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U.S. Citizenship
and Immigration
Services

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FILE: SRC 03 079 53783 Office: TEXAS SERVICE CENTER Date: FEB 07 2005

IN RE: Petitioner:
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:

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.

Michael Burt for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The petitioner filed a motion to reopen and reconsider on June 4, 2003, which the director granted. On September 8, 2003, the director affirmed the previous decision and denied the petition. 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 a 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 North Carolina that claims to be operating as a private investment company. The petitioner also claims that it is the subsidiary of the beneficiary's foreign employer, located in Nyahururu, Kenya. The petitioner now seeks to employ the beneficiary as its president for one year.

The director denied the petition concluding that the petitioner had not established that: (1) it had secured a "viable business" in the United States; (2) that the petitioning organization had been funded or capitalized by the foreign entity; and (3) that the beneficiary possessed the requisite one-year of foreign employment in a qualifying capacity.

On motion, counsel submitted a "bill of sale," executed on May 29, 2003, as evidence of the petitioner's purchase of a "Subway" restaurant, and provided bank statements representing funds available to the petitioner. The petitioner also submitted new evidence, including letters from businesses in Kenya, in support of its claim that the beneficiary was employed abroad in a qualifying capacity for the requisite one year.

In her September 9, 2003 decision, the director recognized the petitioner's agreement of sale for the Subway restaurant, but noted that, although requested, the petitioner had failed to provide a copy of the franchise agreement related to the purchase of the restaurant. The director stated that while the petitioner may own the franchise, it does not control it. Accordingly, the director affirmed the previous decision and denied the petition.

On appeal, counsel states that the director erred in denying the petition, claiming that the foreign entity has "effective control" of the petitioning organization. Counsel notes that the United States company is not a Subway franchise, but rather "a North Carolina corporation with properly issued shares to the Kenyan company." Counsel submits a brief and documentary evidence on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of 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.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

As noted above, in her May 5, 2003 decision, the director determined that the petitioner had failed to demonstrate that it had secured a viable business in the United States, that it had been funded by the foreign entity, and that the beneficiary was employed abroad for one year in a qualifying capacity. Following the petitioner's motion to reopen and reconsider, the director affirmed the previous decision. On appeal, counsel does not address the issues of whether the petitioner had secured a business in the United States at the time of filing the petition, or whether the beneficiary was employed abroad for one year as a manager or an executive. Therefore, the director's decision on these two issues will be affirmed. 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 AAO will address the remaining issue as to whether the beneficiary's foreign employer and the petitioning organization possess a qualifying relationship as required in the Act at § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

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:

- (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 filed the nonimmigrant petition on January 22, 2003, stating that it is a wholly owned subsidiary of the beneficiary's foreign employer. In an attached letter from the petitioner, dated December 16, 2002, the petitioner again noted that a qualifying relationship exists "as the Kenyan parent company wholly

owns and controls the U.S. subsidiary." The petitioner submitted a stock certificate reflecting ownership of 100 of the petitioner's 1,000 authorized shares by the beneficiary's foreign employer. The petitioner provided an August 2002 bank statement for a personal bank account held by the beneficiary in the United States. The petitioner also submitted bank statements for the beneficiary's personal bank account in Kenya for the dates March 2001 through July 2002. In addition, the petitioner submitted wire transfer statements reflecting several funds transfers from October 2001 through September 2002.

On February 1, 2003, the director requested that the petitioner provide copies of all stock certificates issued by the petitioning organization and evidence of the funding or capitalization of the United States company. The director noted that such evidence should include copies of wire transfers, canceled checks deposited into the petitioner's bank account, or a letter signed by a bank officer indicating the account value and the source of the investment. The director also asked that the petitioner submit evidence of its receipt of an employer identification number (EIN) issued by the Internal Revenue Service (IRS).

Counsel responded in a letter dated April 1, 2003, stating that the petitioner issued only one stock certificate for 100 shares to the beneficiary's foreign employer. Counsel provided a copy of the stock certificate and transfer ledger, and resubmitted copies of wire transfers and bank statements, which counsel stated is evidence of the funding of the United States company. With regard to the petitioner's employer identification number, counsel explained that the petitioner has not been able to receive an EIN as the beneficiary does not yet have a social security number, which is required on the EIN application. Counsel stated that the petitioner is in the process of applying for an EIN with a new corporate officer, who possesses a U.S. social security number. Counsel provided a copy of a letter from the IRS explaining that the petitioner's application for an EIN has been rejected because it lacked a social security number or individual taxpayer identification number. Counsel provided the petitioner's subsequent application for an individual taxpayer identification number and the petitioner's second application for an EIN.

The director determined in her decision, dated May 5, 2003, that the petitioner had failed to "establish the funding or capitalization of the U.S. company which has yet to be established." Consequently, the director denied the petition. The director again determined in her September 8, 2003 decision issued in response to the petitioner's motion to reopen and reconsider, that the petitioner did not establish that the foreign entity possessed control of the petitioning organization. The director stated:

Absent the actual franchise agreement, [Citizenship and Immigration Services (CIS)] can only surmise the terms based on other franchise agreements, but more importantly on prior experience with Subway franchise agreements, which are very restrictive in the criteria of the physical premises and the operational end of the business. The owner/operator must conform to the guidelines set forth in the franchise agreement.

The director outlined Operating Instruction 214.2(1)(4) as guidance that a business relationship based on a franchise agreement is typically not considered qualifying. The director stated that while the petitioner may own the franchise, it does not control it. Accordingly, the director affirmed the previous decision and denied the petition.

In an appeal filed on October 2, 2003, counsel states that the director erroneously denied the petition as the foreign entity has control of the petitioning organization. Counsel states that the beneficiary's foreign employer is the sole owner of the petitioning organization, and again submits the petitioner's stock certificate

reflecting ownership by the foreign entity. Counsel states that the petitioner it is in the process of purchasing a Subway franchise in Arkansas as part of its business plan. Counsel notes that the qualifying relationship however, is not based on the franchise, but rather is between the petitioning organization, as a new United States office, and the foreign entity. Counsel claims that the foreign entity owns and has "effective control" of the petitioning organization, and therefore satisfies the requirements for the nonimmigrant visa.

On review, the petitioner has not established that the beneficiary's foreign employer and the petitioning organization possess the requisite qualifying relationship.

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.

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 the instant matter, the record contains insufficient evidence to establish that the beneficiary's foreign employer owns the petitioning organization. Although the submitted stock certificate and transfer ledger identify the foreign entity as the sole owner of the petitioner's issued stock, there is conflicting evidence of the consideration that was purportedly provided in exchange for the stock ownership. The petitioner references bank statements and wire transfer statements as evidence of the foreign entity's funding of the petitioning organization. However, both the bank statements and wire transfers are dated at least three months prior to the issuance of stock in December 2002. Moreover, the bank statements refer to individual bank accounts held by the beneficiary in the United States and abroad. None of the bank or wire transfer statements specifically reference the petitioning organization as the account owner or as the recipient of funds but instead list individuals as the transferors. The petitioner did not provide any documentation reflecting consideration given by the foreign entity in exchange for the petitioner's stock. Absent additional evidence, the AAO cannot conclude that the foreign entity possesses ownership and control of the petitioning organization. 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). Accordingly, the petitioner has not demonstrated the existence of a qualifying relationship between the two organizations. For this reason, the appeal will be dismissed.

For purposes of clarification, the AAO will next address the issue raised by the director of a qualifying relationship as it relates to a franchise. 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(l)(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 other words, the contractual agreement between the foreign organization and the U.S. corporation can be terminated as opposed to one in which the foreign organization and a domestic organization are permanently tied together and not limited to a single, specific venture. *Id.* In the instant matter, the AAO need not consider the relationship between the petitioner and the franchising organization. The petitioner has provided evidence establishing the existence of a separate United States organization rather than the petitioner acting as a franchised business activity. However, since the petitioner did not submit the franchise agreement and admits that the agreement was not final, the petitioner's reliance on this document to establish eligibility is purely speculative. 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).

Beyond the decision of the director, the petitioner has not demonstrated that one year after the filing of the nonimmigrant petition the beneficiary would be employed in the United States in a primarily qualifying capacity. See 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner stated in its December 16, 2002 letter submitted with the petition that the beneficiary would "be ultimately responsible" for such non-qualifying duties as analyzing the company's financial reports and developing marketing strategies. The petitioner's proposed staffing, which includes a secretary and manager and other lower-level employees depending on the type of business purchased, does not account for the performance of these non-managerial and non-executive functions by other employees. 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. Consequently, the AAO cannot conclude that within one year of approval of the petition the beneficiary would be employed in a qualifying capacity. 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.