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U.S. Citizenship
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File: WAC 04 117 54178 Office: CALIFORNIA SERVICE CENTER Date: **SEP 02 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to employ the beneficiary temporarily in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. petitioner, a corporation organized in the State of Arizona that is described as a restaurant, seeks to employ the beneficiary as its executive manager. The petitioner claims that it is the affiliate of [REDACTED] located in Regina, Saskatchewan, Canada.

The director denied the petition, determining that the petitioner had failed to establish that the petitioner and the organization which employed the beneficiary in Canada were qualifying organizations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner submits a letter and additional evidence which seeks to clarify the petitioner's relationship with the foreign entity.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

Form I-129 identifies the foreign entity as "[REDACTED]" and claims that it is doing business as "[REDACTED]". However, throughout the petition, the petitioner refers to "Western [REDACTED]" as the foreign parent with whom the claimed qualifying relationship exists. The nature of the relationship between "[REDACTED]" and "[REDACTED] Q Chicken (1979) Ltd." is not fully explained by the petitioner. It appears from the evidence submitted that "[REDACTED] (1979) Ltd." is the actual parent company of "[REDACTED]" which in turn employed the beneficiary under the trade name of "[REDACTED]". The petitioner, however, has not sufficiently explained this relationship. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.
- (K) "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.
- (L) "Affiliate" means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) 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, or
- (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the Canadian entity and the U.S. entity are affiliates. Specifically, the petitioner asserts that the Bonis family owns 51% of the Canadian company and 51% of [REDACTED] Management, the management company which controls the U.S. entity, and thus concludes that these entities meet the evidentiary requirements for a qualifying relationship. The record indicates that the petitioner, a limited partnership, has 1 general partner and 11 limited partners.

The director found that the initial evidence submitted with the petition to be insufficient to qualify the petitioner for the benefit sought, and consequently issued a request for evidence on March 29, 2004. The director requested evidence that established the existence of a qualifying relationship between the U.S. and Canadian entities, and specifically required the petitioner to submit evidence of the ownership of both companies in the form of stock certificates, money transfer records, and meeting minutes. On April 27, 2004, counsel for the petitioner submitted a detailed response to the director's request which was accompanied by numerous corporate documents for the U.S. and Canadian companies, as well as additional documentary evidence in support of the claimed affiliation.

Upon review of the evidence submitted, the director concluded that the U.S. and Canadian entities did not have common ownership and control as required by the regulations. The director subsequently concluded that the petitioner's claim of affiliation with the foreign entity was invalid, and as a result, the petition was denied on May 12, 2004.

The petitioner appealed the decision, asserting that the current ownership structure was in transition at the filing of the petition and that the current ownership interests clearly establish a qualifying relationship between the companies. Counsel submits new documentation demonstrating the revised and current ownership structure in support of this assertion. The AAO will first examine the record of proceeding and the director's decision prior to examining the petitioner's claims on appeal.

The 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 for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, 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*, 19 I&N Dec. at 595.

Upon review of the record of proceeding, the petitioner has not established that it has the required qualifying relationship with the Canadian entity.

In this case, the petitioner has provided documentary evidence outlining the shareholder interests in the U.S. and foreign entities and has supplemented this evidence with explanatory statements which discuss the percentages of shareholder ownership and, more specifically, the allegation that the entities are qualifying organizations by the foreign entity's indirect ownership of the petitioner through a management company.

The documentation in the record prior to adjudication demonstrated that the foreign entity, as set forth in a profile report dated January 19, 2004, was owned as follows:

Name	# Shares	Class
[REDACTED]	25	COMD
[REDACTED]	1839	Class G
[REDACTED]	10	COME
[REDACTED]	25	COMC
[REDACTED]	20352	Class G ²
[REDACTED]	31	COMA
[REDACTED]	30	COMB
Total Shares Issued:	22312 ³	

Based on this list of shareholder interests, it can be preliminarily determined that the shareholders own approximately the following percentages of the foreign entity:

² According to the documentation submitted by the petitioner, Class G shares are non-voting shares. Thus, while the beneficiary may own 91% of all of the shares issued, his percentage of control over the U.S. entity is much less.

³ The AAO notes that the director's decision relied on the shareholder interests set forth in the Annual Return Confirmation for the foreign entity dated September 30, 1998. As this document was prepared several years prior to the January 19, 2004 profile, it is clear that since that time, additional shares were issued and changes in ownership took place. As a result, the AAO will rely on the January 19, 2004 statement provided by the petitioner in response to the request for evidence as a means of determining the foreign entity's ownership.

[REDACTED]	8.0%
[REDACTED]	0.4%
Beneficiary:	91.0%
[REDACTED]	0.13%
[REDACTED]	0.13%

However, since Class G shares are non-voting shares, a more accurate representation of the foreign entity's ownership and control is as follows:

Name	# Shares	Percentage Owned
[REDACTED]	25	20.66%
[REDACTED]	10	8.26%
Beneficiary:	25	20.66%
[REDACTED]	31	25.62%
[REDACTED]	30	24.80%

The U.S. petitioner is a limited partnership. Its ownership structure, as set forth in Schedule I to the Limited Partnership Agreement, demonstrates that it is owned by one general partner and eleven limited partners. Ownership is as follows:

General Partner	% Interest
[REDACTED]	1%
Limited Partners	% Interest
[REDACTED]	12.01%
[REDACTED]	12.5%
[REDACTED]	12.5%
Beneficiary	11.99%
[REDACTED]	12.5%
[REDACTED]	12.5%
[REDACTED]	12.5%
[REDACTED]	3.125%

Upon review of the record of proceeding, the AAO concurs with the director's finding that the U.S. and Canadian entities are not affiliates as defined by the regulation at 8 C.F.R. §214.2(l)(1)(ii)(L), since they are not owned and controlled by the same parent company or by the same group of individuals, with each individual owning approximately the same share or proportion of each entity. As the above lists clearly demonstrate, there is no common parent company which owns both entities, and the individuals who own each of these companies are almost entirely different. The only common owner listed as having an interest in both the foreign parent and the U.S. petitioner is the beneficiary.

The AAO notes that prior to adjudication of this matter, counsel for the petitioner continually asserted that the foreign entity and the U.S. entity were affiliates based on the fact that both companies were "owned and controlled in the same proportional share (51%) by the [beneficiary's] family." Specifically, counsel asserted both in the initial petition and in response to the request for evidence that the 51% ownership was broken down as follows:

Foreign entity: Jim Bonis (26%) and the Beneficiary (25%)

U.S. petitioner: Jim Bonis (25.5%) and the Beneficiary (25.5%)

This assertion is unacceptable for two reasons. First, the assertions are unsupported by corporate documentation which verifies counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, and most importantly, the assertions of counsel are directly contradicted by the corporate documentation in the record. The foreign entity's profile of January 19, 2004 clearly lists its shareholders and indicates that in terms of ownership, the beneficiary owns 91% of the company, whereas [REDACTED] owns only 0.13%. When considering that the Class G shares are non-voting stock, then the beneficiary and [REDACTED] only respectively control 20.66% and 25.62% of the U.S. entity for a total interest of 46.28%; not 51% as claimed by the petitioner. With regard to the U.S. petitioner, the documentation submitted indicates that the beneficiary is a limited partner with an 11.99% direct interest, whereas [REDACTED] is not listed as having any direct claim of ownership. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If Citizenship and Immigration Services (CIS) fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The definition of affiliate requires that two entities be owned and controlled by the same parent or individual, or owned and controlled by the same group of individuals who own approximately the same amount of shares in each entity. See 8 C.F.R. § 214.2(l)(1)(ii)(L). The record clearly indicates that at the time of the filing of the petition, the petitioning enterprise did not maintain a qualifying "affiliate" relationship with the overseas company. The U.S. entity, a limited partnership, lists one general partner and eleven limited partners with varying proportions of ownership interests, whereas the beneficiary owned a majority interest in the foreign entity along with four other persons not sharing an interest in the U.S. entity. By simply reviewing the ownership structure of the two entities in context of the regulatory definition, it is impossible to find that the two companies were affiliates at the time of the petition's filing.

The AAO notes that counsel simultaneously claims that a qualifying relationship exists through the foreign entity's indirect ownership of the petitioner through [REDACTED]. Although the

petitioner's primary claim is that the companies are affiliates, the AAO will examine the ownership structures of these companies to determine if a parent-subsidary relationship exists based on the foreign entity's claim of indirect ownership. As previously stated, "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. §214.2(l)(1)(ii)(K).

The petitioner and counsel claim that the foreign entity owns the U.S. entity through Western Pizza Management, which manages and operates the petitioner. The AAO notes that Article XV of the Limited Partnership Agreement for the U.S. petitioner designates the exclusive authority to manage the U.S. entity to [REDACTED] who is the sole general partner. Before the elements of ownership and control of the U.S. entity by [REDACTED] Management can be examined, the AAO must first examine the threshold question of whether the foreign entity has demonstrated that it in fact owns and controls Western Pizza Management.

The petitioner submitted the Operating Agreement for [REDACTED] a limited liability company. Exhibit A of the agreement lists the members of [REDACTED] as follows:

[REDACTED]	25.5%
The Beneficiary:	25.5%
[REDACTED]	49.0%

Clearly, the foreign entity is not listed as a member with an ownership interest in the management company, and therefore does not maintain a parent-subsidary relationship with the management company. Although the petitioner apparently is alleging that the foreign entity owns the management company through the 51% ownership of two of its shareholders, [REDACTED] and the beneficiary, this allegation is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Since the foreign entity itself is not listed as a member of the management company, it cannot be concluded that a parent-subsidary relationship exists between the foreign entity and the management company. As a result, there is no indirect exercise of ownership and control by the foreign entity over the petitioner through the management company.

A final review of the ownership structure also shows that an affiliate relationship likewise does not exist between the foreign entity and the management company. As previously stated, the definition of affiliate requires that two entities be owned and controlled by the same parent or individual, or owned and controlled by the same group of individuals who own approximately the same amount of shares in each entity. See 8 C.F.R. § 214.2(l)(1)(ii)(L). The record clearly indicates in this matter that the overseas company and the management company do not have the same group of individuals owning approximately the same amount of shares in each entity.

Moreover, as recognized in *Matter of Hughes*, where each of the individuals own a small amount of stock in the two companies without individually controlling the companies, the individuals control only if their shares

are legally consolidated by a proxy agreement that guarantees that one individual will vote the shares in concert. 18 I&N Dec. 289, 293 (Comm. 1982) (discussing proxy votes). In this matter, four individuals owning approximately 82% of the United States company may or may not vote in concert to retain "de jure" or 51% control. Likewise, these same individuals may or may not vote in concert to retain "de jure" control of the foreign entity. Even if the petitioner were to argue that the four individuals would vote in concert due to some familial relationship, the regulations do not recognize a familial relationship as the basis for a qualifying relationship or as a means of legally consolidating the shares of individual owners. Thus, the companies are not affiliates as the petitioner has not established that the same individuals control both companies.

On appeal, counsel alleges that at the time of the petition's filing and during adjudication, the ownership of the companies was in transition. Counsel claims that newly-submitted corporate documentation now establishes that since the petition's filing, the petitioner and the foreign entity have undergone a change in ownership which now satisfies the regulatory requirements of a qualifying relationship. This evidence, however, will not be considered. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this case, the petition was filed on March 19, 2004. The fact that the petitioner relies on a change in ownership that allegedly took place on June 10, 2004 is of no relevance to these proceedings, since such an interest was acquired several months after the filing of the petition.

Based on the evidence presented, it is concluded that the petitioner and the Canadian entity were not affiliates as of the filing date of this petition, and thus did not have a qualifying relationship as required by the regulations.

Beyond the decision of the director, the AAO notes some additional issues that were not directly addressed prior to adjudication. The AAO notes that the corporate documentation in the record indicates that as of the time of filing, the beneficiary owned 91% of the foreign entity. Furthermore, although not considered, the evidence submitted by counsel on appeal was intended to show that the beneficiary has since acquired sole ownership interests in the U.S. entity. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(i)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.