U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11824059

Date: DEC. 22, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Petition for Multinational Managers or Executives

The Petitioner, a warehouse and distribution center, seeks to permanently employ the Beneficiary as a vice president of operations in the United States 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).

The Director of the Nebraska Service Center denied the petition concluding that the Petitioner did not establish that it had a qualifying relationship with the Beneficiary's former foreign employer.[1] On appeal, the Petitioner asserts that it has submitted relevant, probative, and credible evidence establishing that the Beneficiary's foreign employer controls the Chinese public company (listed on the Shanghai Stock Exchange) which in turns has a majority ownership in and controls a subsidiary company which in turn has a majority ownership in and controls the Petitioner.

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. 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

[1] The Director also concluded that because the Petitioner had not established a qualifying relationship with the Beneficiary's former foreign employer, the Petitioner had also not established the Beneficiary had one year of qualifying employment for the same employer or a subsidiary or affiliate of the foreign employer, in the three years preceding entry as a nonimmigrant. Thus, we find the sole issue to be addressed in this matter is the issue of the qualifying relationship between the Petitioner and the Beneficiary's former foreign employer.

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. ANALYSIS

Upon review of the totality of the record, for the reasons set out below, we conclude that the Petitioner has not established a qualifying relationship with the Beneficiary's former foreign employer.

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. a U.S. entity with a foreign office) or 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). The term "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. Id.

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.

In this matter, the Petitioner acknowledges that the Beneficiary's foreign employer owns 34.32 percent of [redacted] (hereinafter subsidiary A) the entity that ultimately owns and controls the Petitioner. The Petitioner asserts, however, that the foreign employer controls the Petitioner through its partial ownership and de facto control of subsidiary A.

In her decision, the Director thoroughly discussed the Petitioner's evidence and concluded that the Petitioner had not established de facto control of the Petitioner. The Director reviewed the pertinent documents submitted by the Petitioner including the translated versions of subsidiary A's Articles of Association, Abstract Annual Report for 2018, and 2019 Annual Audit Report, as well as various nominations, resolutions, and announcements for subsidiary A's board of directors. The Director found that these documents demonstrate that subsidiary A's shareholders, including the 65.68 percent not owned by the Beneficiary's foreign employer, vote on relevant matters presented and can vote as desired.

Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's decision with the comments below. See Matter of P. Singh, Attorney, 26 I&N Dec. 623 (BIA 2015) (citing Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994)); see also Chen v. INS, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly

resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

In regard to the documents in the record we considered the Petitioner's assertions on appeal that these documents state that the Beneficiary's foreign employer is the controlling shareholder of subsidiary A and that an individual who owns an 11.24 percent of the foreign employer is the actual controlling party. When reviewing the translated versions of these documents, the documents do not clearly identify shares that may be voting or non-voting. For example, the 2018 Abstract of Annual Report includes a graph, which describes the top ten shareholders[2] of subsidiary A. The remarks on this graph indicate that "[t]he biggest shareholder is not related to the other shareholders in transaction," and that "it is not known that there exists any kind of related transactions among any other public shareholders, or there is any action in a concert that needs to be disclosed" according to ruling regulations. Thus, subsidiary A's Abstract of the 2018 Annual Report does not identify any controlling entity or person that could not be removed or restricted through the vote of the shareholders. The remarks acknowledge that there are public shareholders that may or may not be acting in concert either for or against the interests of the Beneficiary's foreign employer. The record does not include any evidence that the Beneficiary's foreign employer has entered into proxy agreements or has the legal right to dictate the votes of a majority of the shareholders. Similarly, although subsidiary A's 2019 Auditor's Report states that the Beneficiary's foreign employer is the parent company and that one individual is the controlling party, the record does not include evidence supporting these statements.

We note that it does not appear that complete translations of these documents were provided. Additionally, the record does not include stock certificates, stock registers or ledgers, or other information identifying restrictions, if any, on particular types of issued shares. Thus, the record does not include evidence demonstrating that the shareholders holding 65.68 or a portion thereof are restricted from nominating a new board of directors, amending the articles of association, or performing other actions that impinge on or eliminate any control the Beneficiary's foreign employer may exercise over subsidiary A, the Petitioner's indirect parent company. Without evidence, such as agreements or restrictions on voting shares, the Petitioner cannot demonstrate that the Beneficiary's foreign employer exercises de facto control over subsidiary A. Accordingly, the record does not establish the Petitioner's qualifying relationship with the Beneficiary's foreign employer.

III. CONCLUSION

The appeal will be dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden here, and the petition will remain denied.

ORDER: The appeal is dismissed.

[2] These documents identify the Beneficiary's foreign employer as holding 34.32 percent of subsidiary A, the next nine shareholders holding 31.99 percent of subsidiary A, and unidentified shareholders owning the remaining 33.69 percent of subsidiary A.