U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-O-T-C-, INC.

DATE: JUNE 14, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a lumber exporter, seeks to temporarily employ the Beneficiary as its chief executive officer 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.

The matter is now before us on appeal. In support of the appeal, the Petitioner contends that it and the foreign entity share a high degree of common ownership, thereby resulting in an affiliate relationship between the two entities.

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

An L-1A classification petition must be accompanied by evidence establishing 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 managerial or executive 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 or 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 ownership scheme of the Petitioner and the foreign entity does not amount to an affiliate relationship as claimed.

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 term "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 . . . .

8 C.F.R. § 214.2(l)(ii)(L).

In the Form I-129, L Classification Supplement, Section 1, Item 10, the Petitioner stated that it and [redacted], the Beneficiary's foreign employer, are affiliates by virtue of being owned by the same three individuals. Specifically, the petition contains the following ownership breakdowns for the Petitioner and [redacted]:

Petitioner	[redacted]
[redacted] 20%	[redacted] 50%
[redacted] 30%	[redacted] 25%
Beneficiary 50%	Beneficiary 25%

By virtue of the above ownership breakdown, the Petitioner claimed both entities are "owned 100% by the same shareholders and . . . 100% controlled by the same directors."

The Petitioner also provided: (1) a 2015 federal tax return, complete with Schedule G, which reiterates the Petitioner's ownership breakdown as described above; (2) the Petitioner's "Written Consent of the Shareholders" showing that the above named shareholders elected themselves as the Petitioner's three directors; and (3) the Petitioner's "Voting Agreement." The "Recitals" section of the latter document states that the three shareholders who "collectively own" the Petitioner and

[redacted] are the directors of both entities so that the entities "are effectively controlled by the same group of directors," while the "Agreement" section of the same document gives each shareholder "the sole power to vote, or cause to be voted" his or her respective shares in the U.S. entity based on the ownership breakdown of those shares.

The Director issued a request for evidence (RFE) followed by a notice of intent to deny (NOID), both of which advised the Petitioner that the record did not contain sufficient evidence to establish that it formed an affiliate relationship with the foreign entity. While the NOID acknowledged the Petitioner's submission of the above supporting documents, the Director noted that the ownership breakdowns provided above indicate that the two entities are not owned by the same group of individuals with each owning and controlling *the same share or proportion of each entity.* The Director further noted that neither the "Written Consent of the Shareholders" nor the "Voting Agreement" addresses the issue of voting rights and control of the U.S. entity, even though the former names the company's directors.

In response to the RFE, the Petitioner resubmitted its "Written Consent of the Shareholders" and "Voting Agreement," contending that together these documents establish that the same three shareholder directors control both entities. The Petitioner cited to precedent case law to support its contention that the ownership structures of the U.S. and foreign entities as described above constitute a high degree of common ownership, thereby resulting in the formation of an affiliate relationship.

The Petitioner also offered an expert opinion letter, dated October 10, 2016, from [redacted] an attorney, who stated that based on his review of the voting agreement and "the corporate formation and governance documents," the two entities have a high degree of common ownership and "an even higher degree of common management, with management of both companies being identical." There is no indication that Mr. [redacted] reviewed or had knowledge of the relevant regulatory provisions that define the term "affiliate" in the immigration law context and within the scope of the Act, which puts forth eligibility guidelines for the immigration benefit sought in the instant matter. Further, despite Mr. [redacted] claim that he reviewed both entities' "corporate formation and governance documents," the only corporate document in the record that pertained to the foreign entity and was available at the time of Mr. [redacted] statement was a list of shareholders. It is not apparent that Mr. [redacted] reviewed documents describing how the foreign entity is governed. Although the Petitioner subsequently provided a translated tax declaration document naming Mr. [redacted] Mrs. [redacted] and the Beneficiary as the foreign entity's three appointed directors, that document was not generated until October 26, 2016, and thus could not have been reviewed by Mr. [redacted], as claimed, when he wrote his initial testimonial.

In response to the NOID, the Petitioner offered a second letter from Mr. [redacted] noting that per the Petitioner's company bylaws, each director gets one vote. The Petitioner also provided declarations from each of its three shareholders who stated that the same control structure exists for both the U.S. and foreign entities. All three declarants in their respective statements indicated that each shareholder, in his or her capacity as a director, "has one board vote."

In denying the Petition, the Director reiterated statements made in the NOID, where he found that the U.S. and foreign entities are not owned by the same group of individuals with each owning and controlling the same share or proportion of each entity and further noted that the "Written Consent of the Shareholders" and the "Voting Agreement" do not address the issue of voting rights and control of the U.S. entity.

On appeal, the Petitioner disputes the Director's finding, pointing out that both entities are owned by the same three shareholders with no one shareholder owning a majority of either entity's stock. The Petitioner cites *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981), stating that the Commissioner found that an affiliate relationship existed where there was a high degree of common stock ownership in both companies. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign entity and 60% of the petitioner, i.e., the majority, 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.

Here, the Petitioner contends that the *lack* of a majority interest by any one party demonstrates that all three parties have equal control of the U.S. and foreign entities, the ownership distribution depicted above does not support the Petitioner's contention based on the fact that negative control of the two entities rests with two different individuals. To the extent that a 50% ownership interest by one shareholder is sufficient to negate the combined votes of the two remaining shareholders, we find that control exists even where no one shareholder owns the majority of a company's shares. Here, the Beneficiary owns 50% of the Petitioner's shares and thus has negative control of the Petitioner, while [redacted] owns 50% of the foreign entity's shares, thereby maintaining negative control of that entity. While the Petitioner contends that each shareholder has one board vote in each entity such that the three shareholders equally control both entities, the Petitioner provided documentation showing that the directors serve at the will of its shareholders and that each shareholder votes his or her respective shares of the U.S. entity. Therefore, control is ultimately proportional to the number of shares owned. As the Beneficiary owns twice the shares in the Petitioner than the two remaining shareholders combined, he ultimately has greater control over the U.S. entity, to the extent that he can block a corporate action put forth by the other two shareholders. The same can be said of the foreign entity based on its ownership breakdown, despite the 2016 income tax declaration listing the Beneficiary, [redacted] and [redacted] as the foreign entity's appointed directors.

Further, 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 *Sun Moon Star*, former Immigration and Naturalization Service (INS), now U.S. Citizenship and Immigration Services (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 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.

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. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

In this case the Petitioner's voting agreement does not show that any combination of the shareholders is in any way bound to vote together. Further, the record shows that the Beneficiary owns only 25% of the foreign entity, which is half of his ownership interest in the Petitioner. Similarly, [redacted] owns only 20% of the Petitioner, which is comparatively less than half of his ownership interest in the foreign entity, where he holds a 50% ownership interest. We cannot conclude that owning 50% of one entity while owning one quarter or one fifth of another entity equates to owning "approximately the same share or proportion of each entity" as required to form an affiliate relationship. 8 C.F.R. § 214.2(l)(1)(ii)(L)(*2*). While it is true that the same three individuals are shareholders of both entities, two different individuals have negative control in each entity and the three individuals do not own "approximately the same share or proportion of each entity." *Id.* Therefore, we do not find that the Petitioner and the foreign entity have an affiliate relationship.

For the reasons discussed above, the evidence submitted does not establish that the Petitioner and the Beneficiary's foreign employer have a qualifying relationship and on the basis of this conclusion, the instant petition cannot be approved.

ORDER: The appeal is dismissed.

Cite as *Matter of O-O-T-C-, Inc.*, ID# 421353 (AAO June 14, 2017)