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U.S. Citizenship and Immigration Services

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[redacted]

DEC 07 2004

File: SRC 03 034 52331 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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, Texas 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 filed this nonimmigrant petition seeking to extend the employment of its administrative manager 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 petitioner is a limited liability company organized in the State of Florida, and is engaged in the import and export of construction materials. The U.S. petitioner claims that it is the subsidiary of American Tile, C.A., located in Aragua, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that a qualifying relationship existed between the U.S. and foreign entities.

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 asserts that the director's decision was erroneous, and that a qualifying relationship has been established between the U.S. and the foreign entity. In support of this assertion, the petitioner submits a brief and additional evidence.

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.

(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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether a qualifying relationship exists between the U.S. and foreign entities. The regulation at 8 C.F.R § 214.2(l)(1)(ii)(G) 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.

The regulation at 8 C.F.R. §214.2(l)(1)(ii)(I) provides that the term *parent* means a firm, corporation, or other legal entity which has subsidiaries.

The regulation at 8 C.F.R. §214.2(l)(1)(ii)(J) provides that the term *branch* means an operating division or office of the same organization housed in a different location.

The regulation at 8 C.F.R. §214.2(l)(1)(ii)(K) provides that 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.

Finally, the regulation at 8 C.F.R. §214.2(l)(1)(ii)(L) provides that the term *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.

The petitioner alleged that the U.S. entity is a subsidiary of the foreign entity. The initial petition included evidence that the foreign entity was owned as follows:

[redacted]	40%
	40%
Beneficiary:	10%
[redacted]	10%

With respect to the U.S. entity, the petitioner provided evidence confirming the following breakdown of ownership:

[redacted]	40%
	40%
Beneficiary:	10%
[redacted]	10%

The director found this evidence insufficient to establish that a qualifying relationship existed between the U.S. and foreign entities. As a result, a request for evidence was issued on November 27, 2002, which requested additional documentation clarifying the ownership of the two entities and their qualifying relationship. Specifically, the director noted that there appeared to be different ownership of the foreign and U.S. entities.

In a response dated December 6, 2002, the petitioner, through counsel, stated that "the owners of 90% of [redacted], the foreign parent company, own and control [a] 90% interest of the U.S. entity."[1] Counsel provided a more detailed breakdown of the ownership interests of the parties in the foreign entity, noting that [redacted] owned 144.000 shares, [redacted] wned 144.000 shares, the beneficiary owned 36.000 shares, and [redacted] wned 36.000 shares. In addition, counsel provided a Representation Agreement on behalf of the foreign entity dated December 6, 2002, which stated that [redacted] and the beneficiary "represent the shareholders assembly and the decisions are made in one vote." Counsel also restated the percentages of ownership for the U.S. entity that were set forth previously in this decision, and resubmitted copies of its Articles of Organization, Operating Agreement, Membership Certificates, and Minutes of the Members Meeting. Counsel concluded that this documentation established that the same persons owned 90% of the foreign entity and 90% of the U.S. entity, thereby satisfying the requirements under 8 C.F.R. § 214.2(l)(ii)(L)*(2)*.

The director found this assertion to be unpersuasive, and subsequently denied the petition on December 23, 2002. In her decision, the director simply stated that an affiliate relationship was not established since the ownership between the entities is different in that one of the owners out of the four owners listed for each entity is not the same.

On appeal, counsel for the petitioner provides an extensive overview of the legislative history governing the treatment of the affiliate relationship with regard to qualifying organizations, and additionally discusses the various precedent decisions rendered with regard to this issue. Specifically, counsel provides a sixteen-page brief in support of the petitioner's appeal, yet it is not until the last paragraph on page fifteen that counsel incorporates the facts of the current petition into his discussion. Specifically, counsel alleges that the requirement that the exact same individuals own and control both companies is not required in light of the plain meaning of the statutes and case law governing this issue, and therefore, he concludes that the U.S. and foreign entities have a qualifying relationship "under the Act, Congressional Intent, the Regulations, or Legal Precedent." The AAO, however, is not persuaded.

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 International*, 19 I&N Dec. at 595.

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[1] Counsel continued to allege that the relationship between the two companies is that of parent-subsidiary. In examining the ownership composition of the two entities, however, it is clear that the appropriate analysis in this case is whether the two companies are affiliates, and consequently, the AAO will examine the qualifying relationship of these entities in accordance with the definition of affiliate.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As control is a critical element of this visa classification, the director may reasonably inquire into the means by which control was acquired. In this case, the director found the initial evidence provided to be insufficient to establish that the entities maintained an affiliate relationship, and requested that the petitioner provide additional evidence that the same ownership and control exists between the U.S. and the foreign entity. In response to this request, counsel for the petitioner submitted a translated copy of the Articles of Incorporation for the foreign entity, copies of the Articles of Organization, Operational Agreement, Minutes of Members Meeting, and Membership Certificates for the U.S. entity. In addition, counsel provided a breakdown of the percentage of ownership held by the various individuals in each company.

In this case the U.S. entity is owned by four individuals, and the foreign entity is owned by four individuals. Three of the individuals share a common interest in both entities, which, when combined, constitutes a majority interest in each entity. If two legal entities are owned *and* controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity, then the two are considered affiliates. *See* 8 C.F.R. §214.2(l)(1)(ii)(L)(2). (Emphasis added). The elements of ownership and control, therefore, are not mutually exclusive. In this case, the element of control has not been established. Although when combined, the shares of the three common owners establish a majority interest in both the foreign entity and the U.S. entity, the record lacks acceptable evidence establishing the voting structure or management hierarchy of either entity.

Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Although counsel provided a copy of a Representation Agreement on behalf of the foreign entity, which provided that the beneficiary, [redacted] would vote together as one unit, this document is not acceptable as evidence of their control of the foreign entity. First, the document is dated December 6, 2002, which is nearly one month after the filing of the extension request.[2] The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). The voting agreement between these individuals was clearly manufactured in response to the director's request for additional evidence, and was intended to overcome a deficiency in the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In an attempt to distinguish the petitioner's relationship with the foreign entity from other failed affilation claims, counsel for the petitioner incorporates numerous precedent decisions addressing this issue. Citing *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), counsel asserts that two companies may be affiliated even though they are not owned by the exact same individuals. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a

[2] The petition to extend the beneficiary's stay was filed on November 15, 2002.

holding company. The decision further noted that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. *See* 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown 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). Although counsel alleges that when their shares are combined, the beneficiary, [redacted] own and control 90% of the U.S. entity, there is no documentation regarding voting agreements or trusts that confirm that these three individuals will control the company. The AAO cannot presume, based solely on the contentions of counsel, that these individuals will consistently vote as a unit. In fact, such a presumption ignores the possibility that one of the members with a 40% interest may vote differently from the other member with a 40% interest. In light of the possibility that the two remaining members, each with a 10% interest, could divide their votes between the two members for a ratio of 50% to 50%, or combine together for a ratio of 60% to 40%, it is not established that the same individuals will clearly not maintain consistent control of each entity as contemplated by the regulatory definition. Therefore, it cannot be concluded that the same group of individuals own and *control* approximately the same share or proportion of each entity. There is no evidence that a voting agreement exists within the U.S. entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also asserts on appeal that *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship. Counsel, however, 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 . . . ." 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.* at 633. The facts in the present matter can be distinguished from *Matter of Tessel* because no one shareholder holds a majority interest in either corporation. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. 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. Without documentary evidence to support the claim of control, the assertions of counsel will not satisfy the petitioner's burden of proof. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Accordingly, the petitioner has not established that a qualifying relationship exists between the U.S. and the foreign entities, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the AAO notes some significant deficiencies in the record of proceeding that were not addressed by the director. First, the record does not contain sufficient evidence that establishes that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, in the petitioner's business plan dated November 6, 2002, the beneficiary's duties as administrative manager are described as: (1) select, contract, train, and evaluate personnel; (2) lead acts and politics in the market and sales; and (3) lead and supervise the operations in the financial area. These duties include non-managerial tasks. Since the record does not contain independent evidence to corroborate the claim that the beneficiary will be working in a capacity that is primarily managerial or executive, the petition must be denied for this additional reason.

Additionally, the record contains some inconsistencies and unexplained omissions that raise questions regarding the legitimacy of the evidence submitted. The Articles of Incorporation and excerpt from the Mercantile Registry for the foreign entity, as translated, indicate that 360.000 shares were issued in the following manner: 144.000, 144.000, 36.000, and 36.000. However, the English translation of this document states, in numerical form, that there were 560.000 shares issued, and they were distributed as follows: 224.000, 224.000, 56.000, and 56.000. This inconsistency leads the AAO to question the legitimacy of the translation, and therefore challenges the legitimacy of the petitioner's claims. 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). In addition, the Membership Certificates provided do not contain the percentage of ownership for each apparent member of the U.S. entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

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.