

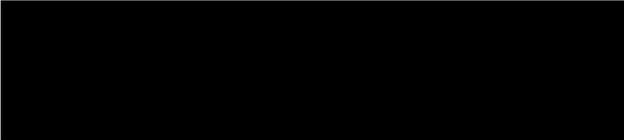
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

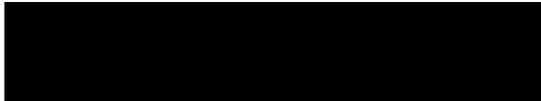
PUBLIC COPY

87



FILE: SRC 03 144 51508 Office: TEXAS SERVICE CENTER Date: JUN 04 2007

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 The director's decision will be withdrawn and the petition will be remanded to the director for entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 Georgia corporation, states that it intends to engage in business investment in the real estate and retail food industries. It initially intends to operate a "DQ Grill & Chill" franchise restaurant. The petitioner claims that it is the subsidiary of R.N. Enterprises, located in Ahmedabad, India. The petitioner seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner had not established the existence of a qualifying relationship between the United States and foreign entities. Specifically, the director discussed portions of the franchise agreement and stated "the primary franchise company, American Dairy Queen Restaurants, would actually be in control of the U.S. business, rather than the foreign entity exercising the control over the U.S. operations." The director further stated, "the L1A manager/executive transferee classification was not created to establish self-employment, nor was it intended to create partnerships with U.S.-based franchises."

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 asserts that that the director cited no authority for her position that the franchise agreement was so restrictive the petitioner could not demonstrate actual control over the U.S. business by the foreign entity. Counsel emphasizes that the franchise agreement does not preclude a franchisee's ability to make independent business decisions. Counsel further asserts that the director failed to consider whether the U.S. company would be engaging in business activities beyond the operation of a single franchise restaurant. Counsel states that the petitioning company intends to purchase land which "will allow them to engaged in commercial development at some point in the future, which will provide an income stream other than that received from the Dairy Queen franchise." Counsel states that the director failed to consider the petitioner's business plan in its entirety.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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 sole issue addressed by the director is whether the petitioner has established that a qualifying relationship exists between the U.S. company and 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;

* * *

(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 April 24, 2003. The petitioner stated on the L Classification supplement to Form I-129 that the beneficiary's foreign employer, R.N. Enterprises, an Indian partnership, owns 55 percent of the U.S. company, with two individuals owning the remainder of the petitioner's shares. The petitioner submitted a copies of its articles of incorporation, by-laws and stock certificates numbers 1

through 3 showing that 1,000 of the company's 100,000 authorized shares had been issued. Stock certificate number 1 indicates that 550 shares were issued on October 11, 2002. It appears that the beneficiary's name was initially entered on the stock certificate, crossed out, and the foreign entity's name was added. Stock certificate number 2 indicates that 200 shares were issued to [REDACTED] and stock certificate number 3 shows that 250 shares were issued to [REDACTED]. The petitioner also submitted evidence that the foreign company is a partnership owned by three individuals, including the beneficiary, who holds a 40 percent interest in the business.

In addition, the petitioner submitted a letter dated November 20, 2002, from American Dairy Queen Corp., advising the petitioner that its application for a "DQ Grill & Chill" restaurant had been approved. In relation to the Dairy Queen franchise, the petitioner submitted a receipt indicating that the petitioner had received a company of the "offering circular" for the franchise program on September 24, 2002, and a document evidencing the petitioner's agreement to pay an initial set-up and service fee of \$35,000 in the event that its application is approved. The petitioner provided a copy of its business plan, which outlines the company's strategy for operating a "DQ Grill & Chill" restaurant in suburban Atlanta, Georgia.

Finally, the petitioner indicated in its letter dated April 14, 2003 that the company intends to be involved in business investment and in the development of commercial real estate, noting that its "first investment" will be the above referenced restaurant, and that it intends to purchase the land upon which the new business will be built.

On May 30, 2003, the director issued a request for additional evidence requesting that the petitioner respond to the following questions.

1. What is the scope of the job position? To whom would the applicant report concerning the business? Would he report to someone in [the foreign entity] or to someone else in the United States?
2. Is the United States business tied directly to the parent business in practices and policies? Is the U.S. enterprise planned to be a separate entity, using only the name of the parent company?
3. Does the foreign company own businesses from which patterns of business for the new company will be derived?
4. Included in the I-129 packet is a franchise agreement with Dairy Queen Restaurants. Does the Dairy Queen company dictate the regulations for how the company is operated[?]? Does the [foreign entity] own part of the Dairy Queen company? Provide stock certificates indicating ownership of the U.S. company and the foreign company.

The director also requested that the petitioner describe the relationship of the franchise company, the foreign company, and the proposed U.S. company.

In a letter dated August 18, 2003, counsel for the petitioner emphasized that U.S. Citizenship and Immigration Services (USCIS) has approved numerous L-1A petitions in instances where the U.S. petitioner is the owner

of one or more franchises, where the petitioner's business is to own and manage these franchises, and where the petitioner operates the U.S. subsidiary or affiliate as a separate, distinct entity. Counsel asserted that the petitioner is not trying to establish an affiliate relationship through the franchise agreement, and acknowledged that such an arrangement is not permitted by the regulations. Counsel further emphasized that the petitioner "is a legitimate subsidiary of the foreign parent corporation and is doing business in the United States through the subsidiary, which will operate one or more business, including franchised retail units."

The petitioner also submitted a letter dated August 18, 2003, in which it emphasized that the U.S. company "will be involved in making various business investment, the first of which will be in the retail food industry." The petitioner stated that the beneficiary would be in charge of the U.S. business and would not report to anyone in the United States or the foreign entity concerning its management, but would consult with his foreign partners with respect to major business decisions involving investments and acquisitions. The petitioner further asserted that the U.S. business would be tied to the parent company in practice and policy, again, noting that the beneficiary would consult with his foreign partners for major planning decisions, and emphasizing the foreign company's experience in "operations and financial management, sales and marketing corporate development and expansion and hiring, firing and training of staff."

The petitioner stressed that the franchisor "does not dictate the regulations for how our company...is operated." The petitioner also stressed that it is an investment company and stated that future business and commercial real estate investments would have nothing to do with the franchisor of the petitioner's first investment. The petitioner noted that the franchisor would control the standardization of the products served, but that the employees staffing the restaurant would be hired, trained, employed by and controlled by the U.S. company, and that the petitioner would implement and coordinate its own marketing and advertising programs, operate its own hours, and hold responsibility for the layout and remodeling of its restaurant. Finally, the petitioner emphasized that the petitioner will continue to purchase other businesses that may or may not be franchises of different companies.

The petitioner re-submitted copies of its stock certificates numbers 1 through 3, and provided a copy of the foreign entity's partnership agreement, and an excerpt from a document referred to as "the Uniform Book utilized by Dairy Queen Corporation in relation to the sale of its franchises." The petitioner stated that it was including "sections that relate to our obligations to Dairy Queen." The petitioner submitted copies of pages 39 through 43 and pages 73 and 74.

In a decision dated January 27, 2004, the director concluded that the petitioner had failed to establish a qualifying relationship between the beneficiary's foreign employer and the U.S. entity. The director noted that the requisite factors for a qualifying relationship are ownership and control, and determined that, because of the terms of the franchise agreement, the beneficiary's foreign employer and claimed parent company cannot control the United States company. The director cited certain rules and restrictions from the franchise agreement and determined that by signing such agreement the petitioner agreed "to conduct business by proven operational standards governed by the large franchise entity." The director concluded that the franchise company would actually be in control of the U.S. business, rather than the foreign entity exercising control over the U.S. operations. The director stated that the L-1A nonimmigrant classification "was not created to establish self-employment, nor was it intended to create partnerships with U.S.-based franchises."

On appeal, counsel for the petitioner asserts that the director erred in finding that the L-1A visa petition cannot be approved when the petitioner operates a franchise business, and by failing to consider whether the petitioner would be engaging in business operations "above and beyond the operation of the Dairy Queen." Counsel contends that the regulations pertaining to L-1A visas do not specifically exclude the purchase of a franchise. Counsel also emphasizes that the petitioner clearly stated that it intended to pursue other investments wholly separate from the operation of the franchised restaurant, and that the director erred by limiting her focus to the franchise agreement.

Upon review, the director incorrectly focused on the petitioner's operation of a franchise 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). Evidence of the petitioner's stock ownership is critical to determining whether a qualifying relationship exists. In this case, the director focused solely on the effect of the petitioner's franchise agreement on control of the United States entity. However, the decision does not indicate that she considered the claimed parent-subsidary relationship between the foreign entity. Accordingly, the director's decision will be withdrawn and the petition will be remanded to the director for entry of a new decision.

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 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.*

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 petitioner has submitted only brief excerpts of the agreement between the petitioner and the franchisor. The director found the terms of the agreement to be so restrictive that she determined the foreign entity could not exercise control over the United States petitioner. Upon review of the limited information provided, the AAO concurs with counsel that there is nothing in the provisions of the agreement that would negate an otherwise valid claimed parent-subsidary relationship between the foreign and U.S. companies. The provisions cited in the director’s decision are neither unusual for this type of agreement nor unduly restrictive.

However, the petitioner submitted copies of only seven pages of a document that is over 70 pages long. Further, according to the evidence in the record, the petitioner also received from the franchisor a "Uniform Franchise Offering Circular" which consisted of 20 exhibits none of which were submitted. The petitioner has not fully disclosed the terms of its franchise agreement, and it cannot be determined from the record as presently constituted whether the agreement includes any terms that would have a bearing on the control of the petitioning entity or its claimed qualifying relationship with the foreign entity. As the petition will be remanded, the director is instructed to request a complete copy of the petitioner's fully executed franchise or operating agreement and any other agreements between the petitioning company and the franchisor.

As noted above, 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. Case law provides that 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 claims that the foreign entity owns 55 percent of its outstanding stock and submits evidence in support of this claim. If the claimed relationship exists, the foreign entity in this case is therefore assumed to have “de jure” control over the petitioner and the petitioner’s burden has been met with respect to establishing ownership and control.

In the present matter, the critical relationship is that between the beneficiary's overseas employer, R.N. Enterprises, and the U.S. petitioner, PNP Investments, Inc. Although the petitioner will do business in the United States through a franchise agreement with American Dairy Queen Corp., the claimed relationship between R.N. Enterprises 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.

Upon review, 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. Although the petitioner's stock certificates suggest that the foreign entity owns a 55 percent interest in the U.S. company, the AAO notes that it appears that the beneficiary's name was initially entered on stock certificate number one and subsequently replaced with the foreign entity's name. The petitioner has provided no explanation for the change, and given the ease with which a stock certificate can be manipulated, additional documentary evidence is required in order to establish that the foreign entity is actually the owner of these shares. At a minimum, the petitioner should be instructed to submit additional evidence related to the stock purchase, including stock purchase agreements, the minutes of any relevant shareholder meetings addressing stock issuance, or any other legal documents. The petitioner should also provide a copy of the petitioner's stock transfer ledger, and any other documentary evidence that would definitively establish that the foreign entity, and not the beneficiary, is the owner of a majority of the issued shares of the petitioning organization. Additional supporting evidence could include stock purchase agreements, minutes of any other relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Further, the petitioner has not adequately documented that the foreign entity paid for its interest in the U.S. company. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Because the director's request for evidence merely questioned control of the foreign entity based on the existence of a franchise agreement, the petitioner did not have sufficient notice of this deficiency. The director is instructed to request proof of stock purchase by the foreign entity. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the United States entity in exchange for stock ownership, such as bank certified copies of wire transfer receipts, or canceled checks or deposit receipts, identifying the account holder names and affiliation to the parent company for all persons making purchases.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish its eligibility for approval of a new office petition. If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. See generally 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial

goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

In this case, the petitioner did not submit a lease agreement or other evidence that the petitioner had secured sufficient physical premises to house the new office as of the date of filing, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner indicated a business address of [REDACTED] Zebulon, GA 30295. The petitioner also made numerous references to its intent to purchase land and a building for the operation of its proposed restaurant, but did not submit any documentary evidence related to such purchase. Accordingly, the director is instructed to request evidence that the petitioner had a valid commercial lease agreement for the premises at the stated address, or other physical premises sufficient to operate the business, as of the date the petition was filed.

Another issue not addressed by the director is whether the petitioner submitted sufficient evidence of the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner submitted evidence that the company had a bank account with a balance of \$60,000 as of April 25, 2003. The petitioner also submitted a business plan which indicated that the company's start-up costs would be \$161,450, which included the initial franchise fee, expensed equipment, legal and consulting costs. The petitioner did not reference its anticipated costs for the purchase of land and a building for operation of the restaurant. On appeal, counsel asserts that \$15,000 was deposited into a local bank account as initial operating capital and "the company had planned on bringing this year an additional \$50,000 to serve as investment capital." Based on this limited evidence, the petitioner does not appear to have an investment sufficient to meet its anticipated start-up costs. Accordingly, the director is instructed to request additional evidence to establish the size of the investment, evidence that the foreign entity had in fact made an investment in the United States entity at the time of filing, and an explanation as to how the petitioner intended to finance its substantial start-up costs and land purchase.

Finally, the record as presently constituted does contain sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner provided only a vague position description for the beneficiary that fails to specify the actual managerial or executive duties to be performed by him on a day-to-day basis as president and chief executive officer of the petitioner's new office in the United States. 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 petitioner should be instructed to submit a comprehensive description of the beneficiary's proposed duties, including the percentage of time he will devote to each duty on a weekly basis, and a description of the beneficiary's "typical day." If the petitioner states that the beneficiary will "direct," "manage," "oversee," or "supervise" an aspect of the petitioner's business, it should clarify who would perform non-qualifying duties associated with the activity or function.

The AAO notes that the petitioner's hiring plan for the first year of operations suggests that the beneficiary will be acting as manager of a single franchised Dairy Queen outlet at the end of the first year of operations. The business plan does not reference any intention on the part of the petitioner to pursue other investments. The petitioner has also presented inconsistent information regarding the number and types of employees to be hired within the first year of operations. The petitioner stated in its letter dated April 14, 2003 that the company will employ eight to 12 employees. The petitioner's business plan references its "Proposed Indian Restaurant" that will include "a maximum of eight to twelve employees working under a president/manager of one." The business plan also indicates that the petitioner intends to employ two management staff and 10 kitchen and drive-thru staff during the first year of operations. Finally, the petitioner submitted a proposed organizational chart indicating that the beneficiary, as president, would supervise three shift managers, who in turn would supervise three cashiers, four cooks and three "back-up" people to assist the cashiers and to prepare ice cream products, for a total staff of 14 employees, including the beneficiary. 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).

The petitioner should provide a detailed hiring plan to clarify the number of employees to be hired, their job titles and duties, their anticipated schedules and wages, and the business's operating hours. The record as presently constituted suggests that the petitioner will have insufficient employees to relieve the beneficiary from participating in the day-to-day restaurant operations, given the nature of the petitioner's business as a restaurant that will be operating three shifts daily. It also appears that the restaurant's administrative, marketing, purchasing, inventory and other operational tasks would be performed by the beneficiary, based on the proposed staffing structure.

It is emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, April 23, 2003. .

Although the director's decision will be withdrawn, the AAO finds insufficient evidence to establish the petitioner's and beneficiary's eligibility for this visa classification under the "new office" regulations at 8 C.F.R. § 214.2(1)(3)(v). Accordingly, the petition will be remanded to the director for further action and entry of a new decision in accordance with the foregoing discussion.

ORDER: The decision of the director dated January 27, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.