

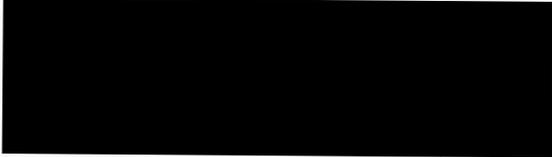


U.S. Citizenship
and Immigration
Services

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File: SRC 04 014 51957 Office: TEXAS SERVICE CENTER

Date: OCT 04 2006

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

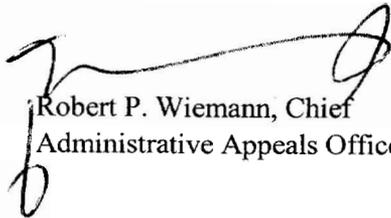
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
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 dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee in the position of manager 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 under the laws of the State of Texas and claims to be engaged in operating a restaurant. The petitioner also claims that it is the subsidiary of [REDACTED] located in [REDACTED]. The beneficiary was initially admitted to the United States in B-2 visitor status, and the petitioner now seeks to change the beneficiary's status to L-1A nonimmigrant classification.

Upon initial review of the matter, the director sent the petitioner a request for additional evidence on October 29, 2003. Specifically, the director requested a copy of the company's franchise agreement for its [REDACTED] restaurant in Fort Worth, Texas.

In response, the petitioner submitted a copy of the requested [REDACTED] franchise agreement.

The director denied the petition concluding that the petitioner did not establish that it had a qualifying relationship with the foreign entity.

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 asserts that the U.S. entity meets the requirements of a qualifying organization as a subsidiary of the foreign entity. In the alternative, counsel submits an amended Petition for a Nonimmigrant Worker and argues that the beneficiary also qualifies for E-2 classification. In support of this assertion, the petitioner submits additional evidence.

Upon review and for the reasons discussed herein, counsel's assertions are not persuasive and, thus, the AAO will dismiss 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 in part 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) provides that, if the manager or executive being transferred to the United States is to be employed in a new office, the following additional evidence should also be submitted:

- (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; 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 matter is whether the United States and foreign entities are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G).

Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term "qualifying organization" as 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 (D)(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.

In addition, 8 C.F.R. § 214.2(D)(1)(ii)(K) defines the term "subsidiary" as:

[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.

The petitioner in this case maintains in the initial petition that the U.S. entity is a wholly owned subsidiary of the foreign entity. In support of this assertion, the petitioner submitted its articles of incorporation, a shareholder certificate issued to the foreign entity, and a second blank shareholder certificate. A franchise agreement was also submitted in response to the director's request as evidence of the relationship between [REDACTED] and the restaurant to be purchased by the U.S. entity.

In her review of the control of the franchised [REDACTED] restaurant, the director noted that the franchise agreement included the following understanding:

Franchisee understands and acknowledges that Company, as franchisor, has not and does not exercise any control over the day-to-day operations of Franchisee's Restaurant, including, without limitation, the selection, scheduling and supervision of Franchisee's employees or contractors, the manner of operating, scheduling and supervision of food preparation, and all aspects of delivery operations.

The director then concluded that, "[as] the petitioning company is operating as a franchise, the petition cannot be approved."

While the director correctly determined that the evidence did not establish that a qualifying relationship existed between the U.S. and foreign entities, it does not appear that the basis for this conclusion was correct. First, as there is no evidence in the record to indicate that the restaurant and the [REDACTED] franchise agreement had been sold and transferred to the petitioner at or before the time the petition was filed on October 15, 2003, the director's statement that the petitioner "is operating as a franchise" is incorrect and unsupported by the evidence. Specifically, the Offer to Purchase document only indicates that the seller and the buyer had agreed to a closing date of October 31, 2003 for the seller's business. Thus, even if evidence of the sale and transfer

of both the restaurant and the franchise agreement had been submitted,¹ the transaction(s) would not have occurred until after the petition was filed. Consequently, the petitioner's claims as well as the director's statement that the petitioner was operating a franchise at the time the petition was filed are both incorrect, and the director's statement must be withdrawn.

Second, even if the petitioner had been operating under a franchise agreement, the director's blanket statement that a company operating as a franchise cannot be a qualifying organization is incorrect and will, therefore, be withdrawn for this reason as well. The qualifying relationship that is at issue is that of the petitioner and the foreign entity and not that of the foreign entity and [REDACTED] or that of the U.S. entity and [REDACTED]. Simply operating as a franchise does not prohibit a petitioner from having a qualifying relationship with a foreign entity. If a petitioner were trying, for example, to transfer a manager from a franchised [REDACTED] restaurant abroad to manage a franchised [REDACTED] restaurant in the United States, without any relationship between the two restaurants other than being part of the same franchise, the director should conclude that no qualifying relationship exists based upon the franchise agreements each business may have with [REDACTED]. However, if a U.S. entity seeks to transfer a manager to the United States to manage a restaurant business it has purchased, the fact that the restaurant is part of a franchise will not bar the U.S. entity from having a qualifying relationship with the foreign entity.

At the same time, while the director should primarily focus on the relationship between a petitioner and a foreign entity in determining whether they are qualifying organizations, this does not mean it is incorrect for the director to examine an applicable franchise agreement. As discussed above, simply owning a franchise, in itself, does not mean a petitioner cannot meet the requirements for a qualifying organization. In such cases, however, the ownership and control of the franchise is an issue that would normally need to be examined in order to ensure that the petitioner has actual control over the business instead of the franchisor, especially where, as here, the petitioner's sole business appears to be the franchised restaurant it has agreed to purchase.

In this matter, assuming again that the petitioner did operate a restaurant under the submitted franchise agreement, the section of the agreement quoted by the director indicates that the franchisee would maintain control over the restaurant, not the franchisor. By quoting this specific section of the franchise agreement, it appears the director may have inadvertently confused franchisee with franchisor and, thus, incorrectly determined that the franchisee did not have control over the business. Moreover, contrary to such a conclusion, section 7.B.4 of the franchise agreement indicates that the franchisee must install and prominently display a sign that reads "Independently Owned and Operated by [Franchisee Name], a franchisee of [REDACTED]". While this section of the agreement was presumably included as additional protection of [REDACTED]

¹ According to section 11 of the [REDACTED] franchise agreement, the franchisee, identified on page 1 as [REDACTED] is not permitted to sell, assign, or otherwise transfer any rights under the agreement or any interest in the license and franchise "without first obtaining the express written consent" of [REDACTED]. As there is no evidence in the record that [REDACTED] obtained an express written consent to sell, assign, or transfer any rights under the agreement to the petitioner, it cannot be concluded that the petitioner ever operated under this franchise agreement before or after the L-1A petition was filed on behalf of the beneficiary.

from indemnification, it also corroborates the finding that the franchisee would maintain control over the operations of the franchised restaurant.

However, given that the petitioner was not operating under a franchise agreement at the time the petition was filed, the franchise agreement is not relevant to the present matter and will not be further discussed. Thus, as indicated above, the crux of the issue is whether the petitioner had a qualifying relationship with the foreign entity. 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 the 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 indicated above, the petitioner initially claimed under penalty of perjury on the supplement to Form I-129, Petition for a Nonimmigrant Worker, that the U.S. entity is a wholly owned subsidiary of the foreign entity. In support of this assertion, the petitioner submitted its Articles of Incorporation, which indicated that it was authorized to issue 100,000 shares at a par value of \$1.00 each and that at least \$1,000.00 worth of shares had to be issued before it could commence business. In addition, the petitioner submitted a stock certificate, which indicated that 1,000 shares were issued to the foreign entity on October 9, 2003. A second, blank stock certificate was also submitted, presumably as evidence that no other stocks had been issued beyond the initial 1,000.

On appeal, however, counsel and the petitioner both make contradictory claims regarding the ownership of the U.S. entity. Specifically, in her letter dated December 4, 2003, counsel states on page two that the petitioner is a subsidiary of the foreign entity. Then on page three of the same letter, in an apparent attempt to prove in the alternative that the beneficiary also qualifies for E-2 Classification, counsel states that the petitioner is "one hundred percent (100%) owned by [REDACTED] a citizen of Pakistan." Moreover, on the supplement to the amended Form I-129, the petitioner claims under penalty of perjury that [REDACTED] owns 100% of the U.S. entity. Based on these conflicting statements, the AAO cannot conclude that the petitioner has met its burden in establishing that it has a qualifying relationship with the foreign entity.

Moreover, as the foreign entity appears to be a partnership, by its very definition counsel and the petitioner could not have meant that [REDACTED] indirectly owned 100% of the U.S. entity via his ownership of the foreign entity. Furthermore, upon review of the submitted Partnership Deed of the foreign entity, of the five partners listed [REDACTED] was not one of the five named. Therefore, as [REDACTED] did not own in any part the foreign entity and as [REDACTED] and the foreign entity could not each own 100% of the U.S. entity, the AAO is left to conclude that counsel and the petitioner made willful misrepresentations as to a material fact, the ownership of the petitioner, in their attempt to obtain benefits

under the Act for the alien beneficiary in violation of section 274C(a)(1),(2), and (5) of the Act, 8 U.S.C. § 1324c(a)(1),(2), and (5).²

Accordingly, upon review of the petition and the conflicting evidence presented, the petitioner has not established that it meets the definition of a qualifying organization as the "same employer or a subsidiary or affiliate thereof" as required by section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Thus, the decision of the director will be affirmed, and the petition will be denied.

Moreover, it is noted for the record that counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for E-2 classification is, therefore, rejected.

Beyond the decision of the director, the petitioner indicated under penalty of perjury that the U.S. and foreign entities have the same qualifying relationship as they did during the one-year period of the alien's employment abroad with the foreign partnership. As the U.S. entity was not incorporated until August 5, 2003, two months before the petition was filed, it appears the petitioner did not even exist prior to the beneficiary's entry to the United States in B-2 status on May 7, 2003. Therefore, the petitioner either misrepresented another fact in this case or made a serious error by responding to this question on the supplement to Form I-129 in the affirmative.

Another error made on the supplement to Form I-129 was the petitioner's claim that the beneficiary was not coming to the United States to open a new office. It is possible that the petitioner believed that by buying an existing business, the franchised [REDACTED] restaurant, it was not opening a new office. However, as indicated above, the petitioner had not purchased the franchised [REDACTED] restaurant business as of the time the petition was filed. According to the regulations, a new office is defined as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than a year." 8 C.F.R. § 214.2(l)(1)(ii)(F). Based on the record before the director, no evidence has been presented to indicate that the

² The Service reserves its right to provide formal notice to counsel and the petitioner of their respective violations of section 274C(a)(1),(2), and (5) of the Act, 8 U.S.C. § 1324c(a)(1),(2), and (5), and to issue cease and desist orders with civil money penalties in accordance with section 274C(d)(3) of the Act, 8 U.S.C. § 1324c(d)(3).

petitioner had been doing business in the United States for any amount of time³ and, therefore, it should be considered to be a new office.

As a new office, the petitioner is required under 8 C.F.R. § 214.2(l)(3)(v)(A) to prove that sufficient physical premises have been secured for the new office. As previously discussed, the petitioner did not provide any evidence that it ever purchased the franchised [REDACTED] restaurant business. In addition, although a sublease for a discount liquor store and check cashing service was submitted, it was signed and dated by the petitioner on June 1, 2003, two months prior to the date the U.S. entity was incorporated and four months prior to when the petitioner was authorized under its Articles of Incorporation to commence business. Therefore, the petitioner has failed to prove that it had secured sufficient physical premises for the new office by the time the petition was filed. For this additional reason, the petition may not be approved.

Moreover, while the petitioner claims that the beneficiary has been employed abroad by the foreign entity in the position of creative manager since July 1, 2001, it has failed to provide any evidence of this employment, such as pay statements or other payroll documents. Thus, even though it appears the beneficiary may own 15% of the foreign entity, this in itself does not mean the foreign partnership actually employed the beneficiary for one continuous year in the three year period preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B). Moreover, based on the vague job duties provided, the AAO is unable to determine whether the beneficiary's claimed position abroad was primarily managerial or executive as defined and required by the Act and the corresponding regulations. *Id.*; See Section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B); See 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C). For these additional reasons, the appeal must be dismissed.

Finally, one additional material misrepresentation should be noted for the record. In her letter dated December 4, 2003, counsel confirms on page three that the petitioner was incorporated on August 5, 2003. Counsel then states on page four that the petitioner "has sales of approximately six hundred thousand dollars (\$600,000 USD) ending June 30, 2003." In addition, the petitioner under penalty of perjury claims on the Form I-129 that it had a gross annual income of \$600,461.00 ending June 2003. Although counsel and the petitioner appear to be relying on the franchised [REDACTED] restaurant business for this stated income, as the petitioner had not purchased the [REDACTED] restaurant business at the time these claims were made, they remain false and misleading. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

³ Although invoices, financial statements, and tax documents were submitted, this evidence pertained to the franchised [REDACTED] restaurant, which the petitioner only agreed to purchase. Again, no evidence was presented to show that the petitioner actually purchased the franchised [REDACTED] restaurant business. Moreover, as previously indicated, based on the petitioner's Articles of Incorporation, it was not authorized to commence business until \$1,000.00 worth of shares had been issued, which did not apparently occur until October 9, 2003, less than a week before the petition was filed.

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.