U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10133839

Date: DEC. 18, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, describing itself as a diamond trader, sought to permanently employ the Beneficiary as its general manager under the first preference immigrant classification for multinational executives or managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

The instant petition was approved; however, the Director of the Nebraska Service Center later revoked the approved petition. The Director determined that the evidence submitted by the Petitioner did not demonstrate that it had a qualifying relationship with the Beneficiary's former foreign employer. In addition, the Director concluded that the Petitioner did not demonstrate that the Beneficiary was employed abroad for one continuous year in the three years proceeding his entry into the United States as a nonimmigrant. The Petitioner later filed a motion to reopen and a motion to reconsider and the Director granted the motion to reopen; however, the Director concluded that it had not overcome the grounds for revocation.

On appeal, the Petitioner contends the submitted evidence demonstrates that the foreign employer owns 25% of its shares and controls the company based on a memorandum of understanding (MOU) executed between the foreign employer and the owner of remaining 75% of its shares. Further, the Petitioner asserts it provided sufficient evidence to demonstrate that the Beneficiary was employed for one continuous year abroad. The Petitioner contends that the Director revoked the approved petition in error.

Upon *de novo* review, we will dismiss the appeal and affirm the Director's revocation of the petition. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner did not sufficiently establish that it had a qualifying relationship with the Beneficiary's former foreign employer. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding whether Beneficiary was employed abroad for one continuous year in the three years proceeding his entry into the United States as a nonimmigrant. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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).

Section 205 of the Act states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (quoting *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).[1]

II. QUALIFYING RELATIONSHIP

The sole issue we will address is whether the Director erred in her determination that the Petitioner did not establish it had a qualifying relationship with the Beneficiary's former foreign employer.

1. Background

In support of the petition, the Petitioner stated that the foreign employer was its "principal," noting that it "gets its stones from abroad and the finishing work is done…where they have their own factory."

[1] A Form I-140 multinational executive or manager petition filed on behalf of the Beneficiary was approved by the Director of the Nebraska Service Center on January 21, 2016. The Director later revoked this approved petition on March 5, 2019, following the issuance of a notice of intent to revoke (NOIR) on October 18, 2018. The Director concluded that the petition had been approved in error and that the Beneficiary was not eligible for the benefit sought.

In another support letter, the foreign employer indicated that it purchased 25% of the Petitioner's shares stating that it "continue[s] to be the sole stockholder and [the Petitioner] continues to be our wholly owned subsidiary." The Petitioner also provided a share certificate dated in September 2012 reflecting that the foreign employer owned 50 of its shares.

Later in response to the Director's request for evidence (RFE), the Petitioner listed the following partners and shares of ownership in the foreign employer:

- [redacted] – 30%
- [redacted] – 20%
- [redacted] – 20%
- [redacted] – 10%
- [redacted] – 20%

The Petitioner stated that "[redacted] is the owner of 30% of the shares of the [foreign employer]" and that he was the "majority sharehold[er] in the [foreign employer]." Further, the Petitioner indicated that the foreign employer owns 25% of its shares and that based on this ownership, the entities qualified as affiliates since they were "one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share of proportion of each entity." The Petitioner also explained that [redacted] "controls the [foreign employer], due to his majority shareholding, but controls the minority share of the [Petitioner], as the [foreign employer] has only the minority share in the [Petitioner]."

After approval of the petition in May 2017, the Director later issued a notice of intent to revoke (NOIR). The Director pointed to two differing 2013 IRS Forms 1120 U.S. Corporation Income Tax Returns, one indicating in schedule G that a [redacted] owned 100% of the Petitioner and another reflecting that it was 25% owned by the foreign employer and 75% by [redacted] Further, the Director stated that the record did not include all the Petitioner's share certificates, nor a stock purchase agreement, stock ledger, or supporting evidence to substantiate the issuance of all its shares. The Director also emphasized that [redacted] did not own a majority of the foreign employer nor any of the Petitioner's shares; and therefore, his 30% interest in the foreign employer did not demonstrate a qualifying relationship. In addition, the Director noted that the foreign employer was owned by five individuals and the Petitioner by only two; and as such, concluded that the entities did not qualify as affiliates on the regulatory definition.

In response to the NOIR, the Petitioner reiterated that [redacted] owned 30% of the foreign employer and as its managing partner was "given the authority to take necessary actions for the establishment of the US entity." The Petitioner asserted that the foreign employer owned 25% of its shares and that it had "actual control" of the U.S. company pursuant to a MOU executed between [redacted] for the foreign employer and [redacted] on behalf of the Petitioner. The Petitioner further stated the following:

> [redacted] controls the [foreign employer] due to his majority shareholding and Power of Attorney which he holds. He also has actual control of the [Petitioner] which is evidence[d] by the MOU. So, even though the Indian Organization has less than 50% of a company's outstanding shares, but [*sic*] they still

> maintain actual control of the company. The two companies need not have a common majority shareholder in order to be affiliates. The common shareholder can be a minority shareholder of one company as long as he/she has actual control over the company.

In revoking the petition, the Director concluded the Petitioner did not demonstrate that it and the foreign employer qualified as affiliates as defined in the regulations, since neither were owned and controlled by the same parent or individual, and because they were not owned by the same group of individuals. The Director determined that the provided MOU between the foreign employer and the Petitioner did not establish that the foreign employer had voting control over its shares, further emphasizing that it was not "registered with the appropriate legal authority in the U.S." The Director also concluded that the Petitioner did not demonstrate that its shareholders were legally bound together to vote, whether thought agreements or proxies, as necessary to demonstrate that the foreign employer both owned and controlled the Petitioner. In addition, the Director stated that the Petitioner did not demonstrate that the submitted MOU was binding in the United States and that it established common ownership and control between it and the foreign employer.

The Petitioner later filed a motion to reopen and reconsider asserting that the Director applied an "overly narrow view" of de facto control. The Petitioner stated that it "is a private limited organization, and hence has non-voting stock." The Petitioner pointed to the submitted MOU and asserted that this gave the foreign employer control over its budget and all final company decisions; specifically [redacted] the asserted controlling partner of the foreign employer. The Director reopened the matter but determined that the Petitioner did not demonstrate a qualifying relationship, using largely the same reasoning set forth in the previous decision. The Director stated that the record did not establish that there was a legally binding agreement between the Petitioner's shareholders that granted voting control to the foreign employer; and as such, that there was no common ownership and control between the entities.

On appeal, the Petitioner notes that incomplete records of its share certificates were due to mistakes made by its former accountant who gave improper instructions as to how its corporate documents should be maintained. The Petitioner asserts that 25% of its shares were transferred to the foreign employer pursuant to the aforementioned MOU. The Petitioner points to a United States Citizenship and Immigration (USCIS) policy memorandum related to qualifying relationships and proxy votes and contends that this, along with the supporting MOU, demonstrates that there is common ownership and control between it and the foreign employer.

2. Analysis

Upon review, the Petitioner did not establish a qualifying relationship between it and the Beneficiary's former foreign employer.

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. To establish a "qualifying relationship," a petitioner must show that the beneficiary's foreign employer

and the proposed U.S. employer are the same employer (i.e., a U.S. entity with a foreign office) or that they are related as a "parent and subsidiary" or as "affiliates." *See generally* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(C).

A subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity. 8 C.F.R. § 204.5(j)(2). "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).

The applicable regulations 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 for purposes of this visa classification. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

First, the Petitioner has not sufficiently established its ownership as necessary to demonstrate a qualifying relationship. As evidence of a petitioner's claimed qualifying relationship, the Petitioner must submit documentary evidence to sufficiently support its asserted ownership, including all relevant stock certificates. Further, stock certificates are not alone sufficient to demonstrate whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In addition, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting control of the entity. *See Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. at 365.

The regulations specifically allow a director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, a director may reasonably inquire as to a petitioner's stock certificates and the means by which stock ownership was acquired. Evidence should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence could include stock purchase agreements, subscription agreements, corporate bylaws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The Petitioner provided insufficient supporting documentation to substantiate its ownership. For instance, the Petitioner did not provide evidence to demonstrate the issuance of all its shares, a complete stock certificate ledger or registry, minutes of its annual shareholder meetings reflecting the issuance of shares, or other similar corroborating evidence. The Petitioner appears to contend that, as of the date the petition was filed, 25% of its shares were owned by the foreign employer while 75% were owned by [redacted] However, the Petitioner only submits one share certificate reflecting the issuance of 50 shares to the foreign employer in September 2012; and likewise, a provided stock

transfer ledger only shows the issuance of 50 shares to the foreign employer. The Petitioner did not submit any other stock certificates; specifically, that reflecting the asserted initial 100% ownership interest held by [redacted] nor a certificate substantiating his asserted 75% ownership of shares following the transfer of 50 shares to the foreign employer. This lack of probative evidence persists despite various requests for evidence and the Petitioner's assertions and submitted IRS Forms 1120 U.S. Corporation Income Tax Returns from 2012 through 2015 indicating that 25% of the Petitioner's shares were owned by the foreign employer, and 75% by [redacted] In fact, the Petitioner provided a letter from its accountant dated in May 2015 indicating that the Petitioner issued 50 shares to the foreign employer for $90,000 in consideration. However, this assertion is questionable, since the Petitioner indicated that [redacted] once held 100% its shares and would have had to be a party to transferring shares to the foreign employer. Further, despite never providing proof of 75% of its issued shares being held by [redacted] or evidence of his previous ownership of all its shares, it submits an MOU whereby [redacted] granted a 25% interest in the foreign employer and control over the entity.

On appeal, the Petitioner vaguely indicates that these material discrepancies are due to poor instructions provided by its accountant. However, this generic assertion does not sufficiently remedy the numerous material discrepancies and evidentiary deficiencies on the record related to its ownership. First, it is not clear what part the Petitioner's accountant played in maintaining its corporate documentation, as well as other documentation legally required documentation related to the issuance and transfer of shares, nor what practical impact this had on its ownership and control. It is also not apparent how the foreign employer gained a 25% ownership interest in the Petitioner from [redacted] when the supporting documentation appears to reflect that these shares were never issued in the first place.

In fact, the record includes bylaws adopted by the Petitioner during its formation in 2010 clearly indicate in article V that the all share certificates "shall be numbered and registered," that full consideration should be paid for each, and that all transfers of said shares should be "made on the share records of the corporation." However, in this matter, the Petitioner provides no documentation to substantiate the initial issuance of shares to [redacted] upon its formation, nor Petitioner meeting minutes reflecting the transfer or sale of these shares, sufficient evidence of consideration paid by the foreign employer to [redacted], nor share certificates or other evidence reflecting [redacted]'s continued claimed 75% ownership interest in the company. As such, the Petitioner has provided an uncertain and unsubstantiated picture of its actual ownership, as well as, conflicting documentation and assertions. Without full disclosure of all relevant Petitioner ownership documents, we cannot determine the elements of ownership and control. The Petitioner must resolve inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the Petitioner also points to a USCIS policy memorandum and asserts that a qualifying relationship existed based on the foreign employer's 25% ownership of its shares and its control over the company. *See* L-1 Qualifying Relationships and Proxy Votes, PM-602-0155, issued on December 29, 2017. First, as a preliminary matter, the policy memorandum cited by the Petitioner is clearly titled "L-1 Qualifying Relationships and Proxy Votes" and cites law related to this nonimmigrant visa category. It is not apparent that this memorandum is applicable in the context of the immigrant classification for multinational executives or managers at issue in this matter. Regardless, even if we

accept this policy memorandum as persuasive authority, the evidence does not properly demonstrate that there is common ownership and control between the Petitioner and the foreign employer as claimed.

We must first establish under what regulatory definition the Petitioner is asserting common ownership and control, as it has offered a confusing array of assertions on the record as to qualifying relationship; noting that the foreign employer was its "sole stockholder," while also indicating the foreign employer owned a "minority share" and that it was a "private limited organization" with "non-voting stock." Even if we accept the asserted ownership in the Petitioner and the foreign employer, it is clear that they cannot qualify as affiliates, as neither is owned by the same parent or individual; further, with each having differing owners; they cannot be 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). Likewise, neither entity owns more than 50% of the other and this matter does not involve a joint venture.

As such, it appears that the Petitioner, despite its shifting assertions on the record, contends that common ownership and control in this matter is based on the foreign employer owning less than half of the entity, but in fact controlling the Petitioner. 8 C.F.R. § 204.5(j)(2). However, the Petitioner has not sufficiently demonstrated that it is controlled by the foreign employer, an entity owning only 25% of its shares. The Petitioner's controlling bylaws indicate in article 6(a) that "any corporate action…shall be authorized by a majority of votes cast at a meeting of shareholders by the holders of shares entitled to vote," while article 6(b) states that each holder of a record of stock "shall be entitled to one vote for each share of stock registered in his name on the books of the corporation." In addition, article 6(c) states that shareholder voting may be completed by proxy "*provided, however,* [emphasis added], that the instrument authorizing such proxy to act shall have been executed in writing by the shareholder himself, or by his attorney-in-fact thereunto duty authorized in writing" and that "such instrument shall be exhibited to the Secretary at the meeting and shall be filed with the records of the [Petitioner]." In addition, article 6(c) states that "no proxy shall be valid after the expiration of eleven months from the date of its execution, unless the persons executing it shall have specified therein the length of time it is to continue in force."

In lieu of these required actions and the documentation explicitly mandated in the Petitioner's bylaws, it submits an MOU executed between the asserted controlling partner of the foreign employer, [redacted] and [redacted] (the claimed owner of 75% of its shares). The MOU states that the Petitioner grants a "25% share" to the foreign employer who "will control the running of [the Petitioner]; further noting that [redacted] "agrees to profit sharing in [the Petitioner], but not the day-to-day running of [the Petitioner]." Likewise, the MOU provides that the Petitioner grants the foreign employer control over "strategies and plans," "the company budget," responsibility "for the establishment of system and management of the employees," as well as "making the final decisions with regard to sale and procurement of the company."

However, it is noteworthy that there is no indication or evidence, as we have discussed, that 100% of the company's shares were ever granted to [redacted] to give him the right to grant it shares and power to control the foreign employer. Regardless, consistent with the Petitioner's bylaws, there is also no indication that the submitted MOU is a proxy agreement whereby [redacted] explicitly granted to the foreign employer the right to vote on his shares related to matters of the company

consistent with article 6 of its bylaws. Further, there is no evidence to reflect that this agreement, if it did indeed grant a proxy voting powers to the foreign employer, was "exhibited to the Secretary [of the Petitioner] at the meeting and…filed with the records of the Corporation" as explicitly stated in article 6(c) of the Petitioner's bylaws or that it was "inserted in the Minute Book of the Corporation under its proper date" as reflected in article 6(d). Similarly, as required by article 6(c) of the Petitioner's bylaws, the MOU includes no indication as to how long such a proxy, if explicitly granted, was valid. As such, even if the MOU was found to be an effective proxy, it appears it would have expired within eleven months of its effectuation, consistent with article 6(d), more than one year prior to the date the petition was filed in September 2014.[2]

Therefore, the Petitioner did not submit sufficient documentation to demonstrate that it is controlled by proxy or that these proxy votes, if established, were irrevocable from the time of filing of the petition through the time of adjudication. Although we acknowledge that perhaps the foreign MOU operated as a general understanding between the interested parties as to how the Petitioner would be operated and managed, there is no indication that the foreign employer was granted actual irrevocable control over the Petitioner, consistent with its bylaws and applicable law, to vote with 75% of the shares it claims were still owned by [redacted] Therefore, the Petitioner did not establish that there was common ownership and control between it and the foreign employer as asserted.

For the foregoing reasons, the Petitioner has not established a qualifying relationship between it and the foreign employer. Therefore, the Director's revocation of the approved petition will not be disturbed.

ORDER: The appeal is dismissed.

[2] The foreign MOU was executed on July 25, 2012; as such, eleven months would equate to an expiration on approximately June 25, 2013.