



U.S. Citizenship
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File: SRC 04 017 53884 Office: TEXAS SERVICE CENTER Date: SEP 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)

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 intends to operate a chain of franchised restaurants. It claims that it is the affiliate of [REDACTED], located in Dhaka, Bangladesh. The petitioner seeks to employ the beneficiary as the president and general manager of its new office in the United States for a one-year period.

The director denied the petition, concluding 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 asserts that the director erred by finding that the petitioner's franchise agreement prevents a finding that the U.S. and foreign entities have a qualifying relationship, and objects to the director's conclusion that the franchisor controls the petitioner's business. Counsel asserts that the foreign entity wholly owns the petitioner and controls its managerial and financial functions. Counsel submits a brief and additional evidence 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 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. . .

The nonimmigrant petition was filed on October 22, 2003. On the L classification supplement to Form I-129, the petitioner stated that the U.S. company is an affiliate of the beneficiary's foreign employer, [REDACTED]. The petitioner described the ownership of each company as follows:

[The beneficiary] owns 100% shares of [REDACTED] and 50% interest in [REDACTED]
[The petitioner] (U.S. Co.) - [The beneficiary] 100% Shares
[REDACTED] Foreign Co.) - [REDACTED] 0% Shares; [REDACTED] 25% Shares; [REDACTED]
[REDACTED] 5% Shares

In support of the petition, the petitioner provided a copy of its July 30, 2003 articles of incorporation, indicating that the U.S. company is authorized to issue 1,000 shares of common stock with a par value of \$1.00 per share, and its stock certificate number one, indicating that 1,000 shares of stock have been issued to the beneficiary. The stock certificate is signed by the beneficiary as president and secretary of the corporation, but is not dated. The petitioner also provided copies of three wire transfer receipts and the U.S. company's

August 2003 bank statement, indicating that these documents indicate “transfer of funds from the foreign company to the Petitioner.” One wire transfer receipt, dated August 18, 2003, in the amount of \$6,980, originated with “S S Enterprises,” while the other two transfers, dated August 8 and August 15, 2003 and totaling \$16,960, originated with [REDACTED].” The petitioner’s bank statement corroborated the deposit of these monies to the petitioner’s account in August 2003.

With respect to the foreign entity, the petitioner submitted the company’s June 1, 1998 deed of partnership, which identifies the beneficiary as the managing partner and owner of a 50 percent interest in the company, with the remaining interest divided evenly between [REDACTED] (25 percent) and [REDACTED] (25 percent). The foreign entity’s report and statement of audited accounts for the year ended June 30, 2003 showed that the partners’ interest in the company was unchanged as of that date.

Finally, the petitioner’s initial submission included a lease agreement for the U.S. company, stating that the leased premises “shall be used for the purpose of operating administrative offices for a food franchise business.” The petitioner stated in its October 14, 2003 letter that the U.S. company intends to establish a chain of retail food locations under the business name of “Philly Connection.”

The director requested additional evidence on November 5, 2003, in part requesting that the petitioner submit evidence of the funding or capitalization of the United States company, such as copies of wire transfers showing transfers of funds from the foreign organization or other evidence of financial resources committed by the foreign company. The director observed: “It is not clear that the investment in [the petitioner] was provided by the foreign entity.” The director also requested a copy of the petitioner’s signed franchise agreement with [REDACTED].

In a response dated November 26, 2003, the petitioner re-submitted its August 2003 bank statement and the above-referenced wire transfer receipts, again stating that these documents show “money transferred from the foreign organization.” The petitioner provided financial statements and bank statements for the foreign company to demonstrate its financial stability.

The petitioner also submitted its franchise agreement with [REDACTED] Connection. In a November 26, 2003 letter, counsel stated that the petitioner is “an independent contractor/owner and not an agent, employee, servant, partner, or joint venturer of the Philly Franchising Company.” Counsel noted that the franchisor provides marketing, training and purchase recommendations, but that the U.S. company, as an independent store owner, has “complete managerial and financial control over day-to-day operations, employees and the business facility.”

The director denied the petition on December 13, 2003, concluding that the petitioner had not established that the U.S. company has a qualifying relationship with the foreign entity. The director reviewed the terms of the franchise agreement and concluded that the franchisor will control the petitioner’s business, as it will “prescribe the manner in which business will be conducted.” The director stated: “This office does not dispute the relationship between [the petitioner] and [the foreign entity], because control has been given over to another unaffiliated entity, a qualifying relationship does not exist.”

On appeal, counsel asserts that the petitioner is a wholly-owned subsidiary of the foreign entity, and that the foreign entity maintains complete control over the U.S. company's managerial and financial functions. Counsel contends that the franchise agreement does not affect this qualifying relationship. The petitioner submits a January 9, 2004 letter from the senior vice president of The Philly Franchising Company, who states that the franchisor provides its franchisees with an operating system, and that it allows the franchisee "complete managerial and administrative control of the business." The franchisor states that the franchisee owns the assets of the restaurant and is responsible for all decisions regarding employees, scheduling, overall management, and ordering its own supplies and inventory, and also maintains the right to sell its business and transfer the franchise to a buyer who meets the same criteria that the franchisee met when purchasing its franchise.

Upon review of the petition and evidence, the petitioner has not established that the U.S. company has a qualifying relationship with the foreign entity. However, the AAO concurs with counsel that the director improperly focused on the petitioner's intended operation of a franchise business rather than on the necessary qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. *See* 8 C.F.R. § 214.2(l)(3)(i) (requiring that the petitioner and the organization which employed the beneficiary are qualifying organizations). Although the director's conclusion will be affirmed, the director's analysis and comments regarding the petitioner's franchise agreement are withdrawn.

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 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 (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.

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, Navroz Store, and the petitioner. Although the petitioner will do business in the United States through a franchise agreement with The Philly Franchising Company, 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.

There is insufficient evidence for the AAO to conclude that the foreign entity and U.S. entity had a qualifying relationship at the time the petition was filed. The petitioner initially indicated on Form I-129 and in its October 14, 2003 letter that the beneficiary owns a 50 percent controlling interest in the foreign partnership, and 100 percent of the U.S. company's stock. The petitioner submitted its articles of incorporation and stock certificate number one showing that all of the company's authorized stock (1,000 shares) had been issued to the beneficiary. At the same time, the petitioner submitted copies of wire transfers purported to show funds transferred from the foreign company to fund the petitioner, and on appeal, counsel claims that the foreign entity owns a 100 percent interest in the U.S. company. 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). Because of this discrepancy, the petitioner's stock certificate alone is insufficient to establish the beneficiary's claimed ownership interest in

the U.S. company. Furthermore, the petitioner has not submitted evidence that the beneficiary actually paid for her interest in the company.

The wire transfers submitted show that the approximately \$25,000 used to fund the petitioning entity originated not with the beneficiary or the foreign entity, but with two apparently unrelated companies: [REDACTED] and [REDACTED]. The director advised the petitioner that the wire transfers did not clearly show an investment in the U.S. company by the foreign entity, and specifically requested copies of wire transfers showing transfers of funds from the foreign organization or other evidence of financial resources committed by the foreign company. In response, the petitioner simply re-submitted copies of the wire transfers showing monies transferred from [REDACTED] and [REDACTED] and offered no explanation as to how these documents demonstrate that the beneficiary or the foreign entity provided funding for the U.S. company. 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)).

Based on the foregoing discussion, the petitioner has not submitted sufficient evidence to establish a qualifying relationship between the U.S. and foreign entities. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds that the record does not contain sufficient evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner initially indicated its intention to operate a chain of franchised restaurants and stated that it anticipated hiring six to eight employees during the first year of operations. The petitioner did not submit a business plan, describe its financial objectives, or explain its intended organizational scope and structure, as required by 8 C.F.R. § 214.2(l)(v)(C)(I). Accordingly, the director specifically requested evidence regarding the proposed staffing level for the first-year of operations, to include job titles and proposed duties. The petitioner submitted an organizational chart which includes the beneficiary as president and general manager; a market manager who would supervise a customer service manager, and franchise relations employees; an operations manager, who would supervise store managers, assistant managers, cashiers, cooks and a sanitation crew; a controller who would supervise an auditors contractor; and external legal counsel. Although the petitioner indicates that it intends to operate restaurants, the accompanying list of job duties references an operations manager position that would be responsible for “buying merchandise for retail wireless stores,” and indicates that the company’s proposed store managers will “oversee operation of food store and gas sales.”

The petitioner also submitted its franchise agreement, indicating that the company is contracted to operate one restaurant in Texas at a location that had yet to be determined. The petitioner has provided no anticipated date for the opening of its first restaurant, yet submits an organizational chart and employee lists suggesting that

the company would be operating multiple restaurants and operating at least two other types of businesses by the end of the first year of operations. Overall, the petitioner has not provided a credible hiring plan or sufficiently described its organizational goals and objectives for its first year of operations, nor does the evidence demonstrate that the company is prepared to begin doing business in the United States as a restaurant operator, given the lack of a lease agreement for a restaurant facility. Again, 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)).

Furthermore, the petitioner has described the beneficiary's job duties in only broad and nonspecific terms, and fails to convey an understanding of specific tasks she will perform. For example, the petitioner indicates that she will devote 40 percent of her time to "management decisions," 15 percent of her time to "company representation," 10 percent to "financial decision," 10 percent to "supervision of day to day functions," 15 percent to "business negotiations," and 10 percent to "organizational development of 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 will 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 petitioner described the beneficiary's duties using general managerial and executive terms, however, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. As discussed above, the record does not persuasively demonstrate that the U.S. company will employ sufficient staff to relieve the beneficiary from performing the non-qualifying duties associated with operating a restaurant within one year of approval of the petition. 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 for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.