U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23672080

Date: FEB. 07, 2023

Appeal of Texas Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a provider of information technology products and services, seeks to permanently employ the Beneficiary as its "Indirect Solutions Senior Manager" under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(l)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner has a qualifying relationship with the foreign entity that previously employed the Beneficiary abroad. The matter is now before us on appeal. 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

An executive or manager who has worked abroad for at least one year may immigrate to the United States to continue to render executive or managerial services to the same employer, or to a U.S. subsidiary or affiliate within the same multinational organization. Section 203(b)(1)(C) of the Act.

A petition for a multinational executive or manager must include a statement from an authorized company official demonstrating that the beneficiary has been employed abroad for the requisite period in a managerial or executive capacity, that they would be employed in a managerial or executive capacity in the United States, and that the prospective employer is the same employer or a subsidiary or affiliate of the legal entity by which the beneficiary was employed overseas. The evidence must also establish that the petitioner has been doing business for at least one year. 8 C.F.R. § 204.5(j)(3)(A)-(D).

II. ANALYSIS

The sole issue before us on appeal 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 establish that the Beneficiary's foreign employer and the proposed U.S. employer are the same employer (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See* Section 203(b)(1)(C) of the Act; *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

Here, the Petitioner states that it has an affiliate relationship with the Beneficiary's last foreign employer, a Venezuelan corporation. The regulation at 8 C.F.R. § 204.5(j)(2) defines the term "affiliate," in relevant part, as:

> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual; or
> (B) 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.

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.

The Petitioner provided copies of stock certificates, stock ledgers, incorporation documents, company by-laws and other relevant documentation sufficient to establish that the Venezuelan entity and the petitioning U.S. employer are owned by the following individuals (identified by their initials) and by the estate of a former shareholder, as follows:

Venezuelan Entity		**U.S. Petitioner**	
33.3%		31%	
33.3%		31%	
33.3%		24%	
		14%	

The record reflects that the [redacted] is a legal entity established in Venezuela that is comprised of a decedent shareholder's four heirs. The Petitioner explained that there is an ongoing legal dispute among those heirs and that, due to this dispute, the [redacted] has not named a legal representative in either the foreign or U.S. entity. The Petitioner indicated that, given these circumstances, the [redacted] has not been represented at either companies' shareholders meetings as of March 2022. It submitted the declarations of three of [redacted] heirs in support of that claim.

The Petitioner maintains that shareholders [redacted] had historically agreed to always vote their shares of common stock in both entities and to make decisions as "one unanimous body." It provided "Shareholders Agreements" executed by them in August 2003, March 2007, and April 2014. The agreements are similar in substance and state these individual shareholders agreed to act "in a unanimous monolithic manner."

The record indicates that the latest shareholder agreement relevant to the control of the two entities was executed on January 10, 2018, after [redacted] death. The 2018 shareholder agreement includes a chart detailing the two companies' respective ownership. Referring to the combined ownership interests of [redacted] the shareholder agreement states:

> Due to the majority (62.00%) of [the Petitioner's] shareholders. . . are also the majority (66.66%) of [the Venezuelan entity's] shareholders . . . they can made [sic] decisions that impact the two entities.
>
> These shareholders establish to act in the shareholdings meeting as one unanimous and monolithic body and as well as their representation and decisions reference to the companies [the foreign entity] located in Venezuela, and [the Petitioner] located in Puerto Rico.
>
> Additionally [redacted] (shareholder of [the Petitioner]) also establishes to be part of the same unanimous and monolithic body in all the shareholders meetings of [the Petitioner].

Based on the ownership structure and shareholders agreement described above, the Petitioner claims that it has an affiliate relationship with the foreign entity because both entities are "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. § 204.5(j)(2).

As noted, the Petitioner must establish that it shares the requisite common ownership and control with the Venezuelan 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] In situations where a petitioner provides documentation of a qualifying relationship based on control through possession of proxy votes, the petitioner must show that the proxy votes are irrevocable from the time of filing through the time of adjudication. Further a petitioner must provide evidence that the qualifying relationship will continue to exist until the beneficiary becomes a lawful permanent resident.[2]

The Petitioner contends that it and the foreign entity share "a high percentage of common ownership and management," citing *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981) to

[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.

[2] *See generally*, 6 USCIS Policy Manual F.4(B), https://www.uscis.gov/policy-manual (discussing petitioner requirements applicable to immigrant petitions for multinational managers and executives).

support its claim. However, the cited decision does not support the Petitioner's argument. In *Tessel*, the beneficiary solely owned 93% of the foreign entity and 60% of the petitioner, thereby establishing that the two entities had 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 in *Tessel* are not analogous to this case, where the evidence does not show that any one shareholder owns a majority interest in either the Petitioner or in the foreign entity. Although the Petitioner correctly states that majority ownership is not required, it must demonstrate that it meets one of the relevant subsections that define the term "affiliate" at 8 C.F.R. § 204.5(j)(2).

In this case, the U.S. entity is owned by three individuals and the [redacted] and the foreign entity is owned by two individuals and the [redacted] 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, similar to the beneficiary in *Tessel*. 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. § 204.5(j)(2).

Further, the record does not establish that both entities, one of which has three owners and one of which has four owners, 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. § 204.5(j)(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. U.S. Citizenship and Immigration Services (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.

The Petitioner maintains that the Director erroneously dismissed the probative value of the submitted shareholder agreements and erred by insisting that the Petitioner provide irrevocable proxy agreements. As noted, the Petitioner has not claimed that it was seeking to establish common control of both entities by a single individual based on proxy agreements and we agree that it is not required to submit evidence of same. However, it remains the Petitioner's burden to establish that the submitted shareholder agreement is a binding voting agreement and that the terms of such agreement give the same group of shareholders the requisite common ownership and control in both companies.

We will first look at the terms of the shareholder agreement. Given the death (in 2016) of one of the shareholders who was a party to the 2003, 2007 and 2014 shareholder agreements, our review is limited to the 2018 agreement, which reflects the shareholding of the companies in place at the time of filing. Based on the terms outlined therein, the shareholders agreed that the foreign entity is majority controlled by a "unanimous and monolithic body" that includes only [redacted] while the Petitioner is majority controlled by a "unanimous and monolithic body" that includes [redacted] and [redacted] Therefore, this agreement does not support the Petitioner's claim that both entities are owned and controlled by the "same group of individuals" acting as a unit. [redacted] who is a party to the

voting agreement in the U.S. company, has no ownership interest in the foreign entity and exercises no control over that entity. Therefore, the shareholder agreement does not establish that the two entities meet the definition of affiliate at 8 C.F.R. § 204.5(j)(2).

Further, the record does not contain sufficient evidence demonstrating that the shareholders agreement is binding. According to Title IV of the foreign entity's Incorporation Agreement and Bylaws, as amended in March 2017, the "supreme authority of the company resides in the General Meeting of Shareholders." The sixteenth clause of this title provides that "Minutes of the Meeting shall be made of each Shareholder's Meeting, and these must contain the name of all attendees, indicating the number of shares they hold or represent and the agreements and decisions that have been made." Such minutes are required to be "registered in the Minutes Book of Meetings." There is no indication that the 2018 shareholders agreement was made as part of a general or special shareholders meeting or that it was registered in the foreign entity's Minutes Book of Meetings in accordance with the company by-laws.

Additional evidence would be required to establish that the agreement is binding on both entities and in both jurisdictions. Nevertheless, as noted, even if the Petitioner established that the shareholder agreement is binding with respect to the control of both entities, it does not establish that both entities are owned and controlled by the same group of individuals.

Finally, while the record supports the Petitioner's claim that the [redacted] had not been represented at shareholder meetings as of March 2022, it also appears that this circumstance is subject to change at any time upon resolution of the legal dispute among [redacted] heirs. The resolution of that dispute could have a material impact on the ownership and control of the companies and therefore that shareholder's status should be addressed in any future proceeding in which the qualifying relationship between these two entities is at issue. As noted, a petitioner must provide evidence that the qualifying relationship exists at the time of filing and will continue to exist until the beneficiary becomes a lawful permanent resident.

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

ORDER: The appeal is dismissed.