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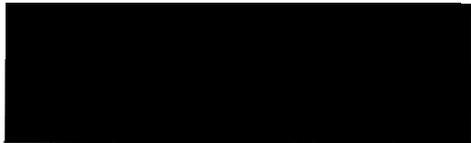
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File: LIN 03 061 54663 Office: NEBRASKA SERVICE CENTER Date: SEP 06 2006

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, Nebraska 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 in the position of president to open a new office 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, a corporation organized under the laws of the State of Illinois, claims to be engaged in the business of operating fast food restaurants and alleges that it is an affiliate of [REDACTED] a sole proprietorship located in Pakistan.

The director denied the petition concluding that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The basis for the decision was the lack of complexity of the United States operation and the petitioner's failure to provide a copy of a franchise agreement, which would have shed light on the magnitude of control the franchisor would have had over the business.

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, the petitioner asserts that it submitted evidence sufficient to prove that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner argues that the director's reliance on the size of the organization in making his decision was in error. The petitioner also submitted with its appeal, for the first time, a copy of the Franchise Agreement for a Quiznos restaurant in Chicago, Illinois, and an associated Assignment of Franchise Agreement.<sup>1</sup>

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<sup>1</sup> On December 19, 2002, the director requested additional evidence from the petitioner, specifically requesting a copy of the Franchise Agreement. Counsel to the petitioner stated in his response to the request for evidence that the petitioner did not yet have a copy of the executed agreement. However, on appeal, the petitioner attempts to submit for consideration a Franchise Agreement dated June 26, 2002, with an effective date of July 3, 2002. Therefore, the Franchise Agreement must have been available to the petitioner before the initial petition was filed on December 17, 2002, albeit perhaps not executed by the franchisor. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

That being said, it must be noted that the Franchise Agreement submitted on appeal is not an agreement between the franchisor and the petitioner. Rather, the Agreement is between the franchisor and the franchisees, identified as the beneficiary and another person, [REDACTED]. While the petitioner has also submitted a purported Assignment of the Franchise Agreement to the petitioner, the Franchise Agreement clearly states that the Franchisor must give written consent to any transfer of the franchise by the franchisees. Since the purported Assignment does not include a written consent from the franchisor, the value of the franchise to the petitioner and its proposed U.S. operation is non-existent. Therefore, even if the Franchise Agreement was considered on appeal, it does not strengthen the petitioner's claim that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position since the petitioner does not have a viable business strategy.

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(1)(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 (1)(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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, 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 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
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defined in paragraphs (1)(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 issue in this proceeding is whether the petitioner submitted sufficient evidence that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In the initial petition, the petitioner alleged without any elaboration that it intended to operate a fast food restaurant. The petitioner described the beneficiary's role during the first year of operation as follows:

The Beneficiary will be employed as President of the Petitioner, and will be responsible for performing the following duties for the Petitioner; such duties to include: hiring and firing managers; supervising subordinate employees; reviewing an [sic] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.

Other than this vague description, no other information about the proposed U.S. operation was provided other than Articles of Incorporation stating that the petitioner was organized to operate a Quiznos franchise, two stock certificates indicating that the beneficiary is a 51% owner of the petitioner, a commercial lease for 220 square feet on the third floor for its "administrative operation," and a bank statement showing a balance of \$18,000.00.

On December 19, 2002, the director requested substantial additional evidence regarding both the foreign entity and the United States entity, including a copy of the Quiznos Franchise Agreement, an organizational chart for the petitioner, a statement of financial goals, an explanation of the size of the U.S. investment, and evidence that the foreign entity can remunerate the beneficiary and can commence doing business in the United States.

In response to the request for evidence for the U.S. entity, the petitioner submitted an organizational chart for the U.S. operation showing the beneficiary supervising one manager, one assistant manager, and three counter attendants, and a job description for the beneficiary largely duplicative of the vague description provided with the initial petition but with the following elaboration:

The beneficiary will direct the management of the organization or a major component of [sic] function of the organization; establish the goals and policies of the organization, component or function; exercise wide latitude in discretionary decision making; and receive only general supervision or direction from higher level executives, the board of director[s], or stockholders of the organization. In the performance of his duties, the Beneficiary will receive minimum supervision from the Board of Directors, and the Beneficiary will exercise wide discretion and latitude in the performance of his duties.

While Counsel to the petitioner explained that it could not provide a copy of the Franchise Agreement, he did include an undated letter to the beneficiary (not to the petitioner) welcoming the beneficiary to the Quizno's family. The petitioner also provided an updated bank statement showing a balance of \$21,488.14. The petitioner provided no other details regarding the proposed U.S. operation.

On February 14, 2003, the director denied the petition. The director determined that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The director relied primarily on the petitioner's failure to provide a copy of the Franchise Agreement but also on his determination that that the proposed organization of the petitioner would not result in the United States operation supporting an executive or managerial position within one year.

On appeal, the petitioner asserts that the director erred and that the beneficiary is, and will be, performing executive and managerial functions. Counsel to the petitioner argues that the Franchise Agreement, which was not provided in response to the director's request for evidence but was provided on appeal, proves that the petitioner will have sufficient control over its business operations to qualify for the L-1A visa classification. Counsel also argues that the director erred in relying on the proposed size and organization of the petitioner to conclude that the U.S. operation would not support an executive or managerial position within one year.

Upon review, the petitioner's assertions are not persuasive.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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(1)(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.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec.

206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

*Id.*

The petitioner has failed to present evidence sufficient to prove that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner provided virtually no information regarding its proposed U.S. expansion other than self-serving statements that the petitioner intends to employ six people, including the beneficiary, to operate a Quizno's restaurant and to search for other fast food franchise opportunities. The petitioner failed to produce any evidence that the petitioner acquired a Quizno's franchise, or any other evidence of a business plan. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. Title 8 C.F.R. § 103.2(b)(14). While the petitioner did provide a Franchise Agreement and Assignment on appeal, not only will the AAO not consider this evidence (*see* footnote 2, *supra*), but the petitioner is not a party to the Franchise Agreement and the purported Assignment to the petitioner is in clear violation of the terms regarding a franchise transfer. Therefore, the petitioner has failed to provide any credible evidence regarding the scope, nature, financial goals, and organization of the U.S. operation, or its ability to commence doing business in the United States.

Even accepting as true the petitioner's assertions regarding its business viability during its first year in operation, the petitioner did not establish that the business vaguely described by the petitioner would support an executive or managerial position within one year of the petition's approval.<sup>2</sup>

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<sup>2</sup> The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other 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 current petition, the petitioner intends to employ six people, including the beneficiary. These employees will apparently operate a Quizno's restaurant, although the petitioner states that the beneficiary will be managing the operation. However, the record is so devoid of specifics that it is difficult to determine what any of the employees will be doing on a day-to-day basis, including the beneficiary. Regardless, given the evidence of record and as recognized by the director, it appears that all six employees will be providing services directly to customers and the beneficiary will be either supervising the day-to-day operations of the employees or providing services directly to customers as well. 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. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn’l.*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A) of the Act; *see also Matter of Church Scientology Intn’l.*, 19 I&N Dec. at 604.

Either way, the petitioner has failed to present evidence probative of how the U.S. entity will be able, after one year, to support a primarily executive or managerial employee by failing to explain how the restaurant services will be provided and by whom. While the small size of an organization does not disqualify a beneficiary from establishing that he or she will be acting in an executive or managerial capacity, it is nevertheless appropriate for Citizenship and Immigration Services to consider the size of the petitioning company in conjunction with other relevant factors, such as lack of specificity in the beneficiary’s job description, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See generally Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity as required by 8 C.F.R. § 214.2(1)(3).

Beyond the decision of the director, it should be noted that, according to Illinois state corporate records, the petitioner’s corporate status in Illinois was “involuntarily dissolved” on April 1, 2006. Therefore, as the State of Illinois has terminated its corporate existence, which prohibits the petitioner from carrying on any business except for taking action to wind up its affairs, the company no longer exists and can no longer be considered a legal entity in the United States. *See* 805 Ill. Comp. Stat. Section 12.40 (2006). Therefore, as this clearly and unequivocally renders the petitioner ineligible for the classification sought, the petition must be denied for this additional reason.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of its lease for 220 square feet on the third floor of a building for its “administrative operation.” However, the petitioner insists that its business will be the operation of a Quizno’s restaurant. Since the lease for the secured premises clearly states that the space cannot be used for anything other than petitioner’s “administrative operation,” it cannot be used for a Quizno’s restaurant. Therefore, sufficient physical premises for the business have not been secured and, for this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to prove that the foreign entity, the [REDACTED] is a qualifying organization as defined in 8 C.F.R. § 214.2(1)(1)(ii)(G)(2). The petitioner claims that the foreign employer is a sole proprietorship owned by the beneficiary and is thus an affiliate of the petitioner, which is 51% owned by the beneficiary. While the petitioner has submitted evidence that he is maintaining a personal bank account in Pakistan and that the foreign business continued to transact some business in 2002, he has failed to establish how the foreign sole proprietorship continues to do business in view of his presence in the United States for seven months prior to the submission of the current petition. 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). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the presence of the beneficiary in the United States raises the question of whether the foreign business continues to do business abroad. This is especially true in cases, such as the current petition, where the petitioner claims that the beneficiary directs the management of the company. As such, the petitioner has failed to establish that the foreign entity continues to do business and that it continues to exist as a legal entity. For this additional reason, the petition may not 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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.