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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 03 088 51061 Office: TEXAS SERVICE CENTER Date: NOV 20 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)

ON 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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 general manager as an L-1A nonimmigrant intracompany transferee pursuant to § 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 import, export, servicing, and supply of aeronautical parts. The petitioner claims on the nonimmigrant petition that it is the subsidiary of the beneficiary's foreign employer, located in Bogota, Columbia. The petitioner now seeks to employ the beneficiary for an additional three years.

The director denied the petition, noting that only two of the foreign company's five shareholders also have an ownership interest in the U.S. entity. The director stated that this was insufficient to establish a qualifying relationship between the two organizations.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that the requisite affiliate relationship exists between the foreign and U.S. entities. Counsel submits a lengthy brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 issue in this proceeding is whether the petitioner has demonstrated the existence of a qualifying relationship between the foreign and U.S. entities as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A).

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means 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.

* * *

(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.

The petitioner stated on the nonimmigrant petition that the U.S. corporation is a subsidiary of the beneficiary's foreign employer, as "[t]he foreign entity, through its shareholders, controls the U.S. entity." The petitioner outlined the following ownership interests for each corporation:

Beneficiary's Foreign Employer:

[redacted]	40.13%
	11.67%
	11.67%
	11.67%
	24.86%

Petitioning Organization:

[redacted]	50%
	50%

In a January 20, 2003 letter submitted by counsel with the nonimmigrant petition, counsel explained that the beneficiary's foreign employer is the parent company of the petitioning organization "due to the fact that the principal shareholders of [the beneficiary's foreign employer] (owning 64.99%) owns [sic]·100% of the U.S. entity." As additional evidence, counsel submitted the foreign company's most recent "Certificate of Existence and Legal Representation," the petitioner's articles of incorporation, minutes from the petitioner's June 1998 shareholders meeting, and stock certificates issued by the U.S. corporation.

In a request for evidence issued on February 12, 2003, the director noted that the record indicated different ownership interests for the foreign and U.S. entities. The director outlined the regulatory requirements for establishing a qualifying relationship, and asked that the petitioner provide evidence that a qualifying relationship exists.

In a response dated March 7, 2003, counsel again outlined the companies' ownership interests. Counsel stated that [redacted] collectively own 64.99% of the foreign corporation, and own 50% each of the petitioning organization. With regard to control over the organizations, counsel provided a certification letter, which counsel refers to as a "voting trust," executed on February 26,

2003 by [redacted] Counsel stated that "[t]he voting trust clearly indicates that the parties will vote in block, and further provides that [redacted] shall have the final decision to be adopted with their favorable vote." Counsel further provided the following:

> Given the foreign company is 64.99% owned by [redacted] it is clear that their decisions within the legal structure of the foreign company regarding the U.S. company are made by the majority of the shareholders of the foreign entity with a total of 100% of the U.S. company. Furthermore, [redacted] and future ability to authorize capital outlays for the US company (as 64.99% owners of the foreign company), it is clear that they control the U.S. company [sic]. Finally, when you couple this implied authority with his actual authority (as shown in the legally binding voting trust agreement), it is clear that both the U.S. company and the foreign company are *owned and controlled* by [redacted]

(Emphasis in original). Counsel claimed that because both parties "own both companies," "ultimately have the final vote in all decisions made for each," and control the foreign company's financial contributions to the U.S. entity, an affiliate relationship between the foreign and U.S. companies has been established. Counsel refers to *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981), *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982), and an unpublished AAO decision as guidance in determining an affiliate relationship.

In her March 24, 2003 decision, the director outlined the regulation at 8 C.F.R. § 214.2(l)(ii), defining the term qualifying organization. The director stated that the evidence showed that the beneficiary's foreign employer is owned by five shareholders, whereas the U.S. company is owned by only two of the shareholders of the foreign company. The director concluded that "[a]lthough the United States company is controlled by the same individual this is insufficient to establish the required relationship as defined in the regulations." Accordingly, the director denied the petition.

In an appeal filed April 23, 2003, counsel submits a lengthy brief discussing Congress' intent in enacting the regulations that define qualifying relationship, and addresses current case law, which counsel contends supports the existence of an affiliate relationship between the two companies. Counsel rejects the director's finding, stating that "[w]hile it certainly is well within the power of [Citizenship and Immigration Services (CIS)] to promulgate regulations to govern L visas under Section 101(a)(15)(L) [of the Act], to require the same group of individuals [to] own both entities would *add a requirement* for L-1 eligibility that appears *nowhere* in the statute or 8 C.F.R. § 214.2." (Emphasis in original). Counsel cites *Matter of Tessel, Inc.*, *Matter of Hughes*, and *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F. Supp. 1373 (N.D. Cal. 1990) as precedents for defining an affiliate relationship. Counsel also refers to Congress' rejection of CIS' "restrictive interpretation" of section 101(a)(L)(15) of the Act, and states that legislative history confirms that Congress did not intend to restrict L visas to those companies owned and controlled by the exact same individuals, of which the individuals own the same share or proportion of each entity.

Counsel contends that applying the standard provided for in [redacted] the foreign and U.S. entities in the present matter "plainly qualify as affiliates." Counsel explains that [redacted] the Court rejected CIS' more restrictive interpretation of "affiliate," and stated that an affiliation should not depend on whether

the U.S. company is owned indirectly through a holding company or whether the individual owners are absolutely identical. Counsel therefore concludes that because [redacted] "own and control both entities," and "hold a controlling interest in each, with a minor difference in ownership between the two companies," the foreign and U.S. entities are affiliates.

On review, while the AAO acknowledges counsel's thorough brief on appeal, counsel's assertions do not demonstrate the existence of a qualifying relationship between the foreign and U.S. entities.

The regulations 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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, 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 Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulation at 8 C.F.R. § 214.2(l)(ii)(L)(2) defines an affiliate as 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. In the present matter, the petitioner provided evidence establishing that ownership of the foreign company is divided among five stockholders. The U.S. company, however, is owned by two stockholders, who are both shareholders of the foreign corporation. As the "same group of individuals" does not own or control both organizations, the petitioner has failed to satisfy this essential element of an affiliate relationship.

Counsel's claim on appeal that Congress did not intend for the L visas to be restricted to only those companies owned and controlled by the exact same individuals who own approximately the same share or proportion of each entity is not conclusively supported by the record. Counsel cites Operating Instruction 214.2(l)(4)(iii)(D), which specifically addresses an affiliate relationship and states:

> Affiliate. Subsidiaries are affiliates of each other. The affiliate relationship is due to the ownership and control of both subsidiaries by the same legal entity. Affiliation also exists between legal entities where an *identical group of individuals own and control both businesses in basically the same proportions or percentages.* Associations between companies based on factors such as ownership of a small amount of stock in another company, exchange of products or services, licensing or franchising agreements, membership

> on board of directors, or the formation of consortiums or cartels do not create affiliate relationships between the entities for L purposes.

(Emphasis added). In the present case, the language of both the regulations and the accompanying operating instructions is clear. To establish an affiliate relationship for purposes of an L visa, the petitioner is required to demonstrate that the same group of individuals owns and controls the foreign and U.S. companies in approximately the same proportion.

Citing *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), counsel rejects this interpretation, and 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 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).

In this case the U.S. entity is owned by two individuals and the foreign entity is owned by five individuals. Counsel asserts both in response to the director's request for evidence and on appeal that the petitioner's two shareholders, [redacted] executed a voting trust that gives each de facto control over the U.S. company. There are several discrepancies, however, with this claim. The translated "Certification," or voting trust, states that [redacted] as "Subscribers" of the beneficiary's foreign employer, "[c]ertify that in the Directive Board Meetings of this Company, [the foreign company], we submit to vote in block, granting the majority of the decision with a 65% of all memberships, by Certification of the Commerce Chamber of Bogota, Columbia." The translated language implies that the shareholders' decision to vote in block applies to voting in the foreign company, not the U.S. company. There is no mention of the shareholders' control over voting in the U.S. company. Regardless, the agreement was executed by both parties on February 26, 2003, following the filing of the nonimmigrant petition. 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). Moreover, 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).

Absent documentary evidence such as valid 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. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals.

Although counsel also cites on appeal that the court in *Matter of Tessel, Inc.* 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 . . . ." 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. While [redacted] may own 40.13% of the foreign entity, this is not a majority interest, i.e. 51 percent, and he may be out voted by the remaining shareholders. Accordingly, he does not have full power and authority to control the foreign entity. As noted previously, absent voting proxies or agreements to vote in concert so as to establish a controlling interest, it cannot be determined that [redacted] can act as one shareholder in order to create common ownership and control in both entities. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. The statute specifically requires that the beneficiary enter the United States to be employed by a subsidiary or affiliate of the beneficiary's foreign employer. 8 U.S.C. § 1101(a)(15)(L). The AAO will not consider the legislative history of the applicable law or the related floor statements. Where the language of a statute is clear on its face, there is no need in inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). As the petitioner failed to satisfy this statutory requirement, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The record does not support counsel's claim in his January 20, 2003 letter submitted with the nonimmigrant petition that the majority of the beneficiary's time would be devoted to monitoring the activities of subordinate employees. Specifically, counsel indicates that the beneficiary would perform such non-qualifying tasks as negotiating contracts and interacting with suppliers. While counsel provides an allocation of the amount of time the beneficiary would spend on various tasks, counsel did not include these job duties in the outline. Therefore, the AAO cannot determine how much time the beneficiary would devote to these non-managerial and non-executive tasks. This information is essential to determining what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. For this additional reason, the appeal will be dismissed.

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).

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.