by providing evidence that they have proxies or voting agreements requiring them to vote together as a single unit. Therefore, while the Petitioner's 20 percent owner, , cannot exert negative control, there appears to be nothing preventing her from voting in concert with one of the 35 percent owners (the Beneficiary or) to overrule the remaining two owners in shareholder voting situations.

Based on the evidence submitted, the Petitioner has not established that it had a qualifying affiliate relationship with the Beneficiary's foreign employer at the time of filing.

III. ONE YEAR OF EMPLOYMENT ABROAD

The Director further found that Petitioner did not establish the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii). The Director's decision was based on the fact that the Beneficiary was primarily residing in the United States during his period of employment with the foreign entity, and therefore the Petitioner could not establish that he was employed abroad for one continuous year.

The record shows that the Beneficiary was granted F-1 nonimmigrant status to attend a U.S. university during the 2013-14 and 2014-15 academic years, and later granted F-1 post-completion optional practical training authorizing one year of employment with the Petitioner beginning in June 2015.

The foreign entity was established in Russia in June 2014. The petitioner provided evidence that the foreign entity paid the Beneficiary a salary to serve as its chief technology officer from its date of establishment through June 30, 2015, a period of slightly over one year. USCIS arrival and departure records show that, during that period, the Beneficiary spent less than six weeks outside of the United States.

The Petitioner explained that "at the same time he was studying at [a U.S. university] and residing primarily in the US, he was able to perform all his duties for [the foreign entity] remotely, with full-time occupation."

Upon review, we agree with the Director's finding that the Beneficiary's remote employment for the foreign entity does not satisfy the requirement that he have at least one continuous year of full-time employment abroad.

The regulations define the term "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or

> subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

8 C.F.R. § 214.2(l)(1)(ii)(A).

Here, although the Petitioner submitted evidence indicating that the Beneficiary received a salary as a remote employee of the foreign entity from June 2014 until June 2015, the statute and regulations require that the one year of qualifying employment take place *abroad.* The Beneficiary cannot meet this requirement given that he was physically present in the United States during the vast majority of the year in question.

On appeal, the Petitioner emphasizes that the worldwide market has changed since the L visa requirements were established, as telework is now common practice, and employees are no longer tied to their employer's work site or office building as they were 30 or more years ago. The Petitioner submits several articles about telework and evidence that Russian law recognizes the practice.

Further, the Petitioner asserts that the Director incorrectly interpreted the nature of the Beneficiary's F-1 stay as being "for" or "on behalf of" the foreign entity in determining that the stay does not count towards his one year of continuous employment broad. The Petitioner emphasizes that the Beneficiary paid for his studies without any financial contribution from the foreign entity and that he could have performed his job for the foreign entity from anywhere in the world.

The Petitioner's assertions do not overcome the Director's finding. The Petitioner appears to be interpreting the following language too expansively: "Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof . . . shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement." 8 C.F.R. § 214.2(l)(1)(ii)(A).

The Petitioner's argument seems to rest, in part, on its belief that, since the Beneficiary was not in the U.S. in F-1 status "for" or on behalf of the foreign entity, his period of stay *can* be counted towards fulfillment of his one year of continuous employment abroad requirement. However, this interpretation of the regulatory language is incorrect. The statute and regulations do not allow *any* period of stay in the United States to be counted towards a beneficiary's one year of continuous employment abroad; neither the beneficiary's nonimmigrant classification nor the purpose of their stay is relevant. All L-1 beneficiaries must accrue one year of continuous full-time employment abroad (outside the United States) in order to meet this eligibility requirement.

The cited regulatory language simply explains that when a beneficiary enters the United States in a work authorized status for employment with a qualifying entity, they may continue to rely on their previously acquired one year of continuous full-time employment abroad for purposes of meeting the "one-in-three" requirement. That one year of employment abroad, once accrued, is not "interrupted" by subsequent authorized U.S. employment within the same qualifying organization.

Finally, although telework is becoming a more common practice and telework capabilities were almost non-existent when the current L-1 regulations were implemented, those regulations are nevertheless applicable to this case. The Beneficiary's remote employment for the Russian entity does not meet the one year of full-time continuous employment abroad requirement.

IV. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that it had a qualifying relationship with the foreign entity at the time of filing or that the Beneficiary had one year of continuous full-time employment abroad in the three years preceding the filing of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of G- Inc.*, ID# 407484 (AAO June 8, 2017)