U.S. Department of Homeland Security
20 Mass Ave.NW, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 001 50937 Office: CALIFORNIA SERVICE CENTER Date: DEC 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:

invasion of personal privacy

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, California 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 employ the beneficiary 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 California that is operating as a Burger King restaurant. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, [redacted] located in Guangdong, China. The petitioner now seeks to employ the beneficiary as the general manager of its restaurant.

The director denied the petition stating that because the petitioner is operating a franchise, "there can never be any actual ownership and control of the franchise by either the qualifying organization abroad or the one in the United States." The director further explained that "[Citizenship and Immigration Services (CIS)] generally does not recognize franchise businesses as qualifying organizations for classification under [the] L-1A category because although ownership may be established, there is no control of the business due to licensing requirements of the franchise agreement." The director therefore denied the petition.

On appeal, counsel contends that the beneficiary's foreign employer "is the legal and equitable owner of the [U.S.] business," and that CIS' finding "that [the] Petitioner has a mere license to operate is unfounded and inaccurate." Counsel states that the franchisor only provides guidelines to the franchisee to ensure that patrons will receive a consistent quality product. Counsel submits a brief and additional documentation 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 Act. 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 issue in the present proceeding is whether the beneficiary's foreign employer and the U.S. entity are qualifying organizations as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(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:
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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.
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> * * *
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> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
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> (J) *Branch* means an operating division or office of the same organization housed in a different location.
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> (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.
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> *(L) Affiliate* means
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> (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 an August 26, 2002 letter submitted with the nonimmigrant petition, the petitioner stated that 50 percent of the U.S. corporation's common stock is owned by the beneficiary's foreign employer. As evidence of ownership, the petitioner provided a copy of a stock certificate identifying the beneficiary's foreign employer as the owner of 100 shares of the petitioner's series A common stock. The petitioner also submitted a stock purchase agreement, dated September 19, 2001 and signed by [redacted]s sellers, which indicates that the sellers agreed to transfer 100 shares of series A common stock in the petitioning organization to the beneficiary's foreign employer in exchange for $300,000. The language in the stock transfer agreement referred to the 100 shares of common stock as "equal to one-half (½) of the outstanding shares of the Corporation." As additional evidence, the petitioner provided a "Customer Advice," which outlined the transfer of $300,000 from Hong Kong Julong Swimming Pools Co, Ltd. to the seller's attorney; the wire transfer confirmation; and the receipt signed by the sellers acknowledging payment by the beneficiary's foreign employer for the common stock.

The petitioner also submitted the U.S. company's Articles of Incorporation, which stated in the fifth paragraph that the corporation is authorized to issue 10,000 shares of Series A common stock, which has exclusive voting rights on all matters requiring a vote by the shareholders, and 30,000 shares of Series B common stock. The petitioner provided an "action" by the petitioner's board of directors in which the board acknowledged that the petitioner's two shareholders, [redacted] transferred "one-half interest" in the petitioner's stock to the beneficiary's foreign employer on September 18, 2001. In addition, the petitioner submitted the corporate by-laws, the franchise agreement, lease/sublease agreement, and financial documentation.

On October 10, 2002, the director issued a notice of intent to deny stating that although the petitioner submitted corporate stock certificates, "the evidence of stock ownership is immaterial because the petitioner is a 'Franchisee of the Burger King Corporation.'" The director explained that while the petitioner may purchase a franchise, it would never own or control it, and therefore, essentially "has only purchased the license to operate it." The director allowed the petitioner thirty days to respond with additional evidence in support of a qualifying relationship.

In a response dated October 28, 2002, counsel stated that the parent-subsidiary relationship between the beneficiary's foreign employer and the U.S. entity is evidenced by the submitted stock certificate, "representing the one hundred (100) shares which equals fifty percent (50%) of the capital stock of [the petitioning organization] held in the name of [the beneficiary's foreign employer]." Counsel also submitted a lengthy explanation as to why the petitioner should be deemed to have ownership and control of the Burger King franchise. As counsel's letter is part of the record, it will not be repeated herein.

In a decision dated November 7, 2002, the director concluded that the petitioner had failed to establish a qualifying relationship between the beneficiary's foreign employer and the U.S. entity. The director noted that the requisite factors for a qualifying relationship are ownership and control, and stated that in a franchise relationship neither the beneficiary's foreign employer nor the U.S. corporation "can ever own or control [the franchise] because a franchisee only holds a license from Burger King to operate the franchisor's business." The director stated that the franchisor essentially owns and controls the store while the franchisee has only purchased a license to operate it. The director consequently denied the petition.

In an appeal filed December 9, 2002, counsel contends that the beneficiary's foreign employer is the "legal and equitable owner" of the U.S. entity as evidenced by the submitted stock certificate. Counsel states that the beneficiary's foreign employer owns 50 percent of the petitioning organization, and therefore owns directly or indirectly one-half of the entity and controls the entity. Counsel again submits a detailed explanation of franchises, and cites excerpts from the California Business and Professions Code and from a franchise and licensing book published by the American Management Association. As these recitations are part of the record, and are not relevant to the present issue, they will not be repeated herein.

On review, both the director and counsel incorrectly focused on the petitioner's operation of a franchise rather than on the necessary qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. *See* 8 C.F.R. § 214.2(l)(3)(i) (requiring that the petitioner and the organization which employed the beneficiary are qualifying organizations). Contrary to the director's statements, the evidence of stock ownership is not only material to the petitioner's claims, but critical to determining whether a qualifying relationship exists.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are "ownership" and "control." *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In general, a "franchise" is a cooperative business operation based on a contractual agreement in which the franchisee undertakes to conduct a business or to sell a product or service in accordance with methods and procedures prescribed by the franchiser, and, in return, the franchiser undertakes to assist the franchisee through advertising, promotion, and other advisory services. A franchise agreement, like a license, typically requires that the franchisee comply with the franchiser's restrictions, without actual ownership and control of the franchised operation. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual"). An association between a foreign and U.S. entity based on a contractual franchise agreement is usually insufficient to establish a qualifying relationship. *Id. See also*, 9 FAM 41.54 N7.1-5; O.I. 214.2(l)(4)(iii)(D) (noting that associations between companies based on factors such as ownership of a small amount of stock in another company, or licensing or franchising agreements, do not create affiliate relationships between the entities for L-1 purposes).

By itself, the fact that a petition involves a franchise will not automatically disqualify the petitioner under section 101(a)(15)(L) of the Act. When reviewing a petition that involves a franchise, the director must carefully examine the record to determine how the franchise agreement affects the claimed qualifying relationship. As discussed, if a foreign company enters into a franchise, license, or contractual relationship with a U.S. company, that contractual relationship can be terminated and will not establish a qualifying relationship between the two entities. *See Matter of Schick,* 13 I&N Dec. at 649. However, if a foreign company claims to be related to a U.S. company through common ownership and control, and that U.S. company is doing business as a franchisee, the director must examine whether the U.S. and foreign entities possess a qualifying relationship through common ownership and management under section 101(a)(15)(L) of the Act.

Nonetheless, it is critical in all cases that the petitioner fully disclose the terms of any franchise agreement, especially as the agreement relates to the transfer of ownership, voting of shares, distribution of profit, management and direction of the franchisee, or any other factor affecting actual control of the entity. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-65.

In the present matter, the critical relationship is that between the beneficiary's overseas employer, Julong [redacted] Although the petitioner does business in the United States through a franchise agreement with Burger King Corporation, the claimed relationship between [redacted] is based on stock ownership and not the franchise agreement. In order to determine whether a qualifying relationship exists, the AAO must examine the number of shares of stock issued by the petitioner, the ownership of that stock, and the resulting percentage ownership of the U.S. petitioner.

Upon review, the petitioner has failed to demonstrate the existence of the requisite qualifying relationship between the foreign and U.S. entities. The AAO acknowledges the evidence submitted by counsel, including the stock purchase agreement, stock certificate, and wire transfer confirmation, which counsel contends demonstrates ownership of the U.S. entity by the beneficiary's foreign employer. However, there are several contradictions and omissions from the record that undermine the petitioner's claim.

As it relates to the foreign company's ownership interest in the U.S. company, the petitioner has not documented that it has fully complied with the terms and conditions outlined in the franchise agreement with Burger King Corporation (BKC).[1] On its face, the stock certificate provided as evidence of the overseas entity's ownership interest states: "The transfer of this stock is subject to the terms and conditions of a franchise agreement with Burger King Corporation. Reference is made to such franchise agreement and the restrictive provisions of the charter and the by-laws of this corporation." Paragraph fourteen of the "Burger King Restaurant Franchise Agreement" requires that the petitioner receive BKC's prior written approval of a transfer or issuance of shares in the petitioning corporation. In the instant matter, [redacted] who owned 100 percent of the petitioning organization, purportedly transferred 100 shares of common stock in the petitioning organization to the beneficiary's foreign employer on September 18, 2001. There is no indication in the record that the petitioner received written consent from BKC prior to transferring the ownership interest. Pursuant to the terms of the franchise agreement, the failure to receive prior BKC approval would result in a breach of contract and the transfer of shares would be null and void. This lack of

[1] The original franchise agreement, which was between BKC and Daniel and Patsy Chu, was subsequently assigned on February 26, 1999 to the petitioning organization, thereby making the petitioner the franchisee, subject to all terms and conditions of the original franchise agreement.

evidence raises questions regarding the claimed transfer of shares to the beneficiary's overseas employer and the resulting corporate relationship.

Furthermore, although the petitioner claims that the foreign entity owns fifty-percent of the company's stock, the petitioner has accounted for only 100 shares of the petitioner's issued stock. As evidence of the overseas entity's ownership interest, the petitioner submitted a copy of stock certificate number five, representing the issuance of 100 shares of series A common stock in [redacted] Ltd. on September 18, 2001. The petitioner did not submit copies of the stock certificates numbered one, two, three, or four. In addition, the petitioner did not submit copies of its stock certificate ledger, stock certificate registry, the minutes of the initial shareholder meetings, or any other evidence that would confirm the total number of issued shares. The petitioner did submit a copy of its articles of incorporation and bylaws, which indicate that the company may issue a total of 40,000 shares. However, neither the articles of incorporation nor the bylaws indicate how many shares were actually issued. Accordingly, because of the petitioner's failure to submit all of the relevant corporate documents, the AAO cannot determine how many shares of stock have been issued in total, how many shares are held by the claimed overseas entity, and the resulting percentage ownership of the petitioning enterprise.

The petitioner's failure to document the total number of issued shares is especially damaging to its claim in light of conflicting evidence regarding the actual number of issued shares. The petitioner submitted for the record a copy of its balance sheets for 2000 and 2001, which were reviewed and prepared by [redacted] ertified Public Accountants. Contrary to the claim that it has issued a total of 200 shares of common stock, the petitioner's balance sheets indicate that it has 40,000 shares issued and outstanding for a total value of $40,000 in capital stock.[2] If true, the submitted stock certificate would represent the overseas entity as holding 100 out of 40,000 shares of the petitioner's stock, or .25 percent of the issued stock.

In addition, the petitioner's Internal Revenue Service Form 1120, U.S. Corporation Income Tax Return for 2001 indicates that the corporation is 50 percent foreign-owned, with the owner's country identified as China. However, rather than identifying the overseas company as the foreign owner, the attached IRS Form 5472, Informational Return on a [redacted] ndicates that the beneficiary himself personally owns 50 percent of the petitioning corporation. This additional discrepancy undermines the petitioner's claimed relationship with the beneficiary's overseas employer.

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). 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.*

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[2] Specifically, under the section titled "Liabilities and Stockholder Deficit," the balance sheet states: "Common stock, no par value; 10,000 shares authorized, 40,000 shares issued and outstanding" and indicates a value of $40,000. Although the stated amount of 10,000 shares "authorized" conflicts on its face with the amount "issued and outstanding" and with the articles of incorporation, there is nothing in the record to explain the discrepancy. The conflicting nature of the balance sheet further confuses the record and raises questions regarding the validity of the remaining financial evidence.

As previously noted, the record includes a copy of the stock purchase agreement, which indicates that [redacted] each originally owned 50 percent of the petitioning corporation, and in September 2001 transferred "half" of the series A common stock to the beneficiary's foreign employer. The stock purchase agreement does not indicate exactly how many shares were originally owned by [redacted] does not provide a specific number of shares that were transferred to the overseas company. This omission is critical in determining how the remaining 50 percent of the petitioner's stock is held. Additionally, this information would identify the total amount of stock issued and substantiate counsel's claim that the 100 shares of stock issued to the beneficiary's foreign employer is in fact half of the petitioner's outstanding stock. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Absent full disclosure of all relevant documents, the AAO is unable to conclude that the foreign and U.S. entities are qualifying organizations, and specifically that the beneficiary's foreign employer has ownership and control of the petitioning organization. For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not establish that the beneficiary would be employed by the U.S. entity in a primarily managerial capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(ii). The petitioner identifies the proffered position as "General Manager for a Burger King Restaurant" and clearly identifies those duties as managerial. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *Id.* In an undated letter submitted with the petitioner's response to the director's notice of intent to deny, the petitioner provided a brief outline of the beneficiary's job responsibilities, which includes training cashiers, kitchen and janitorial personnel, maintaining the restaurant equipment, purchasing food and supplies, and verifying deliveries. These job duties are not typical of an individual employed in a managerial or executive capacity. *See* § 101(a)(44)(A) and (B) of the Act. 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. 593, 604 (Comm. 1988).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks are not traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, the description of the beneficiary's job duties indicate that he will be training personnel, scheduling the cooks and cashiers, and directly supervising subordinate employees at the Burger King restaurant. Pursuant to 101(a)(44)(A)(ii) of the Act, if it is claimed that a beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties, unless the supervised employees are professional. Section 101(a)(44)(A) of the Act. The petitioner did not provide the level of education required to perform the duties of its cooks and cashiers. Thus, the petitioner has not established that these employees could be classified as professionals. Although the petitioner mentions the supervision of restaurant managers, the petitioner provided no details or evidence regarding these managers or whether these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity. For this additional reason, this petition may not be approved.

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.