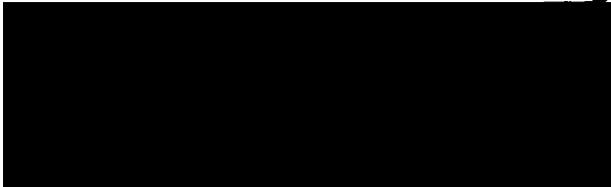




U.S. Citizenship
and Immigration
Services

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prevent unauthorized entry
invasion of personal privacy

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JUN 08 2005

FILE: SRC 03 061 51696 Office: TEXAS 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:



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 nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] endeavors to classify the beneficiary as a nonimmigrant manager or executive 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 claims to be a subsidiary of [REDACTED] located in Venezuela. The petitioner claims to be engaged in the dairy products business and operates a cruise planning services franchise. The initial petition was approved to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for one year as the U.S. entity's general manager. The petitioner was incorporated in the State of Florida on November 14, 2001 and claims to have three employees.

On December 26, 2002, the director denied the petition and determined that the petitioner failed to establish (1) that the petitioner has a qualifying relationship with the foreign entity, and (2) that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

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, the petitioner's counsel claims that the petitioner has a qualifying relationship with the foreign company and the beneficiary "manages the entire U.S. subsidiary." Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (I)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether a qualifying relationship exists between the petitioner and the foreign entity. The regulation at 8 C.F.R. 214.2(I)(ii) provides:

(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 (I)(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.

(H) *Doing business* means 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.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation 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 regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign organization. See *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) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

Initially, in an attachment to Form I-129, the petitioner claimed that: 1) the petitioner is a subsidiary of the foreign entity; 2) the foreign entity owns 100 percent of the petitioner's stock.; 3) the foreign entity is a family owned business with four 25 percent shareholders; and, 4) due to economic conditions the petitioner decided to adjust its original business plan and diversified the U.S. business to two different areas of operation: Technology Products Services and CP Franchise Services. The petitioner submitted a copy of its articles of incorporation and a copy of its franchise purchase agreement with [REDACTED]

On January 9, 2002, the director requested additional evidence. In particular, the director requested evidence showing that the petitioner and foreign entity have a qualifying relationship. The director stated that the "organization is a franchise, which is not a qualifying relationship."

In response, the petitioner submitted a January 8, 2003 letter stating that the petitioner and foreign entity have a qualifying relationship. The petitioner claimed that it entered into a franchise agreement with [REDACTED] to operate the Cruise Planners Franchise. The petitioner further stated that the U.S. petitioning entity "purchased the franchise business model" and "it is not a legal format of corporate organization, or a separate entity from the U.S. petitioner, in fact the U.S. petitioning entity will function under a D/B/A for the Cruise Planners cruise travel agent

business.” In addition, the petitioner claimed that apart from operating the franchise business, it operates a “Technology Products” business focused on the export of dairy processing equipment. The petitioner submitted another copy of the franchise agreement signed on November 5, 2001, and a copy of its stock certificate number one. The stock certificate indicates that 1,000 shares of the U.S. company’s common stock were issued to the foreign entity on November 21, 2001.

On January 14, 2003, the director denied the petition. The director determined that the petitioner failed to establish that the U.S. entity had a qualifying relationship with the foreign entity. The director found that “since the petitioning company is operating as a franchise, the petition cannot be approved.” The director stated that the franchise and license agreements effectively negate the qualifying relationship because “they take away control of the organization.” The director also stated that the petitioner sometimes operates an import-export business; however, the director found that since there were only three employees, it was not possible for the petitioner to be operating the two businesses.

On appeal, the petitioner’s counsel claims that the petitioner has a qualifying relationship with the foreign company. The petitioner claims that the franchise is not the petitioner. The petitioner states that “the franchise is an asset of the U.S. subsidiary” and [t]he Cruise Planners division will operate under a d/b/a with the same tax identification number of the petitioner. In addition, the petitioner claims that it operates a Technology Products division dedicated to export technology equipment for milk and dairy products that is operated by the beneficiary and the same staff who operate the franchise business.

On review, the AAO concurs with counsel that the director 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). The evidence of stock ownership, rather than the petitioner’s purchase of a franchise agreement, the petitioner’s claims, is critical to determining whether a qualifying relationship exists. The director’s comments with regard to the franchise agreement will be withdrawn.

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.

In the present matter, the critical relationship is that between the beneficiary's overseas employer, [REDACTED], and the U.S. petitioner, [REDACTED]. Although the petitioner does business in the United States through a franchise agreement with [REDACTED], the claimed relationship between the foreign entity and the petitioner 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.

On the Form I-129, the petitioner indicated that the foreign entity owns 100 percent of the U.S. entity's stock. The petitioner submitted its stock certificates and articles of incorporation. The articles of incorporation indicate that the company is authorized to issue 1,000 shares and the stock certificate shows that 1,000 shares were issued to the foreign entity; however, stock certificates alone are insufficient evidence to determine ownership and control of the foreign entity. 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., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Therefore, there is insufficient evidence to support the petitioner's claim that it is wholly-owned by the foreign entity.

After careful consideration of the evidence, the AAO finds that the petitioner failed to establish that a qualifying relationship exists between the U.S. entity and foreign company. For this reason, the petition will not be approved.

The second issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

- (i.) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii.) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii.) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv.) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 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 employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily-

- (i.) Directs the management of the organization or a major component or function of the organization;
- (ii.) Establishes the goals and policies of the organization, component, or function;
- (iii.) Exercises wide latitude in discretionary decision-making; and
- (iv.) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On December 26, 2002, the petitioner filed Form I-129. In two separate letters dated December 23, 2002 and January 8, 2003, the petitioner described the beneficiary’s duties as:

As General manager of the U.S. entity, he is in charge of developing and establishing all corporate policies and objectives; planning all company’s functions, operations, and investments. [The beneficiary] is in charge of directing the financial programs and expansion of the U.S. subsidiary to insure at all times the availability of sufficient funds to attain the desired objectives, and to review and adjust the U.S. entity’s goals with the consent of the parent company.

* * *

As General Manager, he directly supervises the work of the Franchise Service Manager who is responsible for contracts and relationships with individual companies that required our Cruise Planning services, suppliers, and liaises directly with clients for our technology products division in order to assess the viability and profitability of these contracts. [The beneficiary], as General Manager reviews and approves the U.S. subsidiary marketing efforts, such as contracts to promote the Cruise Planning business by print media advertising, direct mail, mass e-mailing, and established business contracts with dairy manufacturers in Venezuela, Brazil, and Colombia for expansion of our client base. He has the unfettered decision making authority in this regard, as well as how to expend company funds to further establish the business and expand into other geographical areas. He also decides on additional staff required as the operation expands. His position is at the management level since the two (2) employees . . . report to him and operate under his control.

In addition, the petitioner submitted the U.S. entity's organizational chart showing that the beneficiary supervises two part-time employees, the franchise service manager and the franchise services manager's assistant. The petitioner described the subordinates' job duties and educational backgrounds. The petitioner also stated that the U.S. subsidiary is not a fully developed commercial enterprise.

On January 14, 2003, the director denied the petition and determined that the petitioner had failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The director found that it was not possible for the beneficiary to be functioning as a manager or executive of two businesses. The director stated, "Either there is one person in charge of both businesses, with the beneficiary overseeing those people, or the beneficiary is heading one business, while leaving the other individuals to operate the other business. The director further found that at best, the beneficiary was acting as a first line supervisor, with some of the employees operating under a non-qualifying franchise and not considered for managerial or executive purposes.

On appeal, the petitioner's counsel claims that the beneficiary "manages the entire U.S. subsidiary, which includes two divisions, second, he supervises the work of professional and managerial personnel . . . , third, [the beneficiary] has unfettered authority to hire and fire employees."

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's U.S. job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). On review, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided a nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "developing and establishing all corporate policies and objectives" and "planning all company's functions, operations, and

investments.” However, these duties are generalities that fail to enumerate any concrete policies and objectives that the beneficiary will develop and establish or how the beneficiary will plan the company’s operations. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner generally paraphrased the statutory definition of executive and managerial capacity. *See* section 101(a)(44)(A) of the Act. For instance, the beneficiary’s position is depicted as “establishing all corporate policies.” However, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, a critical analysis of the nature of the petitioner’s business undermines counsel’s assertion that the beneficiary manages the entire U.S. subsidiary. For instance, the petitioner claims that the beneficiary “reviews and approves the U.S. subsidiary marketing efforts.” However, it is unclear who will actually develop the marketing activities that the beneficiary will oversee. Rather, it appears from the record that the only individuals performing any marketing-related functions are the beneficiary and his part-time franchise service manager. As the franchise service manager has been described as performing administrative functions for the beneficiary on a part-time basis, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all other marketing functions, including devising marketing plans, contacting advertisers, and performing any public relations tasks. In addition, although the petitioner claims the beneficiary supervises two part-time employees, the AAO notes that the part-time franchise service manager is the beneficiary’s spouse, who indicated on her Form I-539, Application to Extend/ Change Nonimmigrant Status, that she had not been employed in the United States since her last admission in January 2002. The record contains no evidence of wages paid to the other claimed employee. The petitioner has not established that it employs staff to relieve the beneficiary from performing routine operational duties of the business. Based on the record of proceeding, the beneficiary’s job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary’s duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. On appeal, counsel claims that the beneficiary supervises “the work of professional and managerial personnel.” In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that “[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools,

colleges, academies, or seminaries.” The term “profession” contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor’s degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that a bachelors degree is actually necessary, for example, to perform the administrative work of the franchise service manager or the franchise service manager assistant, who are the beneficiary’s claimed subordinates.

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, another issue in this proceeding is whether the United States entity has been doing business for the previous year. See 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term “doing business” is defined in the regulations 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.” 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not demonstrated that it has been doing business for the previous year. The petitioner filed to extend the beneficiary’s stay on December 26, 2002. However, on November 5, 2002, only less than two months prior to the time of filing, the petitioner entered into a contractual agreement with Cruise Planners Franchise to operate a franchise business. In addition, the petitioner, by its own admission, claimed that the “U.S. subsidiary is not a fully developed commercial enterprise.” The petitioner has also failed to submit U.S. Corporate Income Taxes showing that the business generated any income for the previous year. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner failed to establish that the U.S. entity has been doing business for the previous year. See 8 C.F.R. § 214.2(l)(14)(ii)(B). For this additional reason, the petition will 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 appeal will be dismissed.

ORDER: The appeal is dismissed.