



U.S. Citizenship  
and Immigration  
Services

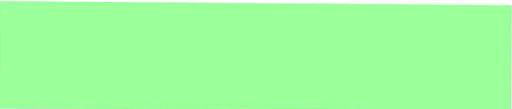
(b)(6)



DATE: **MAR 09 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,  


Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California limited liability company that is engaged in agriculture, and seeks to employ the beneficiary as its vice president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On August 23, 2011, the director denied the petition concluding that the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel disputes the director's findings and provides an appellate brief laying out the grounds for challenging the denial.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue that will be addressed in this proceeding is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the 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* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The petitioner indicated that the beneficiary's foreign employer and the petitioner are affiliates. The petitioner explained that the foreign company is owned by five individuals, each owning 20% of the company. The ownership of the petitioner consists of three individuals, each owning 33.3% of the company. The three owners of the petitioner are also three out of the five owners of the foreign company.

On August 23, 2011, the director denied the petition concluding that the petitioner did not establish a qualifying relationship with the beneficiary's foreign employer. The director noted that an affiliate is established by showing two entities that are owned and controlled by the same corporation, individual, or group of individuals. The director went on to note that in this case, the same individuals do not own both entities since the foreign company has two additional owners from the petitioner.

On appeal, counsel contends that both entities are owned and controlled by the [redacted] family which "should be treated as the same group of individuals." Counsel also states that the "three members of the [redacted] family owning [the petitioner] are the controlling members for [the foreign company], and as such they should be considered to be the owners of approximately the same proportion at [the foreign company]."

Although counsel claims that the petitioning company and the foreign company are both majority owned and controlled by [redacted] this 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").

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The evidence indicates that five individuals own the foreign company. The record further indicates that three individuals own the petitioning entity in the United States. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . ." (8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. For this reason, the petition may not be approved.

On appeal, counsel for the petitioner cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990) and *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) to assert that two companies may be affiliated even though they are not owned by the exact same individuals.

The *Sun Moon Star Advanced Power* decision is distinguishable from the facts of the present matter. First, the court relied heavily on *Matter of Tessel, Inc.* to conclude that the two entities were affiliates through indirect ownership. 17 I&N Dec. at 633. Although *Matter of Tessel* determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship, counsel has misconstrued the decision. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management . . . ." *Id.* It was further determined 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.* The facts in the present matter can be distinguished from *Matter of Tessel*, however, because no one shareholder holds a majority interest in either corporation. As later codified in 8 C.F.R. § 214.2(l)(1)(ii)(L)(1) and in part A of the definition of affiliate in 8 C.F.R. § 204.5(j)(2), the petitioner in the *Tessel* case would have qualified as an affiliate given that the beneficiary owned and controlled a majority of both entities. The record in the present matter, however, fails to demonstrate that there is a majority ownership and control, directly or indirectly, of both companies by any one person.

Second, although *Sun Moon Star Advanced Power, Inc.* stated that "affiliation should not depend [on] whether the individual owners are absolutely identical," this statement was made within the context of direct or indirect ownership, the central issue in that case. *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. at 1380. In other words, it appears the court meant that the exact same individuals should not be required to own both companies, considering that some individuals may only have an indirect ownership of one or both companies. This does not mean, however, that the ownership of both companies should not be the same when direct as well as indirect ownership has been considered. With the present matter, the petitioner has failed to demonstrate that two shareholders of the foreign entity, [REDACTED] continued to own, whether directly or indirectly, any part of the United States entity. Consequently, the petitioner did not meet the requirements of 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) or its counterpart, part B of the definition of affiliate in 8 C.F.R. § 204.5(j)(2).

Moreover, while 8 C.F.R. § 204.5(j)(2) had not yet been codified, the relevant, corresponding section of the definition of affiliate at the time of the *Sun Moon Star Advanced Power, Inc.* decision read, "Affiliate means . . . 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)(1)(ii)(L) (1990). The court in *Sun Moon Star Advanced Power, Inc.*, however, did not directly address this regulation in its decision. See *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. at 1373. Instead, it only discussed an apparent mistake in the August 20, 1987 memorandum's interpretation of the regulation, in which the then Immigration and Naturalization Service (INS) added the word "exact" to describe the ownership required. *Id.* at 1376. When the word "exact" is added, it implies that the ownership must be "absolutely identical" and that indirect ownership will not be permitted or even considered. See *id.* at 1376, 1380. Specifically, the court in *Sun Moon Star Advanced Power, Inc.* stated that, based on the memorandum's interpretation of the regulation, "a determination of whether companies are affiliates depends upon finding that the companies are owned by the *exact* same individuals and excludes the possibility of indirect ownership of the affiliates by these individuals through a third company." *Id.* at 1376 (emphasis in original). Thus, as the word "exact" does not appear in the regulations, the court concluded that

indirect ownership should also be considered when determining whether the same individuals own both entities. At the same time, by not directly addressing the regulation, the court implied that it did not have an issue with the plain meaning of affiliate in 8 C.F.R. § 214.2(l)(1)(ii)(L) and its requirement that the "same group of individuals" own and control, whether directly or indirectly, the same approximate share or proportion of each entity.

Moreover, counsel states on appeal that the petitioner is owned by a total of three individuals and the foreign entity is owned by a total of five individuals. Absent documentary evidence, such as voting proxies or agreements to vote in concert so as to establish a controlling interest, this admission is sufficient in itself for the AAO to conclude that the petitioner is not an affiliate of the foreign entity. To establish eligibility in this situation, the burden is on the petitioner to show that the foreign employer and the petitioning entity 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. 1982).

On appeal, counsel contends that the three owners of the petitioner are also the only individuals of the foreign company that can issue checks and transfer assets of the foreign company. However, this information is not sufficient evidence to establish a proxy vote agreement. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Beyond the decision of the director, the record lacks substantive job descriptions establishing what job duties the beneficiary performed during her employment abroad. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds of ineligibility discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.