



U.S. Citizenship  
and Immigration  
Services

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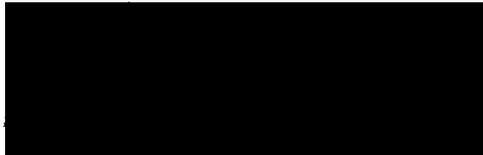


File: SRC 04 155 50238 Office: TEXAS SERVICE CENTER Date: JAN 27 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

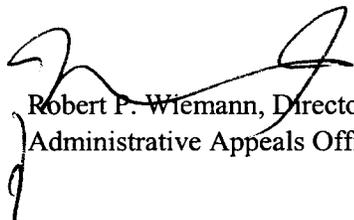
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition to the director for further action and consideration and entry of a new decision.

The petitioner seeks to employ the beneficiary temporarily in the United States 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 Florida that intends to operate a private preschool and childcare center. It claims that it is the subsidiary of Super Sub 1, C.A., located in San Bernardino, Venezuela. The petitioner seeks to employ the beneficiary as the director and general manager of its new office in the United States for a one-year period. The petitioner disclosed that it had previously filed two petitions on behalf of the beneficiary for the same position, both of which had been denied on the basis that the petitioner had not established the existence of a qualifying relationship between the United States and foreign entities.

The director denied the petition, determining that the petitioner had failed to establish that the U.S. entity and the foreign entity have a qualifying relationship.

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, counsel for the petitioner contends that the director misstated facts regarding the intended business of the U.S. company and disregarded evidence submitted in response to the request for evidence which clearly demonstrates a qualifying parent-subsidiary relationship between the foreign entity and the petitioner. Counsel submits a brief and copies of previously submitted documents in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that 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 involves executive or managerial authority over the new operation; and
- (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.

The primary issue in the present proceeding is whether a qualifying relationship exists between the petitioner and the foreign entity.

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. . .

On the Form I-129 petition, the petitioner indicated: "100% of the shares of the US company . . . have been issued to the Venezuelan company, Super Sub 1, C.A., therefore the US company is a wholly owned subsidiary of the Venezuelan company." The petitioner submitted its articles of incorporation, which indicate that the corporation is authorized to issue 1,000 shares of common stock with par value of \$1.00, and its stock certificate number one issuing 1,000 shares to the foreign entity on April 7, 2003. The petitioner also submitted the foreign company's articles of incorporation indicating that two individuals own the company, and evidence that the foreign company operates a Subway restaurant pursuant to a franchise agreement entered into in October 2001. The petitioner submitted extensive evidence establishing that the U.S. company will operate as a private preschool and child care facility.

The director found that the initial evidence submitted with the petition to be insufficient to establish the required qualifying relationship and thus issued a request for evidence on May 19, 2004. Specifically, the director stated:

The evidence submitted does not establish ownership and control of the foreign entity. The foreign entity is a "Subway" franchise. The petitioner submitted a copy of the franchise agreement as evidence. The agreement clearly indicates the foreign entity does not have operational control of the "Subway" establishment. The foreign entity must abide by the Subway "system [sic] and operations manual, which includes advertising, obtaining and location of the business, controlling the lease, menu items, quality control standards, access to electronic transfers directly from the foreign entities [sic] bank account, access to the computer systems, signs, stationary, equipment, etc. The foreign entity cannot offer items for sale without approval from Subway. The foreign entity must operate the restaurant in accordance with the operations manual. If not, Subway may revoke the franchise. The foreign entity cannot relocate the business without permission from Subway. The franchise agreement clearly demonstrates the foreign entity does not have operational control.

The director provided the definition of "subsidiary" pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(K) and instructed the petitioner to submit "convincing evidence to establish a qualifying relationship exists."

In an August 9, 2004 response to the director's request for evidence, counsel for the petitioner emphasized that the U.S. company is a wholly owned subsidiary of the foreign entity in that the foreign entity owns and controls the U.S. entity through its 100 percent ownership of the petitioner's stock. With respect to the franchise agreement, counsel explained:

Super Sub 1, C.A. is a corporation which invested in the purchase of a Subway franchise. It must be clearly understood that Super Sub 1, C.A. is not obligated to solely operate the Subway franchise. Super Sub 1, C.A. can engage in any type of business operation, therefore the corporation has control over it[s] activities and is able to diversify its activities. The Subway franchise agreement only applies to the activities of the company as they relate to the operations of the Subway franchise.

In support of its response, the petitioner submitted a detailed expert opinion letter, dated July 13, 2004, from [REDACTED], a member of the American Bar Association's Antitrust and General Practice Sections and the Forum Committee on Franchising, and a founding member of the Franchise Law Committee of the Florida Bar. [REDACTED] explained that he had reviewed the franchise agreement and the Subway operations manual and found both documents, in his professional opinion, to be "fairly typical" in that they require uniformity and standardization according to the franchisor's business model, without granting the franchisor any control over key aspects of day-to-day operations, including control over employees or responsibility for the financial performance of the business. [REDACTED] provided evidence that Subway is listed on the United States Small Business Administration Franchise Registry, and indicated: "listing on this Registry means that the Franchise Agreement does not impose unacceptable control provisions on a franchisee (which could result in affiliation with a franchisor)." [REDACTED] also emphasized that the foreign

entity will continue to exist as an independent entity should it terminate its agreement with Subway and is free to operate any number of businesses according to its articles of incorporation.

The director denied the petition on August 26, 2004, concluding that the petitioner had not established the existence of a qualifying relationship between the United States and foreign entities as it had not “clearly demonstrated ‘operational control’ of the franchises.” Specifically, the director observed:

The foreign entity is a “[S]ubway” franchise and seeks to establish another “Subway” franchise in the [United States]. The U.S. entity is claimed to be a “subsidiary” of the foreign entity. In order to qualify for the “L” classification, it must be clearly established that both “ownership” and “control” is present. The petitioner submitted a copy of the franchise agreement. Such agreement clearly indicates that the foreign entity does not have operational control. As a franchisee, the petitioner must abide by the Subway “system” and operations manual . . . . The foreign entity cannot offer items for sale without approval from Subway. The petitioner must operate the franchise in accordance with the operations manual. If not, Subway may revoke the franchise granted. The petitioner cannot relocate the business without permission from Subway. The franchise agreement clearly demonstrates the petitioner does not have operational control.

On appeal, counsel for the petitioner asserts that the director erroneously stated that the petitioner intends to operate a Subway franchise, noting that the petitioner has invested in the opening of a private preschool and daycare center in Florida. Counsel asserts that the foreign entity owns 100 percent of the shares of the U.S. corporation and concludes: “Therefore a qualifying relationship has been established as the parent . . . owns more than half of the entity and controls the entity through its 100% ownership. There is clearly a qualifying relationship regardless of the activity of the company.” Counsel further contends that the director failed to acknowledge the expert opinion letter of [REDACTED] submitted in response to the request for evidence or consider any of the issues raised therein. Counsel reiterates the opinions expressed by [REDACTED] regarding the control of the foreign entity and requests that the petition be approved.

On review, the AAO concurs, in part, with counsel’s arguments and withdraws the director’s August 26, 2004 decision. The director clearly misstated the facts of the case in determining that the foreign entity is a “franchise” and that the petitioner would operate a Subway franchise in the United States; there is no evidence in the record to support such a conclusion. This was a critical error of fact that appears to have contributed to the denial of the petition and is sufficient grounds for withdrawing the director’s decision. Contrary to the director’s statements, the record shows that the foreign entity is a privately owned corporation that has entered into an agreement to operate a Subway franchise, and the United States entity is a corporation that is in the process of opening a preschool and childcare center in Florida. Furthermore, in issuing the request for evidence, the director improperly focused on the foreign entity’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(I)(3)(i) (requiring that the petitioner and the organization which employed the beneficiary are qualifying organizations). Evidence of the petitioner’s stock ownership is critical to determining whether a qualifying relationship exists. In this case, the director’s decision focused on the franchise relationship between the foreign entity and Subway rather than on the claimed parent-subsidiary relationship between the foreign and United States entities.

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 franchisor 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(1)(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 the foreign 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 control 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, Super Sub 1, C.A., and the petitioner. Although the foreign entity does business in Venezuela through a franchise agreement with Subway, 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.

Case law provides that control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In this case, the petitioner claims that the foreign entity owns 100 percent of its outstanding stocks and submits evidence in support of this claim. If the claimed relationship exists, the foreign entity in this case is therefore assumed to have "de jure" control over the petitioner and the petitioner's burden has been met with respect to establishing ownership and control.

Upon review, there is insufficient evidence for the AAO to conclude that the foreign entity and U.S. entity enjoy a qualifying relationship. The stock certificate and articles of incorporation for the petitioner suggest that the foreign entity owns all of the petitioner's issued shares; however, the petitioner has not adequately documented that the foreign entity paid for its interest in the U.S. company. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Because the director's request for evidence merely questioned control of the foreign entity based on the existence of a franchise agreement, the petitioner did not have sufficient notice of this deficiency. The petition will be remanded to the director, who is instructed to request proof of stock purchase by the foreign entity. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the United States entity in exchange for stock ownership, such as bank certified copies of wire transfer receipts, or canceled checks or deposit receipts, identifying the account holder names and affiliation to the parent company for all persons making purchases. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the foreign entity's ownership interest in the petitioning company.

Although the foreign entity has entered into a franchise agreement with Subway to operate a restaurant in Venezuela, there is no evidence that the franchise agreement would prohibit the foreign entity from establishing a subsidiary in the United States, or from engaging in other types of businesses in Venezuela. As such, the AAO finds no evidence that the franchise agreement renders the foreign entity ineligible to be considered a qualifying organization abroad, provided that the petitioner is able to supplement the record with additional evidence to demonstrate the foreign entity's ownership and control of the U.S. entity, as discussed above.

Beyond the decision of the director, the record as presently constituted does not contain sufficient evidence to establish that the beneficiary has been employed by the foreign entity for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The instant petition was filed on May 11, 2004 with a request that the beneficiary be granted a change of status from that of a B-2 nonimmigrant. The director is instructed to request evidence that the beneficiary was employed by the foreign entity on a full-time basis for one continuous year preceding her admission to the United States in B-2 status in May 2003. The petitioner should also provide the dates the beneficiary was physically present in the United States between October 2001 and May 2003, as such time will not be considered in determining whether she possesses the qualifying one continuous year of employment abroad. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

In addition, the record does not persuasively establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. The petitioner provided only a vague and general description of the beneficiary's duties that fails to convey an understanding of what managerial or executive tasks the beneficiary performed as general manager of the foreign entity. For example, the petitioner stated that the beneficiary was responsible for "overseeing and directing the activities of our Venezuelan parent," "management and direction of corporate policy," and "all operations and financial activities of the company." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The director is instructed to request additional evidence to establish that the beneficiary was employed in a qualifying managerial or executive capacity abroad, including, but not limited to: a detailed description of the beneficiary's actual duties, including the percentage of time devoted to each listed duty on a weekly basis; a detailed organizational chart for the foreign entity as of the date the beneficiary was last employed in Venezuela, including names and job titles for all positions subordinate to the beneficiary and whether the employees worked on a part-time or full-time basis; brief job descriptions for all employees of the foreign entity; and payroll records confirming the employment of individuals named in the foreign entity's organizational chart.

Finally, as the petitioner is seeking to open a new office in the United States, the AAO notes that the record does not contain certain initial evidence required by 8 C.F.R. § 214.2(l)(3)(v)(C), namely evidence that the United States entity, within one year of the approval of the petition, will support the beneficiary in a primarily executive or managerial capacity. The petitioner has provided insufficient evidence regarding the intended scope of the United States entity, its organizational structure, and its financial goals. *See* 8 C.F.R. 214.2(l)(3)(v)(C)(1). Although the evidence submitted establishes that the petitioner has made substantial progress toward preparing to open a preschool and daycare center, the petitioner has not submitted its business plan, a detailed hiring plan, or any evidence regarding its financial goals, other than stating an estimated gross annual income figure on the Form I-129. In addition, the record contains no evidence of the size of the United States investment, nor evidence that the foreign entity had actually transferred any monies to the petitioner as of the date of filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Finally, as discussed above, the petitioner has not provided evidence of the organizational structure of the foreign entity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(3). For

these reasons, the petition cannot be approved, and the director is thus instructed to request additional evidence consistent with the above discussion.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, May 11, 2004.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for this nonimmigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence she deems necessary.

**ORDER:** The decision of the director dated August 26, 2004, is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.