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**D7**

**MAY 19 2004**

FILE: WAC 00 054 50730 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

**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 The decision of the director will be withdrawn. The AAO will remand the matter for additional action and a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.

The petitioner is engaged in the operation of fast food restaurants in the United States. The petitioner currently employs the beneficiary as a general manager, and seeks to extend the employment of the beneficiary for an additional two years. On January 4, 2000, the petitioner filed a petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. The director approved the petition and granted the extension of the beneficiary's classification as a nonimmigrant intracompany transferee.

On August 16, 2001, pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii), the director, on his own motion, vacated the decision and issued a motion to reopen and reconsider the decision with the intent to deny. The director indicated that at the time of filing the petition, the petitioner had failed to establish the claimed affiliate relationship between the beneficiary's foreign employer and the petitioning organization.

The petitioner responded providing clarification of the ownership of the foreign and U.S. organizations at the time of filing the petition, and submitted additional documentation, including stock certificates and a stock ledger. The director subsequently issued an additional Notice of Intent to Deny, stating that Citizenship and Immigration Services (CIS) had failed to "address the fact that the petitioner is a franchisee" in its previous notice.

Following an additional opportunity to respond, in which counsel for the petitioner asserted that the director's conclusion regarding ownership and control of a franchise "is without factual basis," the director denied the petition. In his decision, the director stated that the evidence was insufficient to establish the petitioner's claim that "the petitioner owns and controls the franchise and that the petitioner is only a contractor for the Burger King Corporation." The director consequently determined that the petitioner failed to establish the two companies are qualifying organizations.

On appeal, counsel submits the franchise agreement and evidence, which counsel claims, establishes that the petitioner controls the franchise. Counsel asserts that "the documentation submitted proves ownership by the Petitioner of the sites at which it does its business."

Upon review, the decision of the director must be withdrawn. The director may not reopen and deny a previously approved petition. With regard to the revocation of an approved petition, the regulation at 8 C.F.R. § 214.2(l)(9)(iii) states that the director shall send to the petitioner a notice of intent to revoke the petition if he finds that the approval of the petition involved gross error. In the present matter, the petition was approved in gross error, as the petitioner had not established the existence of a qualifying relationship between the foreign and U.S. organizations. The director was therefore obligated to provide the petitioner with a notice of intent to revoke the petition. Consequently, this matter will be remanded to the director for additional action and a new decision.

Although the matter will be remanded, the AAO must note the following for the record and as guidance.

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 director initially approved the petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. CIS subsequently vacated the decision, and notified the petitioner of its decision to reopen and reconsider the decision. The director indicated that at the time of filing the petition, the petitioner had failed to establish the claimed affiliate relationship between the beneficiary’s foreign employer and the petitioning organization.

In response, the petitioner explained that at the time of filing the petition the shareholders of each organization were as follows:

**Foreign Company**

Charanjit Ghai	25%
Paramjit Ghai	25%
Gurmeet Ghai	25%
Amarjit Ghai	25%

**U.S. Petitioning Company**

Charanjit Ghai	25%
Paramjit Ghai	16.66%
Gurmeet Ghai	16.66%
Amarjit Ghai	16.66%
Amarjeet Ghai	25%

The petitioner further explained that Amarjeet Ghai's 25% interest in the U.S. company was held by her "in trust" for Paramjit Ghai, Gurmeet Ghai, and Amarjit Ghai, and that this share "was in fact controlled by the remaining three Indian company stockholders."<sup>1</sup> The petitioner stated that "the 100% stock holders of the Indian Company directly held 75% of the stock of the U.S. Company," and that "ownership of the U.S. Company has in fact always directly or indirectly been controlled by the stockholders of the Indian company."

Following the petitioner's response, the director issued an additional Notice of Intent to Deny, stating that CIS had failed to "address the fact [in its previous notice] that the petitioner is a franchisee." The director explained that "although the petitioner has attempted to establish a qualifying relationship through the submission of corporate stock share certificates, the evidence of stock ownership is immaterial to the present case because the petitioner is a 'Franchisee of the Burger King Corporation'." The director further explained that "in a franchise agreement wherein the foreign entity is allowed to use the name of the franchising organization but must comply with certain operational restrictions, there can never be any actual ownership and control of the petitioning organization."

The petitioner was again given an opportunity to respond, in which counsel for the petitioner asserted that the director's conclusion regarding ownership and control of a franchise "is without factual basis." In support of his assertion, counsel explained that franchisees of Burger King hire and train their own staff, set their own hours, control their own prices, set their own profit margins, and are not obligated to purchase directly from the franchisor. Counsel also submitted an opinion letter from an attorney, who served for over ten years as general counsel for the National Franchise Association, Inc., which has previously represented several Burger King franchisees.

The director subsequently denied the petition, stating that the evidence submitted was insufficient to establish the petitioner's claim that "the petitioner owns and controls the franchise and that the petitioner is only a contractor for the Burger King Corporation." The director consequently determined that the petitioner and the beneficiary's foreign employer were not qualifying organizations.

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<sup>1</sup> The petitioner explained that a 25% interest in the U.S. company was held in trust by Amarjeet Ghai in order "to facilitate compliance with By-laws of having at least 50% stockholders at board meetings for approving borrowing/legal resolutions, thus saving the Indian Stockholders the need to travel to the U.S.A. for every meeting to make up the required presence."

On appeal, counsel submits the franchise agreement and evidence, which counsel claims, establishes that the petitioner controls the franchise. Counsel asserts that “the documentation submitted proves ownership by the Petitioner of the sites at which it does its business.” Counsel further claims that franchisees of Burger King maintain independence, and provides:

[t]he franchisees themselves and not the franchisor own a purchasing cooperative through which they create the economic power to buy food and supplies necessary for operations at the best possible price. Not only does this give the franchisees the economic leverage to control their costs but it also permits them to share in such profits as may be earned by wholesaling operations.

On review, the record does not demonstrate that the U.S. and foreign corporations are qualifying organizations.

The AAO will first address the petitioner’s failure to establish an affiliate relationship between the two organizations. 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*, *supra* at 595.

As noted above, 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 the foreign company is owned in equal shares by four stockholders. The U.S. company, however, is owned by five stockholders, four of which are shareholders of the foreign corporation. As the “same group of individuals” does not own or control both organizations, the petitioner has failed to satisfy the regulations.

It appears that the petitioner attempted to overcome this requirement by explaining that the fifth stockholder of the U.S. company, Amarjeet Ghai, held her 25% interest in trust equally for three shareholders of the U.S. corporation - Paramjit Ghai, Gurmeet Ghai, and Amarjit Ghai – thereby increasing each shareholder’s interest in the U.S. company to 25%. The petitioner asserted that the U.S. company has always “directly or indirectly been controlled by the stockholders of the Indian company.” The record, however, does not contain any documentation establishing the existence of a trust instrument, which would indicate that Amarjeet Ghai’s 25% interest is held for the benefit of three of the petitioner’s shareholders. In fact, in the minutes from a meeting of the petitioner’s board of directors, Amarjeet Ghai is identified as an individual stockholder of 25% of the company. Additionally, the U.S. corporation’s stock ledger contains a subsequent transfer of stock from Amarjeet Ghai to the three other stockholders. Again, there is no indication in either document that the stock is held in trust for the benefit of others. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has therefore failed to establish an affiliate relationship between the foreign and U.S. companies.

For purposes of clarification, the AAO will next address the issue of qualifying relationship as it relates to a franchise. The relationship that must be reviewed in this matter is that between the beneficiary's foreign employer and the U.S. petitioner, Ghai Investments, Inc. In the present matter, it is not clear how the franchise relates to the U.S. petitioner or the beneficiary's overseas employer.

An association between a foreign and U.S. entity based on a franchise agreement is usually insufficient to establish a qualifying relationship. *See* O.I. 214.2(1)(4)(iii)(D) (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 purposes); 9 FAM 41.54 N7.1-5. As noted by the director, a franchise, like a license, typically requires that the franchising organization comply with the franchisor's restrictions, without actual ownership and control of the franchise organization. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (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 determined to be "purely contractual").

In the present matter, the record contains several inconsistencies as to who is actually operating the Burger King franchise. The petitioner claimed on the petition and an appended letter that the petitioning organization diversified into the "quick service restaurant industry," and is operating fast food restaurants. However, the franchise agreement submitted by counsel on appeal identifies the franchisee as Charanjit S. Ghai and Amarjeet K. Ghai, two of the petitioner's shareholders. There is no evidence in the record that the petitioning organization acquired a franchise, or is actually operating a Burger King restaurant. Therefore, as the record fails to demonstrate a relationship between the petitioner and the franchise, it is not necessary to address the issue of franchise as it relates to a qualifying relationship with the foreign corporation. A more pertinent issue, which was not addressed by the director, is whether the petitioning organization is actually doing business in the United States.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In the present matter, the petitioner claimed that the U.S. corporation is operating fast food restaurants, specifically Burger King. Yet, as noted above, the franchise agreement identifies the franchisee as two of the petitioner's shareholders. While the existence of the petitioning organization as a U.S. corporation is evident from the Articles of Incorporation, it appears the petitioner is merely an office, and is not engaged in providing goods and services through the fast food industry. Therefore, absent additional documentation, it is impossible for the AAO to conclude that the petitioner is doing business in the United States.

For the foregoing reasons, the petitioner has failed to demonstrate that the U.S. and foreign corporations are qualifying organizations.

An additional issue not addressed by the director is whether the beneficiary has been and will continue to be employed in the United States in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a

detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In a letter submitted with the petition, the petitioner stated that the beneficiary's job responsibilities would include monitoring the set-up, funding, and lease acquisitions of the proposed venture, and hiring and training personnel. Additionally, the petitioner provided employee records verifying employees of the petitioning organization during the year 1999, yet submitted no documentation explaining the capacity in which these individuals are employed. Absent further documentation, the record does not support a finding that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this additional reason, the petition must be denied.

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. Because the director failed to follow the regulations at 8 C.F.R. § 214.2(l)(9)(iii), the AAO will remand the matter for additional action and a new decision pursuant to the regulations.

**ORDER:** The decision of the director is withdrawn. The matter will be remanded for additional action and a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.