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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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File: EAC 07 252 51355 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 "company manager" 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 formed under the laws of the State of Florida, claims to operate a Quizno's restaurant franchise.¹

The director denied the petition concluding that the petitioner failed to establish that it and the foreign employer are qualifying organizations. The director concluded that, under the franchise agreement, the franchisor will retain control over the operation.

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 has established that it is owned and controlled by the foreign employer and that the terms of the franchise agreement do not deprive the owner of control over the enterprise.

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

¹According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 26, 2008. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, the company can no longer be considered a legal entity in the United States. See Fla. Stat. 607.1405 (2006). Therefore, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

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(l)(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 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 in this proceeding is whether the petitioner has established that it is owned and controlled by the foreign employer, and is thus a qualifying organization, despite the terms of the franchise agreement pertaining to its planned operation of a Quizno's restaurant.

Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the

entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In this matter, the petitioner asserts that it is majority owned and controlled by the foreign employer. In support of this assertion, the petitioner submitted, *inter alia*, copies of its articles of incorporation and stock certificates. The petitioner also asserts that its sole business interest will be a Quizno's restaurant franchise operated pursuant to a Franchise Agreement (the "Agreement"). This Agreement describes in detail the relationship between the parties and outlines the franchisee's obligations as these relate to choosing a location, royalty payments, operating the restaurant, training, advertising, marketing and promotion fees, operation standards, the use of approved suppliers, bookkeeping, the transfer of the franchise, and the operation of other businesses by the franchisee. The franchisor retains significant control over virtually all aspects of the franchisee's operation of the restaurant including the franchisee's right to sell the franchise and the franchisee's ability to operate other businesses, including unrelated businesses not in direct competition with Quizno's.

The petitioner also submitted a copy of an email from a Quizno's franchise representative, [REDACTED], dated June 25, 2007. Although Mr. [REDACTED] indicates that "[t]he deal to purchase Quiznos #1319 has been approved for [REDACTED]," the record is devoid of evidence that the petitioner (a Florida corporation), [REDACTED], or the beneficiary has ever entered into an Agreement with Quizno's. None of the pertinent documents is signed by Quizno's, and only [REDACTED], not the petitioner, is identified as having an interest in the franchise.

Finally, the petitioner submitted a copy of a letter from the purported landlord of the building in which the existing Quizno's restaurant is located. The author indicates that it will consent to the assignment of the existing lease to [REDACTED] "[p]rovided [he] is successful in negotiating the purchase of the Quizno's."

On October 2, 2007, the director requested additional evidence. The director requested evidence pertaining to the control of the United States operation by its owners despite the terms of the Agreement.

In response, the petitioner submitted a letter from an attorney dated October 5, 2007 in which counsel asserts that all managerial decisions other than those specifically discussed in the Agreement remain with the petitioner and that the purpose of the Agreement is to protect the franchisor's trademarks and goodwill within the franchise context.

On October 29, 2007, the director denied the petition. The director concluded that, because the petitioner had ceded control over the United States operation to the franchisor, the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

On appeal, counsel asserts that the petitioner has established that the foreign entity owns and controls it and, thus, the petitioner has established that it has a qualifying relationship with the foreign entity. Counsel argues that the Agreement did not result in the cession of control over the operation to the franchisor.

Upon review, counsel's assertions are not persuasive.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes

of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Although a franchise may be an asset of an independently owned and operated company, and pursuit of a franchise business model alone does not automatically disqualify a petitioner from establishing that it has a qualifying relationship with a foreign entity, the petitioner must prove that it has retained the necessary latitude to control, direct, and develop the enterprise. *See Matter of Kung*, 17 I&N Dec. 260 (Comm. 1978). If the petitioner has ceded control over the enterprise to a franchisor, the petitioner cannot establish that it is a qualifying organization even if the foreign employer owns most, or all, of the petitioner's stock. The regulation clearly requires that the petitioner establish common ownership *and* control. 8 C.F.R. § 214.2(l)(1)(ii)(K).

In this matter, the petitioner has failed to establish that it is controlled by the foreign entity. As explained above, the franchisee has ceded control over its business enterprise to the franchisor. The franchisor has direct or indirect control over virtually all aspects of the business operation including, but not limited to, the purchasing of supplies, bookkeeping, marketing, and choosing a location. Moreover, the franchisor has control over the franchisee's investment in other business ventures, even non-competing businesses, and can prohibit the transfer of the franchise to a third party. Therefore, the franchisee has failed to retain the necessary latitude to control, direct, and develop the enterprise, and the petitioner has failed to establish that it has a qualifying relationship with the foreign employer.

Furthermore, it must be noted that the Agreement and supporting documentation do not establish that the petitioner is or will be "doing business" as defined in the regulations. Therefore, the petitioner has not established that it is a qualifying organization for this additional reason. While the petitioner asserts that it will operate a Quizno's restaurant, the Agreement and the email from Quizno's both indicate that [REDACTED] and not the petitioner, will individually own and operate the restaurant in question. The "individual" block, as opposed to the "Legal Entity" block, is clearly checked on page 41 of the Agreement, and the petitioner's name does not appear on the signature page. The petitioner does not appear to be a proposed party to the Agreement or the proposed assigned lease, and the record is devoid of evidence that the franchise was properly assigned to the petitioner (or even to [REDACTED], as the record does not contain any fully executed documents bearing the signatures of Quizno's). While the petitioner's absence from the Agreement could cure its cession of "control" to the franchisor (*see supra*), it nevertheless results in the petitioner failing to establish that it is, or will be, doing business as a Quizno's restaurant, which is equally material to the petition. Either way, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, and the petition may not be approved for that reason.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. The petitioner has failed to credibly describe the scope of the proposed operation. 8 C.F.R. § 214.2(l)(3)(v)(C).

As explained, the record indicates that [REDACTED] will be, individually, the sole party to the Franchise Agreement as well as the lessee identified by the current landlord. The "individual" block is clearly checked on page 41 of the Agreement, and the petitioner's name does not appear on the signature page. Therefore, as the petitioner does not appear to be a party to the Franchise Agreement and does not appear to have an ownership interest in the Quizno's restaurant, the petitioner has not established that the petitioner's business will likely 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. To the contrary, the petitioner does not appear to operate any business whatsoever. It is further noted that the record is devoid of evidence that Quizno's has entered into an Agreement with [REDACTED] as the documents, submitted by the petitioner are all unsigned. Accordingly, the record does not even establish that the petitioner or [REDACTED] operates, or will operate, the restaurant in question.

Therefore, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). As indicated above, [REDACTED] will be the assignee of the lease pertaining to the Quizno's location. The record is devoid of any evidence that this lease may be or will be properly assigned to the petitioner. Accordingly, as the petitioner has failed to establish that it has secured sufficient physical premises to house its business operations, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner describes the beneficiary's duties abroad as a "partner" in Seaward Surveyors in the Form I-129 as "[b]eginning in November 2005, [the beneficiary] conducted various surveys on behalf of the company." The petitioner also describes the beneficiary's foreign duties in a letter dated August 16, 2007 as "director" as being "in charge of risk management and contract execution for our Pakistani company."

Upon review, the petitioner has failed to describe the beneficiary as primarily performing qualifying duties abroad. To the contrary, the petitioner has described the beneficiary as performing surveys, which are non-qualifying tasks necessary to the provision of a service. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for Citizenship and Immigration Services to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad and whether he was relieved of the need to primarily perform non-qualifying surveying tasks by a subordinate staff. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Specifics are clearly an important indication of whether a beneficiary's duties were 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Accordingly, the petitioner has not established that the beneficiary has been employed abroad in a primarily *managerial or executive capacity*, and the petition may not be approved for this additional reason.

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 at 1002 n. 9 (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.