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File: SRC-04-042-51458 Office: TEXAS SERVICE CENTER Date: OCT 05 2006

IN RE: Petitioner:
Beneficiary:



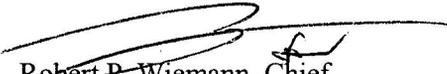
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 qualify the employment of its Director of Finance 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 Limited Liability Company organized under the laws of the State of Texas and is engaged in running fast food franchises. The petitioner claims that it is the affiliate of [REDACTED] located in Tamaulipas, Mexico.

The director denied the petition concluding that: (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) that the beneficiary had been operating in a managerial or executive capacity in the foreign entity, and (3) that a qualifying relationship exists between the foreign entity and petitioner.

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 director erred in determining that beneficiary had not been and would not be employed in a primarily managerial or executive capacity. In support of this assertion, the petitioner submits additional evidence.

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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

The specific duties undertaken by the Director of Finance for [petitioner] will include: (1) formulate financial policy to ensure that expansion goals for the Carl's Jr. franchise are met; (2) direct the company's financial goals and ensure that objectives are met; (3) oversee the management of the budget; (4) be responsible for the investment of funds; (5) supervise all cash management activities; and (6) devise capital-raising strategies to support the company's expansion in the South Texas Market.

In the support letter, the petitioner quoted verbatim from a Department of Labor (DOL) manual as a description of beneficiary's specific duties.¹

On December 8, 2003, the director requested additional evidence. In part, the director requested:

- Evidence of the business conducted by petitioner during past year
- Evidence of the funding and capitalization of the United States company
- Form 1099s for petitioner's contract employees
- Documentary evidence to establish the current ownership and control of [third party franchiser] and [foreign company]
- Articles of Organization for [foreign company]
- A definitive statement describing the U.S. and foreign employment of the beneficiary, including:
 - Position title
 - List all duties
 - **Percentage of time spent on each duty**
 - Number of subordinate managers/supervisors or other employees who report directly to the beneficiary
 - A brief description of their job titles and duties; give their educational background; if the beneficiary does not supervise other employees, specify what essential function within the organization that is managed
 - Specific dates of employment
 - **Indicate the qualifications required for the position**
 - Indicate the level authority held by the beneficiary
 - Indicate whether or not the beneficiary functions at a senior level within the corporation
 - Specify the position with the organizational hierarchy
 - Indicated who provides the product sales/services or produces the product of the business
- Copies of the quarterly wage reports for all employees from 2002 to present
- Evidence that the foreign employer is currently engaged in business operations
- Organizational chart of the foreign and United States entity
- Indicate who does the shipping and handling at the United States and foreign entity
- Documentary evidence of the relationship between the petitioner and Carl's franchise
- A copy of the franchise agreement with Carl's restaurants

¹ The AAO would note that it needs a description of what the beneficiary's actual duties are, not a quote from DOL manual. See 8 C.F.R. 214.2(I)(3)(ii).

- Documentary evidence to show that the beneficiary has worked for the petitioner in one of the last three years

In response, the petitioner submitted invoices for purchases in the name of petitioner as evidence of doing business, wire transfer deposit slips as evidence of capitalization, a letter of support, tax forms, corporate documents, hierarchy diagrams, financial documents to establish the foreign organization has been doing business, franchise agreements, and pay stubs to support assertion that beneficiary was employed within one of the last three years. In the Response to RFE support letter, the petitioner described the beneficiary's duties as:

(1) formulate financial policy to ensure that expansion goals for the [REDACTED] Franchise are met (15%); (2) direct the company's financial goals and ensure that objectives are met (15%); (3) oversee the management of the budget (20%); (4) be responsible for the investment of funds (20%); (5) supervise all cash management activities (15%); (6) devise capital-raising strategies to support the company's expansion in the South Texas Market (15%).

The petitioner also re-quoted the same DOL dictionary excerpt.

On March 10, 2004, the director denied the petition. The director determined that the petitioner had not established that the beneficiary had been and would be working in a primarily managerial or executive capacity and that no qualifying relationship existed between the foreign organization and the U.S. petitioner.

On appeal, counsel for the petitioner asserts that the director erred in determining that beneficiary would not be acting primarily in a managerial or executive capacity, that beneficiary had not acted in a managerial or executive capacity while employed with the foreign affiliate, and that a qualifying relationship did not exist with foreign affiliate.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

On appeal the petitioner submits a letter of support and repeats the same description of the beneficiary's duties.

This description is overly broad in nature and does not detail what beneficiary will actually do on a day-to-day basis. Despite two separate opportunities to clarify the petitioner's inadequate description of the beneficiary's duties, the petitioner submitted and resubmitted the same statement of duties and DOL dictionary quote. The petitioner fails to describe how beneficiary will meet objectives, or even what those "objectives" are, much less how the beneficiary will "direct" the company's financial goals versus actually

performing the activities necessary to “meet objectives.” The petitioner has not provided evidence that there are any employees to perform budget operations such that beneficiary can “oversee the management of the budget” as opposed to actually performing budget operations herself – this language is aspirational and fails to detail or inform CIS of what beneficiary’s actual day-to-day activities and duties include. The petitioner also failed to explain in what context the beneficiary would be “investing funds,” and how investing these funds is a duty or activity that is related to the position beneficiary will occupy.

The submitted description and percentages, without any context in which to apply them, appear arbitrary and are not supported by any documentary evidence in the record. In the instant case it does not appear that there are any other employees which would be performing financial duties or activities for the petitioner, thus the AAO is left to assume that they will be performed – as opposed to managed – by beneficiary. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be primarily employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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). The actual duties themselves reveal the true nature of the employment. *Id.*

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

On appeal counsel for petitioner asserts that petitioner’s letter of support is competent evidence that beneficiary’s duties qualify as acting in a primarily managerial or executive capacity because they are included in the Department of Labor’s Dictionary of Occupational Titles. However, the Department of Labor does not have jurisdiction over these proceedings and the DOL publication does not apply. Instead, this petition is governed by the Immigration and Nationalization Act and the applicable definitions. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Again, merely reiterating the regulations of the Department of Labor guidelines is not sufficient to meet the burden of proof in these proceedings. *See Fedin Bros. Co., Ltd. V. Sava, supra.*

The second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists. Contrary to counsel’s assertion that the law does not require control in a 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. at 593; *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.

The petitioner has admitted that both the foreign company and petitioner are actually operating under franchise agreements and thus do not exercise the level of control contemplated by statute and precedent.² 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 petitioner has submitted a franchise agreement from [REDACTED] reflecting the petitioner, [REDACTED] as the franchisee. As the U.S. petitioner is the franchisee, the relationship between the U.S. entity and the foreign employer is not contractual. Accordingly, the AAO must evaluate the ownership and control of the two entities, in accordance with the applicable regulations. *See* 8 C.F.R. 214.2(l)(1)(ii)(I) through (L).

If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. That is not the situation in this case, however, as there are different owners for each entity and different percentages of ownership among those owners with no majority shareholder in either. CIS has never

² *See* Letter of counsel ("Response to RFE"), dated February 25, 2003, attached hereto (stating "[petitioner] is strictly a franchisee for Carl's Jr.").

accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. 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 has submitted documentation on appeal which clouds the ownership of the foreign organization. U.S. entity is owned by three individuals, and the foreign entity is owned by four individuals. See Regulation of [Beneficiary], attached hereto as petitioner's appeal exhibit K; Articles of Incorporation [foreign organization], attached hereto as petitioner's exhibit L. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. In addition, counsel's assertions on appeal are undermined by inconsistent evidence in the record. Allegations of ownership on appeal are not the same as what was alleged on Form I-129. On appeal the petitioner has submitted an undated document labeled "Appendix B, Corporate Ownership" which asserts that [REDACTED] owns 2% of the foreign organization, [REDACTED] 48% of the foreign organization, and a previously unidentified individual [REDACTED] owns 50% of the foreign organization. An additional document, which appears to be an excerpt of corporate minutes authorizing purchase of shares by [REDACTED] and [REDACTED], lists the ownership of the foreign organization as [REDACTED] 48%, [REDACTED] 25%, [REDACTED] 25%, [REDACTED] 2%. On the petitioner's Form I-129 the ownership of the foreign organization is listed as [REDACTED] 33 1/3%, [REDACTED] 33 1/3%, [REDACTED] 33 1/3%.

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). In this case petitioner failed to clearly articulate the ownership of the foreign organization and it cannot be determined from the record that a qualifying relationship exists. The record does not support that the companies are owned and controlled by either the same individual by majority ownership of both companies or by the same group of individuals with the same approximate ownership such that they constitute affiliates. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

The third issue in this case is the failure to establish that the beneficiary was employed in a primarily managerial or executive capacity by the foreign petitioning organization within three years prior to filing. Contrary to counsel's assertion, 8 C.F.R. 214.2(l)(3)(iv) clearly states that an individual petition shall be accompanied by evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge. However, the documentation submitted to establish prior managerial or executive capacity employment with the foreign company is exactly the same as what was submitted for the beneficiary's proposed duties in the United States, and thus suffers the same shortcomings as the petitioner's description of the proposed U.S. job duties. The petitioner submits a letter

with the same vague and un-specific description of beneficiary's prior duties and little supporting documentary evidence such as work product. An organization chart has been submitted which asserts that her duties were of a managerial or executive capacity; pay stubs have been submitted showing that the beneficiary was paid by the foreign entity; and a resume for the beneficiary was submitted. Unfortunately none of this evidence is probative as there has been no detailed description of what the beneficiary actually did on a day-to-day basis nor how the beneficiary fulfilled the vague goals submitted as a description of duties. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

In visa 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.