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U.S. Citizenship and Immigration Services

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[redacted]

D7

File: WAC 02 092 51466 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa in this matter on September 13, 2002. On October 17, 2002, the petitioner filed an untimely appeal on Form I-290B, which was treated as a Motion to Reopen/Reconsider by the director pursuant to the regulations at 8 C.F.R. 103.3(a)(2)(v)(B)(2). Upon review of the motion, the director rendered a decision again denying the petition on May 15, 2003. 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 extend the employment of its general manager 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 California that is engaged in the operation of fast food restaurants, specifically, a Burger King franchise in Benicia, California. The petitioner claims that it is an affiliate of [redacted] located in Bombay, India. The beneficiary was initially granted a two-year L-1A visa and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that although a qualifying relationship has been established between the foreign entity and the petitioner, the petitioner has not establish that a qualifying relationship exists between the foreign entity and the franchise where the beneficiary will render services.

On appeal, counsel for the petitioner asserts that the director's determination with respect to the ownership and control of the franchise is in error. Counsel further asserts that because a qualifying relationship has been established between the foreign entity and the U.S. entity, the petition should be approved.

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 issue in this proceeding is whether a qualifying relationship exists between the beneficiary's foreign employer and the U.S. organization.

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.

In a letter dated January 13, 2002 accompanying the initial petition, the petitioner described the foreign entity and the U.S. entity as "affiliates" and stated that "[the] shareholding relationship of our Indian Affiliate and our California Corporation is exactly identical as of today." The petitioner submitted the relevant minutes of special board meeting, the share register, and share certificates number 1 through 4 of the foreign entity, evidencing the ownership of the company by four individuals as follows:

#1. [redacted] 62,375 shares
#2. [redacted] 62,375 shares
#3. [redacted] 62,375 shares
#4. [redacted] 62,375 shares

With respect to the U.S. entity, the petitioner submitted copies of share certificates number 4 through 11, and an incomplete excerpt from the share register relating to those certificates, denoting the ownership of the company as follow:

#4. [redacted] 3,000 shares
#5. [redacted] 3,000 shares (certificate cancelled upon transfer)
#6. [redacted] 2,000 shares
#7. [redacted] 2,000 shares
#8. [redacted] 2,000 shares
#9. [redacted] 1,000 shares
#10. [redacted] 1,000 shares
#11. [redacted] 1,000 shares

Each of the above share certificates bears the following restrictive legend on its face:

> The transfer of this stock is subject to the terms and conditions of a Franchise Agreement with Burger King Corporation. Reference is made to such Franchise Agreement and to the restrictive provisions of the Charter and By-Laws of this corporation.

The petitioner did not submit copies of the U.S. entity's share certificates number 1-3, or the portion of the ledger relating to those shares. The record also does not contain the U.S. entity's charter and by-laws, minutes of board meetings, or any other documentation relating to the ownership and control of the U.S. entity.

On February 22, 2002, the director issued a request for further evidence. Specifically, the director requested "a complete copy of the petitioner's franchise agreement, including all addendums, attachments, additional statements, exhibits, etc." to establish that the U.S. and foreign entities have a qualifying relationship as defined in the regulations. In addition, the director requested the following evidence in connection with the foreign entity for the purpose of ascertaining that it is a valid business entity: photographs of the company's business premises; financial statements; bank statements; business licenses; telephone directory listing; and publications containing advertisements or articles about the company.

In response to the request for evidence, the petitioner submitted the requested documentation relating to the foreign entity. The petitioner also submitted a copy of a franchise agreement dated September 30, 1998, between Burger King Corporation and [redacted] and [redacted] as franchisees, attached to which were Exhibits A and B to the agreement (a description of the site of the restaurant and the New Restaurant Marketing Account, respectively) and an amendment to the agreement dated the same date. In a letter accompanying the response, the petitioner referred to two other visa petitions, apparently also filed by the petitioner in connection with the beneficiary's employment, and sought to "incorporate by reference the entire record files of [those] two cases."[1]

In his September 13, 2002 decision denying the petition, the director concluded that although a qualifying relationship has been established between the foreign entity and the petitioner, the evidence does not establish a qualifying relationship between the foreign entity and the franchise where the beneficiary will render services. The director reasoned that "because of the structure provided in a franchise agreement, wherein the [franchisee] is allowed to use the name of the franchising organization but must comply with certain operational restrictions, there can never be any actual ownership and control of the franchise by either the qualifying organization abroad or the one in the United States." The director noted that the franchise agreement could terminate upon the occurrence of any of the default events listed in Section 18 of the franchise agreement. In his May 15, 2003 decision again denying the petition following the petitioner's motion to reopen/reconsider, the director added that since the franchise was acquired by only two of the four owners of the foreign entity and the petitioner, common ownership has not been established. Moreover, the director concluded, even if either the foreign entity or the petitioner owned the franchise, "control" of the franchise ultimately rests with Burger King Corporation, the franchiser.

On appeal before the AAO, counsel for the petitioner asserts that the director erred in finding that neither the foreign entity nor the petitioner owns the franchise, because the original franchisees had assigned the franchise to the petitioner pursuant to an assignment agreement dated September 30, 1998.[2] Moreover, counsel asserts, Burger King Corporation does not have ultimate control of the franchise, given the franchisee's independence of action in setting product, prices, hours, staffing, compensation of workers, etc. Counsel contends that since the director agrees that the foreign and U.S. entities are related as required under the regulations, the petition should be approved.

At the outset, the AAO finds that the ownership and control of the franchise is not the dispositive issue in this case. The qualifying relationship at issue in an L-1 visa petition is that between the beneficiary's overseas

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[1] The AAO notes that the record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Citizenship and Immigration Services (CIS) is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

[2] Counsel submitted a copy of the assignment agreement on appeal, indicating that it was submitted earlier. However, the AAO notes that the record contains no copy of the assignment agreement other than the copy submitted on appeal, nor was there any reference to the assignment in the petitioner's previous correspondences contained in this record of proceeding.

employer and the beneficiary's U.S. employer. *See* section 101(a)(15)(L) of the Act; 8 C.F.R. §§ 214.2(l)(2)(a) and 214.2(l)(3)(i). In this instance, the record reflects that it is the petitioner, [redacted] and not the Burger King franchise, which is the beneficiary's U.S. employer.[3] As such, the "qualifying relationship" that the petitioner must establish in order to satisfy the regulatory requirements for an L-1 visa is the relationship between the foreign entity and the petitioner, not the franchise owned and operated by the petitioner. Thus, insofar as the director's denial of the petition is based on his conclusion that there is no qualifying relationship between the beneficiary's foreign employer and the franchise, it is in error and will be withdrawn.

Notwithstanding the foregoing, the AAO disagrees with the director's conclusion that the petitioner has sufficiently demonstrated that a qualifying relationship exists between the foreign entity and the U.S. petitioner. 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 noted earlier, the petitioner represented that the foreign entity and the U.S entity are "affiliates" in that the shares of each entity are held by the same four individuals in the same proportion. However, while the petitioner has submitted evidence to show that the same four individuals who own all of the shares in the foreign entity in equal proportion also own shares in the U.S. entity in equal proportions, the evidence is insufficient to establish that the shareholding of those four individuals in the U.S. entity constitute ownership of all of the issued and outstanding shares of the U.S. entity. Specifically, the petitioner failed to produce copies of the U.S. entity's share certificates 1-3, or any other evidence relating to those share certificates. The petitioner also did not submit any documentation relating to the ownership of the U.S. entity other than copies of the share certificate numbered 4 through 11 and the incomplete excerpt of the share ledger pertaining to the shares held by the owners of the foreign entity. Thus, it is not clear based on the evidence in the record that the petitioner disclosed all of the issued and outstanding shares of the U.S. entity.

Finally, each of the share certificates of the U.S. entity bears a legend referencing restrictions on the transfer of such shares pursuant to the franchise agreement and the charter and by-laws of the company. It is noted that section 15 of the franchise agreement sets forth certain conditions and restrictions that *may* be imposed upon the transfer or assignment of the agreement to a corporation. However, absent further evidence, such as

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[3] *See, e.g.*, the Quarterly Wage and Withholding Reports of [redacted] listing the beneficiary as one of its salaried employees. *See also* section 11.B of the franchise agreement, which states that "FRANCHISEE shall be the sole and exclusive employer of its employees with the sole right to hire, discipline, discharge, and establish wages, hours, benefits, employment policies, and other terms and conditions of employment and conditions of employment of FRACHISEE'S employees. [Burger King Corporation] shall have no control over the terms and conditions of employment of FRANCHISEE'S employees."

the charter and by-laws of the company or any documentation specifying what if any of such restrictions apply in the transfer of the franchise to the U.S. entity, the AAO is unable to determine what effect such transfer restrictions would actually have on the ownership and control of the U.S. entity.

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, the elements of ownership and control cannot be determined.

In light of the defects in the evidence relating to the ownership and control of the petitioner, as described above, the AAO must conclude that the petitioner has not sufficiently demonstrated that the foreign and U.S. entities are affiliates as described in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L)(2), or that a qualifying relationship exists between those entities.

Beyond the decision of the director, the AAO finds that the record contains insufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In the Form I-129, the petitioner described the beneficiary's proposed job duties as "overseeing the day to day operation, finance, banking, hiring, leasing, expansion, of the fast food business in California." The only other description of the beneficiary's job duties in the U.S. is found in the beneficiary's resume, which states:

> January 1999 to Date: working for [redacted], California, a Franchisee of Burger King Corporation, as General Manager, acting as Director of Operations, overseeing the functioning, financing, and expansion of their Hamburger Fast Food business. Currently working on company's expansion plans for opening new restaurant in Suisun City, California and acquiring existing locations in Milpitas & San Jose, California.

These descriptions of the beneficiary's duties are vague and non-specific, and fail to demonstrate what the beneficiary does on a day-to-day basis. 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). 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). Absent further evidence relating to the beneficiary's job duties with the U.S. entity, the AAO cannot conclude that the petitioner has sufficiently established that the beneficiary

would be employed in the U.S. in a primarily executive or managerial capacity, as required under the regulation at 8 C.F.R. § 214.2(l)(3)(ii).

Similarly, the record contains insufficient evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for the requisite period preceding the filing of the petition. The only description of the beneficiary's job duties with the overseas entity, or the duration of such employment, appears to be a brief paragraph in the beneficiary's resume, stating that from June 1994 to March 1998, the beneficiary "[w]orked with [redacted] Bombay as General Manager overseeing the Food & Beverage Manager, the Restaurant Managers, Marketing Manager and Business Development Manager." A brief description on the beneficiary's resume, without more, is insufficient to support a finding that the requirements set forth at 8 C.F.R. § 214.2(l)(3)(iii) and (iv) with respect to the beneficiary's employment with the foreign entity have been met.

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).

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 director's decision to deny the petition will be affirmed and the appeal will be dismissed.

ORDER: The appeal is dismissed.