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

U.S. Citizenship and Immigration Services

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[redacted]

File: SRC-03-210-51567 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.

for
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 Vice President and 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 corporation organized in the State of Texas that is engaged in the marketing and sale of horse saddles and related goods. The petitioner claims that it is the affiliate of Tapetes Tipico, S.A. de C.V., located in Guadalupe, Mexico. The beneficiary was initially granted a two-year period of stay in L-1A status, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 petitioner and the beneficiary's foreign employer are affiliates, as they are owned and controlled by the same group of individuals in approximately the same proportion. In support of this assertion, the petitioner submits 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 primary issue in the present matter is whether a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) states:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
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> (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;
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> (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
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> (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) states:

> *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) states:

> *Branch* means an operation 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) states:

> *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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L) states, in pertinent part:

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
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> (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.

In the initial petition, the petitioner stated that it is the affiliate of the beneficiary's foreign employer. Specifically, the petitioner indicated that four shareholders each own 25 percent of the petitioner, and the same four shareholders own 74 percent of the foreign entity. The petitioner submitted three documents, executed by its shareholders, reflecting changes in stock ownership and identifying the percentage of ownership held by the current shareholders. In an attached letter, the petitioner provided the following:

> Both [the petitioner] and [the beneficiary's foreign employer] are majority owned by the same group of shareholders. [redacted] and [redacted] . . . each own 25 percent of [the petitioner]. Similarly, the [petitioner's] shareholders also hold approximately 441,704 of [the beneficiary's foreign employer's] 600,000 total shares, giving the [petitioner's] shareholders a 74 percent ownership interest in [the beneficiary's foreign employer].

On September 1, 2003, the director requested additional evidence. In part, the director requested "documentary evidence to establish the ownership and control of the foreign company."

In a response dated September 4, 2003, counsel for the petitioner submitted: (1) a letter further explaining the corporate relationship between the petitioner and the beneficiary's foreign employer; (2) a partially translated document reflecting internal action taken by directors of the petitioner's foreign employer which reflects the ownership of the company; (3) articles of a company titled Figusa, reflecting its ownership as of December 6, 1983; and (4) a document reflecting action taken at a Figusa shareholder general assembly, reflecting a change is stock ownership. In the letter, counsel stated:

> [The beneficiary's foreign employer] is primarily owned by [redacted] S.A. de C.V., which is owned by four individuals in equal shares, and by the four individual owners of [redacted] . . [The beneficiary's foreign employer] has five classes of shares. [redacted] owns 71,709 out of a total 71,800 shares of Classes A-C with the four individual owners each owning in near equal shares the remaining 93 shares. Class D shares total 200,000 and are divided equally between the four individual shareholders, who are: [redacted] shares issued in 1995 total 328,200 and are divided so that the four individual shareholders each own approximately 18% and [redacted] owns 28%.
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> [redacted] [sic] is owned in four equal shares by the individuals who each own equal shares of [the beneficiary's foreign employer]. Each of these individuals owns 25% of the Class D shares of [the beneficiary's foreign employer] (100%) and 18% of the Class E shares of [the beneficiary's foreign employer] (72%). These same four individuals owned [the petitioner] in equal shares on February 4, 2003. However, three of the owners gave portions of their shares to their children on that day without giving up control of the corporation. As shown in the written consent of shareholders, the original four owners (and the owners of [the beneficiary's foreign employer] and of Figosa [sic]) presently own 77.2% of the shares of [the petitioner].

> Thus, these four individuals own and control the majority of the shares in the Texas and Mexican companies.

On September 19, 2003, the director denied the petition. The director determined that the petitioner did not establish that it has a qualifying relationship with the beneficiary's foreign employer. Specifically, the director indicated that "[i]t is stated that the foreign and United States companies are majority owned by the same 4 individuals, however the remaining portions of the 2 companies are owned by different individuals. In view of this there is no qualifying relationship."

On appeal, counsel for the petitioner asserts that the petitioner and the beneficiary's foreign employer are affiliates, as they are owned and controlled by the same group of individuals in approximately the same proportion. In support of this assertion, counsel submits: (1) a voting agreement between the shareholders of the petitioner, the beneficiary's foreign employer, and [redacted], S.A. de C.V.; (2) four stock certificates for the petitioner; (3) charts and graphs showing the ownership of the petitioner, the beneficiary's foreign employer, and Figusa, S.A. de C.V.; and (4) a statement on Form I-290B that provides:

> [T]he majority owners of [the petitioner], [the beneficiary's foreign employer], and [redacted] S.A. de C.V. control these three corporations. The individual owners of these companies have executed a Voting Agreement that makes clear that the four individual majority owners of each of the three companies have consolidated their voting rights with respect to their stock in each of the corporations. Thus, the four majority owners vote as a block in all decision concerning each corporation. They control 77.2% of [the petitioner] and 74% of [the beneficiary's foreign employer] and 100% of Figusa S.A. de C.V.

Upon review, counsel's assertions are not persuasive. 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.

In the instant matter, the facts of who owns the relevant corporations are not at issue. The petitioner has provided ample documentation to show who possesses an ownership interest in the petitioner, the beneficiary's foreign employer, and Figusa, S.A. de C.V. Further, the petitioner has established what percentage of outstanding shares each shareholder currently possesses. The petitioner has shown that four individuals collectively own approximately 77 percent of the petitioner's shares, approximately 74 percent of the shares of the beneficiary's foreign employer, and 100 percent of the shares of Figusa S.A. de C.V. No single individual owns a majority of shares in any of the three companies. The petitioner is owned by a total of seven individuals in varying proportions. The beneficiary's foreign employer is owned by four individuals holding 18.5 percent each, and Figusa S.A. de C.V. holding the remaining 26 percent. [redacted] S.A. de C.V. is

apparently a holding company owned in equal parts by the same four individual shareholders of the beneficiary's foreign employer.

The record clearly indicates that the petitioner does not maintain a qualifying "affiliate" relationship with the beneficiary's foreign employer. As the petitioner states, seven individuals own the beneficiary's foreign employer, yet four individuals and a holding company own the petitioner. Accordingly, 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 . . . ." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). The fact that four individuals collectively own a majority interest in both entities does not satisfy the plain meaning of the regulatory definition for "affiliate". *See id.* The petitioner contends that four shareholders vote as a majority block and thus control all three of the entities in question.[1] However, even if this assertion is proven, the petitioner still must establish that the entities are owned by the same group of individuals with each individual owning the same share or proportion of each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). As discussed above, the petitioner clearly states that all three entities are not owned by the same group of individuals. The AAO further notes that there is no parent entity with ownership and control of both companies that would qualify the two as affiliates.

Based on the foregoing, the petitioner has failed to show that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i). For this reason, the appeal will be dismissed.

The AAO notes that Citizenship and Immigration Services (CIS) approved another petition that was previously filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same corporate relationship as presented in the present record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. In response to the director's request for evidence, the petitioner submitted a document describing the beneficiary's prospective duties with the percentage of time he will devote to categories of tasks. The beneficiary's duties include numerous non-qualifying tasks, such as "[developing a] new line of show saddles and roping

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[1] As evidence of the control of the companies, the petitioner submits a voting agreement between the shareholders of the petitioner, the beneficiary's foreign employer, and [redacted], S.A. de C.V. This document is dated October 9, 2003, after the date of filing the present 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). Thus, as the voting agreement was executed after the petition was filed, it is not probative of the petitioner's eligibility as of the date of filing, and it is accorded no weight in this proceeding.

saddles," "purchas[ing] all products sold in two retail locations," and "attend[ing] [shows and expositions] as [an] exhibitor with distributors or stand-alone." The breakdown of the beneficiary's duties does not sufficiently reflect whether such non-managerial and non-executive tasks constitute the majority of the beneficiary's time. Further, while the record indicates that the beneficiary will supervise other employees, the petitioner has not shown that the beneficiary's subordinates will be supervisory, professional, or managerial, as contemplated by section 101(a)(44)(A)(ii) of the Act. Thus, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(ii). 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 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.