OWNERSHIP? CONTROL?

WHEN ASSET PROTECTION GETS IN THE WAY OF YOUR L1-A VISA

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Every business owner wants to protect their assets. No one wants their assets jeopardized by lawsuits, judgments, the IRS, or liens of any kind. High net-worth individuals usually go to great lengths to achieve that. They hire the most creative lawyers, who in turn, create a complicated corporate structure that sometimes alienates sister companies so much, that they become stranger to each other, stranger to its own owner or in the best case, a faraway family member in the corporate structure. In the complicated web of trusts, off-shores, LLC's and partnerships, the corporate family member became legally stranger to each other. They are no longer a "family."

I recently had a case of a South American company (let's call it case X) with its "subsidiary" here in the United States completely "controlled" by the South American counterpart, but that had been alienated so much by layers and layers of companies and trusts that legally they did not share even a 1% ownership.

What happens then when a multinational corporation needs to send a high ranked executive to the United States to work, and wants to benefit from an intra-company executive transferee visa—the popular L-1 executive visa. Have the companies become so strange to each other that the transferee will no longer be considered by U.S. laws "intra-company"?

Generally, USCIS[1] and DOJ[2] decisions, have been good to adjust to corporations' sophisticated structures. However, at the end of the day, for L-1 visa purposes, cases and regulations tell us that the companies need to be related at the ownership or stock level. The transfer needs to be "intra-company," From company A in country X, to company A in country Y. A company's asset protection structure cannot have alienated the foreign counterpart so much, that they are now under the law, company A and company B.

L-1 REQUIREMENTS IN INA[3] AND CFR[4]

The L-1A visa is available to "an alien who, within 3-years preceding the time of his application for admission into the U.S., has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary [] and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate [] in a capacity that is managerial, executive, or involves specialized knowledge."[5] For a company to be eligible to bring a foreign executive to work in its U.S. branch or affiliate the two companies must have a *qualifying organization* or *relationship*.[6] A qualifying organization can be established if the U.S. company is the (I) parent, (J) branch, (K) subsidiary or (L) an affiliate of the company abroad.[7]

[1] United States Citizenship and Immigration Services.
[2] Department of Justice.
[3] Immigration and Nationality Act.
[4] Code of Federal Regulations.
[5] 8 U.S.C.S. § 1101 (LexisNexis, Lexis Advance through changes received November 14, 2017).
[6] 8 C.F.R. § 214.2(l)(1)(ii)(G).
[7] The other two requirements, not relevant for purposes of this article, are that the company is actively doing business in another country during the duration of the L-1 visa stay, 8 C.F.R. § 214.2(l)(1)(ii)(G)(2), and meets the requirements of INA 101(1)(15)(L) [8 U.S.C.S. § 1101(a)(15)(L)] which says that the alien must have worked for at least one year within the preceding 3-years in the other company prior to arrival in the U.S.

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The CFR defines these terms:[8]

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries. 8 C.F.R. § 214.2(l)(1)(ii)(I)
(J) *Branch* means an operating division or office of the same organization housed in a different location. 8 C.F.R. § 214.2(l)(1)(ii)(J)
(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. 8 C.F.R. § 214.2(l)(1)(ii)(K)
(L) *Affiliate* means
  (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, 8 C.F.R. § 214.2(l)(1)(ii)(L)(1); 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. 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).[9]

To make it more graphic:

1. Parent	Has subsidiaries.
2. Branch	The same legal entity in two locations.
3. Subsidiary	Four scenarios: a) 51% of it owned by parent and controlled by parent. b) 50% of it owned by parent and controlled by parent. c) 50% of it owned by parent and has veto power by virtue of its 50% interest. d) < 50% of it owned by parent and in fact it is controlled by parent.
4. Affiliate	Two options: a) Company A and B owned and controlled by same company or person. b) Company A and B owned and controlled by group of individuals in same proportion in both A and B.

Some scenarios in our graph do not create much room for debate. Option 1 and 2, for example, make it clear-cut to determine whether the company abroad is a qualifying organization. In other words, if the company abroad is the parent, or the same company (branch) it will undoubtedly be a qualifying organization. Options 3(a), 3(b), and 3(c) do not seem to create much of a confusion either. If the company abroad is 50% or more owner of the U.S. entity and is controlled by the foreign entity, it will qualify. Similarly, a 50% ownership with no control but with "veto power," meaning that it can block some of its major decisions, is considered by the regulations to be a qualifying relationship.

Option 3(d), 4(a) and 4(b) create some problems. For example, option 3(d) tells us that less than 50% could work; but how less? Will 1% ownership (and control) be enough to create a qualifying relationship? Option 4(a) leaves ambiguous the percentage of ownership required in both Company A and B. Similarly, in option 4(b) the percentage of ownership that the group must have in A and B is not specified.

[8] The CFR describes a third kind of affiliate relationship that applies only to accounting, consulting and managerial services firms which, for the purposes of this short article, we won't detail.
[9] 8 C.F.R. § 214.2 (Lexis Advance through the June 6, 2018 issue of the Federal Register. Title 3 is current through June 1, 2018).[10] Fla. R. Jud. Admin 2.516(b)(1).

HOW MUCH "OWNERSHIP AND CONTROL"? – MATTER OF HUGHES.

The CFR uses the words "ownership" and "control" together, almost as if one cannot be without the other. The cases and regulations follow a similar approach. Though arguably, we could make clear semantic distinctions between the two words, even in the context of corporate law, for purposes of L-1 visa regulations it seems that we cannot understand one without the other.

USCIS describes two types of "ownership and control." (1) *De jure*: where a legal entity owns more than 50-percent of an entity and because of this, control the entity. (2) *De facto*: where a legal entity owns 50-percent or less of an entity, yet still controls the entity.[10] This of course, goes back to our graphic and the scenarios that don't really create confusion as to "ownership and control." Essentially, in those scenarios (1, 2, 3(a), 3(b), and 3(c)), control would be "*de facto*."

This two-fold approach was already the understanding of the DOJ in 1986 about *qualifying organizations*. In *Matter of Siemens Medical Systems, Inc.*, the DOJ had said that "[u]nless [] agreements restrict actual control of one parent, [] 50-percent ownership will be deemed per se control."[11] The DOJ's main concern in that case was to identify de facto control and to determine that, it articulated the idea that unless they can find some restrictions in some document of a company, 50-percent will be deemed *per se* control.[12]

The leading case that analyzes intercompany relationships (and "ownership and control") even before they were more specifically described in 8 C.F.R. § 214.2(l)(1)(ii), was *Matter of Hughes* in 1982.[13] *Hughes* was a case where the petitioner, California company Smith Tool International ("Smith-Tool") wanted to bring its manager on an L-1 visa from its South African counterpart Smith-Boart-Ltd. ("Smith-Boart"). Smith-Tool (California) owned 50% of Smith-Boart (South Africa). The only purpose of Smith-Boart was to manufacture and market the products of Smith-Tool. The petition was denied because it was determined that the petitioner "failed to establish an affiliate or subsidiary relationship between itself and the foreign employer of the beneficiary."[14]

On appeal the DOJ, had to determine whether Smith-Tool was a subsidiary of Smith-Boart. To do that, the DOJ analyzed the concept in other legislation like the Securities Acts of 1933 and 1934.[15] Both Acts (and its correspondent section in the CFR[16]) show "control as being determinative as to whether a subsidiary relationship exists."[17] "The term control is defined as the possession, direct or indirect, or the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[18]

[10] Policy Guidance on the Interpretation of the L-1B Specialized Knowledge Classification, USCIS, AILA InfoNet Doc. No. 13042663 (posted 4/26/13).
[11] *In re Siemens Med. Sys.*, 19 I. & N. Dec. 362, 365; 1986 BIA LEXIS 5, 1986 BIA LEXIS 5 (Comm'r, I. & N. Serv. March 31, 1986).
[12] Before Siemens, the DOJ in *In re Tessel, Inc.*, 17 I. & N. Dec. 631, 1981 BIA LEXIS 5, 1981 BIA LEXIS 5 (Assoc. Comm'r, I. & N. Serv. January 9, 1981), had already said that an overwhelming majority of ownership will create a qualifying relationship. *Tessel* rebuffed a prior decision in *In re Del Mar Ben, Inc.*, 15 I. & N. Dec. 5, 1974 BIA LEXIS 49, 1974 BIA LEXIS 49 (Regional Comm'r, I. & N. Serv. July 5, 1974), where the DOJ had said that mere stock ownership does not make it. However, in *Del Mar Ben*, the ownership was minimal. *Tessel* said that when ownership is majority (or a high percentage) affiliation exists.
[13] *In re Hughes*, 18 I. & N. Dec. 289, 1982 BIA LEXIS 24, 1982 BIA LEXIS 24 (Comm'r, I. & N. Serv. February 9, 1982)
[14] *Id.*
[15] U.S.C.S. § 77a et seq. (LexisNexis, Lexis Advance through changes received November 14, 2017); and 15 U.S.C.S. § 78a et seq. (LexisNexis, Lexis Advance through changes received November 14, 2017).
[16] C.F.R. § 230.245(f).
[17] *In re Hughes*, 18 I. & N. Dec. 289, 292, 1982 BIA LEXIS 24, *7 (Comm'r, I. & N. Serv. Feb. 9, 1982).
[18] *Id.* (internal quotations omitted).

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Hughes then reviews the Investment Company Act (ICA) of 1940[19]. In Section 2(a) the ICA "defines control as the power to exercise a controlling influence over the management or policies of a company and includes a presumption that a person who owns more than 25% of a company's voting securities controls that company."[20] In a sense, the reference to the ICA lowers the bar on what the percentage of ownership (or "voting securities"[21]) is required to determine "control" when there is actual management or policy control of the company.

Hughes then looks at two more references: The Public Utilities Holding Company Act (PUHCA) of 1935 and Internal Revenue (IR) Code. The PUHCA defines "affiliation" of companies in terms of "Control of 5 per centum or more of the outstanding voting securities."[22] The IR Code, in a far more restrictive approach, requires 80% of stock ownership to establish affiliation.[23] *Hughes* notes however that both the PUHCA and the IR are designed in the context of public utility companies' liability to pay taxes and may not, in that sense, be enlightening for L-1 "ownership and control" purposes.[24]

In the end, *Hughes* holds that Smith-Boart and Smith-Tool had a qualifying relationship but does not commit to a definition, or to set a definitive percentage of ownership required to establish "ownership and control." *Hughes* presents a cautious scenario with a sliding scale in which smaller companies may be required to show *de jure* control by having 51% of outstanding stock of the other entity, or in other types of companies, majority of voting stock may establish *de facto* control. In some other situations, perhaps in larger corporations, 10% of ownership, and a disperse, varied remaining 90% may be enough to establish "control" for L-1 purposes.[25] Further, the consideration of the number of shares or voting stock is not done in isolation. The government may take into consideration other companies' ownership of patents, processes, copyrights, or other elements used by the related company.[26]

If we get any take away from *Hughes*, that is that there has to be ownership in the traditional sense of ownership, namely, owning a security, a share, a voting stock. And if one wants to make a case for the minimum amount of percentage required, it is hard to see how one could make a viable case where less than 5% ownership would qualify—and even that would be extremely hard. However, based on the *Hughes* analysis it could arguably be said that it is theoretically possible that a company overwhelmingly controlled by the other (through contracts, patents, advertising, management) but with only 5% ownership at the stock level, could potentially be a *qualifying organization*.

In any event, it is clear that, in case X, absolute control with zero stock or share ownership will not do it.[27] For L-1 visa purposes, the transfer has to be *intracompany* and that means affiliation at the core, at the stock or share level, in the traditional sense of the word. Maybe one day, in an ever-sophisticated world, with asset protection attorneys getting more and more creative in its corporate structures, 8 CFR 214.2(l)(1)(ii) will catch up to it.

[19] 15 U.S.C.S. § 80a-1 et Seq. (LexisNexis, Lexis Advance through changes received November 14, 2017).

[20] *In re Hughes*, 18 I. & N. Dec. 289, 292, 1982 BIA LEXIS 24, *7 (Comm'r, I. & N. Serv. Feb. 9, 1982)(internal quotations omitted).

[21] To make things more complicated, the cases don't define the term "voting securities" but seem to identify the percentage of "voting securities" with the percentage of "ownership and control." Some cases dealing with the Investment Company Act of 1940 have followed a similar approach. In *Clemente Glob. Growth Fund, Inc. v. Pickens*, 705 F. Supp. 958, 965 (S.D.N.Y. 1989), for example, the Court said that "a limited partnership interest may be the functional equivalent of a voting security for purposes of § 3(c)(1)(A)" of the ICA. Further, in a recent Policy Memorandum, USCIS addressed a similar but narrower issue: the situation when an owner wants to show "control" through proxy votes. USCIS said that when control is being shown via proxy votes, such "proxy votes must be irrevocable from the time of the filing of the L-1 petition through the time of adjudication." USCIS December 29, 2017 Policy Memorandum, p.4 at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-12-29-PM-602-0155-L-1-Qualifying-Relationships-and-Proxy-Votes.pdf (last checked 06/07/2018).

[22] *In re Hughes,* 18 I. & N. Dec. 289, 292, 1982 BIA LEXIS 24, *7 (Comm'r, I. & N. Serv. Feb. 9, 1982)

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] The only exception to having actual percentage of ownership requirement may be companies from communist governments which are forced by those laws to be owned by the communist government. See *In re Barsai*, 18 I. & N. Dec. 13, 1981 BIA LEXIS 10, 1981 BIA LEXIS 10 (Regional Comm'r, I. & N. Serv. March 2, 1981) (holding that the Director failed to recognize the reality of a communist political system where ownership of the means of production is held by the country's central government).

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