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File: SRC 03 226 52022 Office: TEXAS SERVICE CENTER Date: **OCT 20 2006**

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

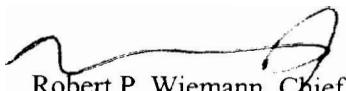
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 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 Texas that is described as a bakery and grocery store. It claims that it is the affiliate of [REDACTED] Texaco Panamericana, located in San Salvador, El Salvador. The petitioner seeks to employ the beneficiary as its administrative manager for a three-year period.

The director denied the petition, determining that the petitioner had failed to establish that the petitioner and the foreign entity have a qualifying relationship. Specifically, the director noted that the foreign entity “is a franchise which is independently owned and does not fit the Citizenship and Immigration and Naturalization Services definition of qualifying organization.”

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’s conclusion that the foreign entity is a franchise is unsubstantiated by the evidence of record. Counsel submits a brief and additional evidence which seeks to clarify the petitioner’s relationship with the foreign entity.

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 primary issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

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

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. . .

On the Form I-129 petition, the petitioner indicated that the United States company is an affiliate of the foreign entity based on common ownership by an individual, [REDACTED]. The evidence of record indicates that [REDACTED] operates or operated two Texaco service stations as a sole proprietor in El Salvador. In addition, the petitioner submitted evidence in the form of its articles of incorporation and stock certificates indicating that [REDACTED] owns 60 percent of the U.S. company's stock.

The record also contains a letter from the foreign entity's accountant, who stated the following:

I certify that [the beneficiary] is the General Manager and Sole Owner of the company: [REDACTED] a legally constituted Salvadoran enterprise and franchisee of TEXACO CARIBBEAN INC., a subsidiary of CHEVRONTEXACO Company.

The above-mentioned franchise is exercised since 1994 at TEXACO PANAMERICA and TEXACO SANTA EUGENIA in the city of San Salvador, El Salvador.

The director denied the petition on March 22, 2004, concluding that the petitioner had failed to establish the existence of a qualifying relationship between the United States and foreign entities. Specifically, the director stated: "Texaco Panamericana is a franchise which is independently owned and does not fit the Citizenship and Immigration Service definition of qualifying organization."

On appeal, counsel for the petitioner asserts that the director erroneously alleged that the foreign entity is not a qualifying organization because it operates as a franchise. Counsel for the petitioner contends that the business identified as Texaco Panamericana "is owned 100% by [REDACTED] as a proprietorship in El Salvador." Counsel asserts that since [REDACTED] is a majority shareholder of the petitioner, a qualifying relationship exists between the foreign entity and the U.S. petitioner. Counsel further notes that the director improperly concluded that the foreign entity is a franchise, and submits a letter from Texaco Caribbean, Inc. ("Texaco"), as well as a partial translation of the first page of the contract between Jorge Cervantes and Texaco.

The letter from Texaco's general manager, dated April 2, 2004, states that [REDACTED] is the owner of two service stations that utilize the Texaco brand. The general manager refers to [REDACTED] as an "agent," and indicates that his company "has absolute freedom to manage and operate his stations in all of the aspects, such as: determining prices, marketing, inventory control, contracting personnel, accounting, taxes, government regulations, etc." Finally, Texaco's general manager states that the [REDACTED] owns the land, buildings and equipment at one of his stations, and "[Texaco] pays him for letting us sell our products."

Upon review of the record of proceeding the petitioner has not submitted sufficient evidence to establish that the foreign and U.S. entities have a qualifying relationship.

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.

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 franchisor, 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 franchisor'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 petitioner 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 entity claims to be related to a U.S. company through common ownership and control, and that foreign entity is doing business as a franchise, 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.

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.

The evidence in this matter shows that the same individual, [REDACTED] is the sole owner of the foreign entity and the majority owner of the petitioning company. However, the petitioner has submitted

inconsistent and incomplete evidence regarding the nature of [REDACTED] relationship with Texaco which precludes a finding that there is a foreign qualifying organization.

The petitioner previously submitted a statement from the foreign entity's accountant, dated April 9, 2002, which states that the foreign entity is "a legally constituted Salvadorian enterprise and franchise of Texaco Caribbean Inc., a subsidiary of ChevronTexaco Company." The accountant further claimed that the franchise relationship had been in effect since 1994. On appeal, however, counsel refutes the previously-claimed franchise relationship, and asserts that [REDACTED] merely has a supply contract with Texaco. On appeal, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Furthermore, these conflicting statements cast doubt upon the petitioner's claims. 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).

Whether a true franchise relationship exists between Texaco and [REDACTED] remains questionable. Since the petitioner failed to submit a complete copy of the agreement between Texaco and [REDACTED] the AAO is precluded from determining the true nature of the relationship between the two parties and the resulting effect on the qualifying relationship. 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)).

It is further noted that the petitioner has not submitted sufficient evidence to establish that the foreign sole proprietorship will continue to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition). USCIS records show that [REDACTED] the owner and sole proprietor of the foreign business, has been residing in the U.S. in L-1A status, which raises the question of whether the foreign business will continue to do business abroad.

Finally, the AAO notes that the majority of evidence submitted with respect to the foreign entity was in the original Spanish language and accompanied by no translations, or only partial, summary translations. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, much of the evidence is not probative and will not be accorded any weight in this proceeding.

Based on the foregoing discussion, the petitioner has failed to establish that the petitioner and the foreign entity are qualifying organizations. For this reason, the appeal will be dismissed.

Beyond the decision of the director, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the beneficiary had never been denied the requested classification. This petition was filed on August 15, 2003. A review of U.S. Citizenship and Immigration Services (USCIS)

records indicates that the beneficiary's previous L-1 petition (SRC.02 1795 53429) was denied by the director on or about August 29, 2002. The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the petitioner indicated on the form that the beneficiary had never been denied the requested classification, and the petitioner failed to fully disclose the previously filed petitions, this petition will be denied as a matter of discretion.

Another issue not addressed by the director is whether the petitioner established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has provided a vague job description which fails to convey any understanding of the duties to be performed by the beneficiary in her proposed role as administrative manager. The petitioner indicated that the beneficiary would manage the finances of three stores; hire, fire and supervise other employees (including an operations manager); review activity reports and financial statements; and direct and coordinate the formulation of financial programs. The petitioner did not indicate who would perform non-qualifying duties associated with the financial function or otherwise describe the beneficiary's proposed subordinate staff. 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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 petitioner indicated on Form I-129 that the U.S. company had 16 employees as of the date of filing, and claimed to operate three retail stores. The petitioner submitted an organizational chart which shows the beneficiary's proposed position of administrative manager overseeing an accountant and an operations manager, who in turn supervises the petitioner's three stores and their staff, including cashiers, bakers and drivers. The organizational chart did not identify any workers by name and the record is devoid of any further information regarding the company's structure or the duties assigned to each staff member. 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)).

The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2003, show that the company employed 15 workers, but paid salaries of only \$14,318.61 during the quarter in which the petition was filed, \$7,500 of which was paid to the company's president. Considering that the remaining 14 members of the petitioner's workforce earned combined wages of less than \$8,000 during the three month-period, the company does not appear to have any full-time workers, although, at a minimum, it is reasonable to expect that the company would require the services of a full-time manager for each of its stores. Based on the minimal evidence submitted regarding the beneficiary's proposed duties and the petitioner's organizational structure, it cannot be concluded that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The petitioner has neither provided a detailed description of the beneficiary's proposed duties, nor presented evidence of a sufficient staff who would relieve the beneficiary from performing non-qualifying operational or first-line supervisory tasks associated with the petitioner's day-to-day business operations. For this additional reason, the petition cannot 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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.