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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

File: SRC 04 098 52928 Office: TEXAS SERVICE CENTER Date: JUN 2 9 2004

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

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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 president 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 corporation organized in the State of Florida that is engaged in the business of pharmaceutical sales, importation, and distribution. The petitioner claims that it is an affiliate of Industrias Intercaps de Venezuela, located in Caracas, 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, determining that the petitioner had failed to establish that the petitioner and the organization which employed the beneficiary in Venezuela are 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, 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.
>
> (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.
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> (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 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 Venezuelan entity and the U.S. entity are affiliates. Specifically, the petitioner asserts that both entities are indirectly owned and controlled by the same group of individuals through intermediary companies. With the initial petition, the petitioner provided a large number of documents in accordance with the evidentiary requirements set forth in the regulations. Since these documents are part of the record of proceeding in this case, the AAO will not individually list them herein.

The director found this initial evidence to be insufficient to qualify the petitioner for the benefit sought, and consequently issued a request for evidence on March 2, 2004. In the request, the director specifically required the petitioner to submit evidence that definitively established its qualifying relationship with the Venezuelan company.[1] On March 29, 2004, the petitioner submitted a detailed response to the director's request which was accompanied by numerous corporate documents for the U.S. and Venezuelan companies and the intermediary companies through which ownership was alleged, as well as additional documentary evidence in support of the claimed affiliation.

Upon review of the evidence submitted, the director concluded that the record owners of both the U.S. and Venezuelan entities did not own the same share or proportion of both entities 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 April 2, 2004.

The petitioner appealed the decision, asserting that the director misunderstood the relationship between the U.S. and Venezuelan entities. In support of this contention, the petitioner provides a written statement

[1] The request for evidence also required the petitioner to submit additional evidence with regard to the current financial status of the U.S. entity as well as evidence that both the U.S. and Venezuelan entities were doing business as required by the regulations. Since the director did not base his denial on these issues, there is no need for the AAO to address these issues in examining this matter.

accompanied by additional documentary evidence. 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 Venezuelan 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 summary charts for each entity, which display the percentages of shareholder ownership. Specifically, the evidence shows that the U.S. entity is owned by the following three corporations:

(1) Automotriz 2424 C.A., with a 34% interest;
(2) Unimed Pharmaceuticals, Inc. with a 33% interest; and
(3) Technopharma International, S.A., with a 33% interest

With regard to the Venezuelan entity, the petitioner submits evidence that this entity is owned by five corporations. The composition of ownership is as follows:

(1) Inversora 13.840 C.A., with a 34% interest;
(2) Unimed Pharmaceutical, Inc., with a 24.5% interest;
(3) Technopharma International, S.A., with a 24.5% interest;
(4) Inversiones Industriales Minski Hermanos & CIA. S. en C., with an 8.5% interest; and
(5) Steritex, C.A., with an 8.5% interest.

Upon initial review of the petition, the director found this evidence to be insufficient to warrant a conclusion that the U.S. and Venezuelan entities were affiliates. In response to the director's request for additional evidence, which included a specific request for documentation establishing the affiliation between the two companies, counsel for the petitioner submitted summary charts and stock certificates for the U.S. and foreign entities, but failed to include explanatory information in support thereof. The director found that on their face, the documents submitted showed that the ownership of the two companies was disproportionately distributed among numerous corporate entities.

Upon review of the record of proceeding, the AAO concurs with the director's finding that the U.S. and Venezuelan 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.

On appeal, counsel for the petitioner claims that the director's analysis in this case should not have focused on the corporate owners of record of the U.S. and Venezuelan entities, but rather on the individuals that control those companies. Counsel explains that the same four individuals, [redacted] his wife, and two children, own Automotriz, 2424 C.A. ("Automotriz"), the largest percentage shareholder of the U.S. entity with a 34% interest, and Inversora 13.840 C.A. ("Inversora"), the largest percentage shareholder of the Venezuelan entity with a 34% interest. Counsel further states that the ownership interests of the four individuals are proportionately equal in both companies. Finally, in further support of this assertion, counsel provides more detailed summary charts for the U.S. and Venezuelan entities which display the shareholder breakdown of all of the intermediary companies that have ownership interests in the U.S. and foreign entities.

Counsel's main contention, therefore, is that since the same group of individuals, namel[redacted]his wife, and two children, own proportionate shares in the two companies that are the largest percentage shareholders of the U.S. and foreign entities, affiliation has therefore been established. The AAO disagrees.

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 the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The U.S. entity is owned by three corporate entities, none of which is a majority shareholder holding an interest of 51% or more. The foreign entity is owned by five corporations, and like its U.S. counterpart, it also does not have a majority shareholder. 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 are affiliates.

Clearly, the two entities are not owned and controlled by the same parent or individual, as set forth in 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*). The summary charts submitted by the petitioner demonstrate without question that multiple corporations own each entity, thereby negating the petitioner's eligibility to satisfy the definition of affiliate under this section. In addition, the two entities are not "owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity . . . ." *Id.* § 214.2(l)(1)(ii)(L)(*2*). The "individuals" who own the U.S. and foreign entities are corporate entities, and the summary charts provided by the petitioner demonstrate that the U.S. entity is owned by three corporations, whereas the foreign entity is owned by five corporations.[2] While both Unimed and Technopharma own a percentage of both the U.S. and foreign entities, the fact remains that the claimed affiliates are owned by two different groups of corporations, and therefore fails to meet the definition of "affiliate" under this section. Although a third definition of "affiliate" exists in the regulations, it applies solely to partnership relationships in the United States and thus is not applicable here. *See* 8 C.F.R. §214.2(l)(1)(ii)(L)(*3*).

Counsel, however, alleges that this limited review of only the first tier of ownership interests is inappropriate. Specifically, counsel urges Citizenship and Immigration Services (CIS) to look deeper into the ownership hierarchy to the *actual individuals* who own the intermediary corporations. Counsel claims that as individual owners of Inversora and Automotriz, the largest percentage shareholders of the U.S. and Venezuelan entities, the Nash family indirectly owns these entities. Counsel's principal argument, therefore, is that since the Nash

[2] Although the regulation specifically refers to "the same group of individuals," the AAO notes that corporations are "juristic persons." *Black's Law Dictionary* 341 (West 1999).

family owns equally proportionate shares in each of the two intermediary companies, the definition of "affiliate" has been satisfied

Counsel is correct in stating that the regulations allow for the consideration of indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service (now CIS) amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. *See* 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). However, despite the amended regulation, 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. Here, even though the family members have an indirect ownership interest in Inversora and Automotriz, this interest does not give them either majority ownership or control over the claimed affiliates.

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). The petitioner has not satisfied the crucial requirement of control in this case. First, there is no evidence that the corporate entities that own both companies have entered into an agreement regarding voting shares. Second, although Inversora and Automotriz both own 34% of the U.S. and foreign entities, this fact alone does not establish *control* over these entities. While both Inversora and Automotriz clearly own the largest amount of shares in the respective entities, there is no evidence to suggest that the two companies actually maintain "de facto" control over the claimed affiliates despite owning less than a majority of the issued stock. For example, there is nothing to prevent the remaining owners from pooling their voting interests and thus overpowering the parties' 34% interests. 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 actual control of the entity. *See Matter of Siemens*, 19 I&N Dec. at 365. Without full disclosure of all relevant documents, CIS is unable to determine the element of control. Since the petitioner failed to provide any evidence of agreements between the corporate shareholders, it is impossible to conclude that the corporations who owned a 34% interest in both the U.S. and foreign entities through the above-named intermediary companies actually exercised control over these entities.

In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates. Although counsel claims that the U.S. petitioner and claimed foreign affiliate are majority owned by Carlos Nash, his wife, and two children, this familial relationship does not constitute a qualifying relationship under the regulations. For these reasons, the petition may not be approved.

In addition to the evidence previously discussed, counsel has also submitted updated corporate documents alleging that the Nash family acquired a 100% interest, albeit indirectly, in both the U.S. petitioner and the claimed foreign affiliate on March 17, 2004. Specifically, counsel submits evidence that Inversora has acquired a 100% interest in the claimed foreign affiliate, and that Automotriz has acquired a 100% interest in the U.S. petitioner. Counsel further provides documentation that [redacted] is wife, and two children hold 100% of the shares of Inversora, and that they share ownership of Automotriz with two other corporations, namely, Inversora 15466 C.A. and Inversora 02051969 C.A. Finally, the documentation provided demonstrates that the Nash children subsequently own a 100% interest in both Inversora 15466 C.A. and Inversora 02051969 C.A. Upon review of this new ownership structure, the AAO has determined that the Nash family, referred to for simplicity purposes as A, B, C, and D, own the following percentages of each entity:

Automotriz:	A:	<1%	Inversora:	A:	<1%
	B:	<1%		B:	<1%
	C:	49%		C:	49%
	D:	49%		D:	49%

Although the newly-submitted evidence establishes a qualifying relationship between the U.S. petitioner and the claimed foreign affiliate, the evidence cannot establish the petitioner's eligibility in this proceeding. 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 February 23, 2004. The fact that the petitioner relies on a change in ownership that took place on March 17, 2004 is of no relevance to these proceedings, since such an interest was acquired several weeks after the filing of the petition. However, should the petitioner elect to file a new petition based on this ownership structure, the petitioner would have a qualifying relationship with the claimed foreign affiliate.

Based on the evidence presented, it is concluded that the petitioner and the Venezuelan 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. First, the petitioner claims that the beneficiary will be employed in a primarily managerial capacity while in the United States. The record of proceeding, however, fails to establish that the position is primarily managerial. The petitioner submitted a general overview of the beneficiary's supervisory duties, but failed to provide details about the manner in which he would conduct these duties or the amount of time he would spend performing them on a daily basis. This vague description of the beneficiary's duties does not satisfy the regulatory requirements. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava,* 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir 1990). The petitioner merely provides brief statements regarding these duties, such as "sign all checks and financial instruments," "hire and fire personnel," and "supervise marketing, sales, and customer relations." Since the evidence in the record indicates that there are no more than two other besides the beneficiary who currently work for the U.S. entity, it is unclear how the beneficiary is operating on a daily basis in a primarily managerial capacity. The petitioner must establish that the employees who are subordinate to the beneficiary are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Additionally, the actual nature of the duties does not establish that the beneficiary's position is primarily managerial. Generally, signing checks is considered to be an administrative function. In addition, the petitioner's claim that the beneficiary will supervise sales and customer relations when there are only two subordinate employees working below him suggests that the beneficiary is personally responsible for the performance of at least a portion of these non-managerial tasks. Since the petitioner has not provided a detailed breakdown of the time the beneficiary devotes to all of his required duties, it is unfeasible to conclude, based on the record of proceeding, that the beneficiary's continued employment in the United States will be in a capacity that is primarily managerial.

Furthermore, the petitioner has not established that the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification needs to submit only a simple statement of

facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). Since the petitioner has not clearly indicated that the beneficiary's stay is intended to be temporary, the facts in this matter warrant further review of this issue should the petitioner choose to further pursue this petition.

Finally, a discrepancy exists in the record with regard to the U.S. entity's place of business. In the first petition for a new office, the petitioner was required to demonstrate that it had acquired sufficient physical premises to commence doing business. 8 C.F.R. § 214.2(l)(3)(v)(A). The lease agreement submitted by the petitioner indicates that its primary business location is located at [redacted] However, all of the tax returns filed by the petitioner during this period (both quarterly and annually) indicate a formal address of [redacted] The AAO notes that the record contains evidence that the lease agreement was in effect during this time period from January 2003 through July 2003 with a subsequent renewal through July 2004, yet the petitioner fails to adopt this address exclusively for use in commerce.

While not addressed by the director as a basis for denying the petition, such unexplained inconsistencies in the record can cast doubt on the credibility of the documentary evidence provided in these proceedings. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." While not a basis for the dismissal of this appeal, the petitioner is cautioned to clarify these inconsistencies should further action be taken in this matter, because 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. *See id.* at 591.

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.