U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-P-C- LLC

DATE: MAY 8, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a potato chip manufacturer, seeks to permanently employ the Beneficiary as its logistics manager under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(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 Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) it has a qualifying relationship with the Beneficiary's foreign employer; and (2) the Beneficiary was employed abroad in a managerial capacity prior to his entry to the United States to work for the Petitioner as a nonimmigrant.

On appeal, the Petitioner asserts that the Director denied the petition in error. It submits additional evidence in support of its claim it has a qualifying affiliate relationship with the Beneficiary's foreign employer, and contends that the Beneficiary was employed abroad in a managerial capacity as a function manager.

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

I. LEGAL FRAMEWORK

An immigrant visa is available to a beneficiary who, in the three years preceding the filing of the petition, has been employed outside the United States for at least one year in a managerial or executive capacity, and seeks to enter the United States in order to continue to render managerial or executive services to the same employer or to its subsidiary or affiliate. Section 203(b)(1)(C) of the Act.

The Form I-140, Immigrant Petition for Alien Worker, must include a statement from an authorized official of the petitioning United States employer which demonstrates that the beneficiary has been employed abroad in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition, that the beneficiary is coming to work in the United States for the same employer or a subsidiary or affiliate of the foreign employer, and that the prospective U.S. employer has been doing business for at least one year. *See* 8 C.F.R. § 204.5(j)(3).

II. QUALIFYING RELATIONSHIP

The first issue to be addressed 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 (a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See* § 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").

"Affiliate" means one of two subsidiaries, both of which are owned and controlled by the same parent or individuals; or 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. § 204.5(j)(2).

A. Facts

The Beneficiary worked for two different Canadian entities prior to his initial entry to the United States to work for the Petitioner in L-1A nonimmigrant status in November 2013. During most of the three year period prior to his entry, the Beneficiary worked for [redacted] Prior to January 2010, and after August 2013, he worked for [redacted]

The Petitioner stated that it is an affiliate of both Canadian entities and that all three companies are owned and controlled by the same individual, [redacted]

Specifically, the Petitioner initially described the ownership of each company as follows:

		Petitioner
[redacted] 1 share	[redacted] 100 shares	[redacted] 100 shares
[redacted] 1 share		
[redacted] 1 share		

The Petitioner explained that [redacted] was founded in 2009 to perform motor carrier transportation services for [redacted] The Petitioner stated that [redacted] was "amalgamated back into [redacted] in August 2013.

The Director denied the petition after finding that the Petitioner did not submit sufficient supporting evidence showing the number of shares actually issued by each company and therefore did not establish each company's respective ownership and control. The Director also noted an inconsistency, pointing out that the Petitioner's 2015 tax return indicated that [redacted] owns 55% of the company's shares, not 100% as claimed. The Director determined that the Petitioner did not establish its qualifying relationship with [redacted]

On appeal, the Petitioner offers additional explanation and documentation in support of its claimed affiliate relationship with the Beneficiary's foreign employers, noting that it did not fully understand the documentary requirements needed to establish the qualifying relationship. The Petitioner maintains that [redacted] "has been the de facto owner and controller of the enterprises" since their inception.

First, with respect to [redacted] the Petitioner states that [redacted] and [redacted] parents, were always silent shareholders of the company, that [redacted] has always been recognized as the founder, president, and CEO of the company, and that "both [redacted] and [redacted] have bequeathed their share to [redacted]." Specifically, the Petitioner notes that [redacted] inherited [redacted] share when she passed away in 2013, giving him ownership of two-thirds of the shares, and states that [redacted] and [redacted] "never exercised their voting rights to exclude [redacted] as President and CEO over the course of twenty-five years." Finally, the Petitioner states that [redacted] is no longer competent to exercise his voting rights, thus giving [redacted] sole control over the company. The Petitioner notes that "documents are being prepared to formally recognize [redacted] receipt of this ownership interest," but does not provide documentary evidence that [redacted] is the majority or sole owner of this entity's shares, or that he controls at least a majority of the shares.

Regarding [redacted] the Petitioner now explains that [redacted] incorporated the company and issued all 100 shares to himself in July 2009, but sold all of his shares to his son, [redacted] in 2010 in exchange for $1.00. The Petitioner asserts that "this was done for gifting and other financial incentives" and that [redacted] did not give up any operational control over the company. The Petitioner states again that the company was later "amalgamated back into [redacted] but that [redacted] has not been dissolved and [redacted] son continues to own its shares. The Petitioner further explains that "the enterprise is no longer functional with [redacted] continuing to run the trucking and transportation division of the Canadian and U.S. manufacturing facilities."

The Petitioner provides evidence of the share transfer from [redacted] to his son, and a statement from [redacted] who confirms his ownership of [redacted] shares. He states that the sale of shares to him for a nominal price was "for tax planning purposes" and "long-term estate planning." He further states that he was a "silent shareholder" while attending college full-time through May 2014, and had no involvement with the company during that period beyond signing the tax returns.

B. Discussion

The evidence submitted on appeal does not overcome the Director's determination and is insufficient to document the claimed qualifying relationship between the Petitioner and [redacted] the only company that employed the Beneficiary for more than one year between 2010 and 2013.

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., 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 record now shows that, during the Beneficiary's period of employment with and at the time this petition was filed, there was no common ownership between that entity and the Petitioning company. The Petitioner does not explain why it did not disclose Nicholaus Margie's sole ownership of this company previously.

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 states that is its sole shareholder, and is wholly owned by Thus, the companies are not affiliates as they are not owned and controlled by the same individual or individuals. Although the Petitioner cites to *Matter of Hughes* in support of its claim that maintained *de facto* control over after transferring all of his shares to his son, *Matter of Hughes* does not contemplate the existence of a qualifying relationship where there is *no* common ownership between two entities.

We have considered the Petitioner's claim that business operations have been "amalgamated" back into The Petitioner has not sufficiently explained when this amalgamation occurred, how it was accomplished from a legal standpoint, or provided supporting documentation related to this claimed transfer of business activities from one company to another. It appears that, as a result of the amalgamation, the Petitioner seeks to have us consider as the same company as for purposes of establishing an ongoing qualifying relationship with the Petitioner. However, it also appears that continues to exist as a separate legal entity.

In addition, we note that even if we did consider the relationship between the Petitioner and there is still insufficient documentation in the record to establish the ownership of these companies. On appeal, the Petitioner claims that has owned at least two-thirds of shares since 2013, but has not documented this ownership or explained why it stated at the time of filing in 2016 that he owns only 33 percent of the company. The Petitioner also concedes that formal documentation of his majority ownership is currently unavailable.

The Petitioner also has not addressed the discrepancy noted its 2015 tax return, which, as noted by the Director, indicates at Schedule G that has a 55% ownership interest in the company. On appeal, the Petitioner submits a 2016 tax return showing that owns 100% of its shares, but it does not explain the information provided in the previous tax return. Further, both tax returns indicate at Schedule K that the petitioning company has four shareholders.

We acknowledge the Petitioner's claim that [redacted] effectively manages all of the [redacted] companies, that all three companies are owned by either him and/or members of his family, as well as evidence that they operate as a single corporate group. However, a familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F. Supp. 2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

Based on the inconsistencies and omissions in the Petitioner's evidence, and the lack of any common ownership between the Petitioner and [redacted] the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer.

III. EMPLOYMENT ABROAD IN A MANAGERIAL CAPACITY

The Director also determined that the Petitioner did not establish was employed abroad in a managerial capacity. The Director found that the Beneficiary's job description included a number of non-managerial duties and noted that the Petitioner did not show how the foreign entity's staff supported him in a managerial capacity, as all of his subordinates were contracted truck drivers.

On appeal, the Petitioner contends that the Director failed to consider whether the Beneficiary was employed abroad as a function manager, noting that his supervision of contractors does not preclude a finding that he was employed in a managerial capacity. The Petitioner further claims that the Beneficiary's duties abroad were essentially the same as those he performs in the United States and emphasizes that the Director determined that his proposed U.S. position is in a managerial capacity.

"Managerial capacity" means an assignment within an organization in which the employee primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has authority over personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. Section 101(a)(44)(A) of the Act.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. If a petitioner claims that a beneficiary will manage an essential function, it must clearly describe the duties to be performed in managing the essential function. In addition, the petitioner must demonstrate that "(1) the function is a clearly defined activity; (2) the function is 'essential,' i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5)

the beneficiary will exercise discretion over the function's day-to-day operations." *Matter of G-Inc.*, Adopted Decision 2017-05 (AAO Nov. 8, 2017).

Prior to his entry to the United States to work for the Petitioner as a nonimmigrant, the Beneficiary was employed as logistics manager for [redacted] from January 2010 until August 2013.

The Petitioner submitted a letter from [redacted] president, who stated that the company operated as "a motor carrier that mainly shipped outbound loads from its affiliate [redacted] . . . to the USA and then transported 3rd party goods for the backhaul to Canada." He noted that the Beneficiary was assigned "all operational duties" and hired driver contractors to fill trucks and make pickups and deliveries, while he was responsible for "price negotiations, fleet safety compliance, maintaining the required legal permits and running authorities, dispatching drivers, coordinating shipments . . . etc."

The letter from [redacted] included a lengthy description of the Beneficiary's duties, listing over 50 tasks. These duties were consolidated under the following headings

- Oversee transportation department, including its assets and employees. (21%)
- Access and acquire resources. (3%)
- Manage the operational aspects of ongoing projects and serve as liaison between project management and planning, project team, and line management. (13%)
- Ensure customer goods move from production through the supply chain to the end user. (4%)
- Supervise air and ocean freight forwarding, global warehousing, transportation, reverse logistics, surface transportation and supply chain solutions. (9%)
- Establish quality transportation services. (8%)
- Develop partnerships with outside carriers in shipping. (5%)
- Plan and implement budgets and prepare progress reports. (5%)
- Utilize services of less-than-truckload carriers and air-forwarders to handle fulfillment shipments. (1%)
- Implement scheduling of shipments. (5%)
- Review financial reports. (3%)
- Manage performance of branch employees with emphasis on productivity, efficiency and service delivery. (3%)
- Lead all distribution and transportation planning and strategic activities. (4%)
- Recruit, interview, train, motivate, coach and mentor shipping clerks and transport drivers. (5%)
- Assist in the identification and implementation of continuous improvement opportunities and customer satisfaction opportunities. (2%)
- Report to the President. (4%)
- Interacting with all levels of government. (3%)
- Implementing and maintaining all government regulations and guidelines for DOT and the food industry. (2%)

The Petitioner maintains that these duties show that the Beneficiary primarily managed the logistics function. Further it claims that logistics was the core or essential function carried out by , as the company's only purpose was to provide transportation between the related U.S. and Canadian potato chip manufacturing companies. The Petitioner also emphasizes that the Beneficiary hired driver contractors to make all pickups and deliveries and therefore was not involved in performing this function himself.

The Beneficiary undoubtedly had an important role in the company and exercised discretion over the company's transportation services, but the Petitioner has not shown that the duties he performed were primarily managerial in nature. The Petitioner appears to argue that any tasks that do not involve actually loading, driving, or unloading a truck should be considered managerial. We disagree.

The Petitioner indicates that more than half of the Beneficiary's time was spent scheduling and dispatching drivers, and coordinating timing and scheduling of pickups and deliveries with both suppliers and the claimed affiliate companies to ensure that ingoing and outgoing shipments were timed appropriately. These responsibilities includes planning routes, maintaining data files, scheduling and re-scheduling appointments for deliveries, and arranging for the maintenance of the company's fleet of vehicles and truck yard. The Petitioner indicates that the Beneficiary was also responsible for "overseeing" completion of U.S. and Canadian customs documentation and related paperwork, but does not indicate who completes it. Overall, many of the Beneficiary's duties, as described in the record, are administrative and operational rather than managerial.

The Petitioner indicates that the Beneficiary performed higher-level budgetary responsibilities, had the authority to negotiate prices, retained and monitored the performance of the contracted drivers, and reported to the company president, but it has not shown that his actual day-to-day duties were primarily managerial in nature. Whether a beneficiary is a "function" manager turns in part on whether the Petitioner has sustained its burden of proving that their duties are "primarily" managerial. *See Matter of Z-A-*, Inc., Adopted Decision 2016-02 (AAO Apr. 14, 2016).

We acknowledge the Petitioner's claim that the Beneficiary's foreign job description is similar to the description provided for his proposed U.S. position. The Petitioner emphasizes that the Director did not make an adverse finding with respect to the Beneficiary's proposed U.S. employment and suggests that the Director denied the petition in error.

There are some similarities between the Beneficiary's foreign and U.S. position descriptions; however, we review the job descriptions within the context of the totality of the evidence. All of the contractors the Beneficiary supervised in Canada were drivers, which meant that all other administrative and operational tasks associated with the foreign entity's logistics function were left to the Beneficiary to perform. In his U.S. position, the Beneficiary oversees three subordinate supervisors responsible for shipping, receiving, and warehouse functions. The totality of the record supports the Petitioner's claim that it can support the Beneficiary in a managerial capacity and does not require him to have the same degree of involvement in non-managerial duties that he had when employed in Canada.

The fact that the Beneficiary managed the foreign business as its sole full-time employee does not necessarily establish his eligibility for classification as a multinational manager. By statute, eligibility for this classification requires that the duties of a position be "primarily" managerial in nature. Section 101(A)(44)(A) of the Act. Even though the Beneficiary exercised discretion over the foreign entity's logistics operations, the Petitioner did not establish that he was employed abroad as a function manager.

IV. CONCLUSION

The appeal must be dismissed as the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer, or that he was employed abroad in a managerial capacity.

ORDER: The appeal is dismissed.

Cite as *Matter of S-P-C- LLC*, ID#1222707 (AAO May 8, 2018)