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U.S. Citizenship and Immigration Services

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[redacted]

File: WAC 00 054 50730 Office: CALIFORNIA SERVICE CENTER Date: APR 04 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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, initially approved the nonimmigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The director's decision is now before the Administration Appeals Office (AAO) on certification for review. The AAO will affirm the director's decision to revoke the approval.

The petitioner, a California corporation, is engaged in the operation of fast food restaurants in the United States. It claims to be the affiliate of the beneficiary's former employer, located in India. The petitioner currently employs the beneficiary as general manager, and seeks to extend the employment for an additional two years. On December 30, 1999 the petitioner filed a petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. The director approved the petition on January 26, 2000 and granted the requested extension of classification and status.

On August 16, 2001, pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii), the director, on his own motion, vacated the decision and issued a motion to reopen and reconsider the decision with intent to deny. After providing the petitioner two opportunities to respond to the director's concerns regarding the qualifying relationship between the foreign employer and the petitioning organization, the director denied the petition on June 18, 2002. The petitioner subsequently submitted an appeal. In a decision dated May 19, 2004, the AAO withdrew the decision of the director and remanded the petition to the director for additional action and a new decision. The AAO noted that the director did not have the authority to reopen and deny a previously approved petition on motion, but instead must send to the petitioner a notice of intent to revoke the approved petition if he determined that the approval of the petition involved gross error. *See* 8 C.F.R. § 214.2(l)(9)(ii).

On September 14, 2004, the director issued a notice of intent to revoke the petition observing that the petitioner had not established: (1) that a qualifying relationship exists between the United States entity and the beneficiary's foreign employer; (2) that a relationship exists between the petitioner and the franchise it claims to operate; (3) that the United States entity is doing business; and (4) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity. The petitioner provided a rebuttal. The director, upon review of the record, determined that the petitioner had not overcome the grounds of revocation. The director revoked the approval and issued a notice of certification on January 11, 2005. The petitioner, through counsel, has submitted a timely brief in response.

In response to the revocation and notice of certification, counsel for the petitioner asserts that "the decision in this case appears to be motivated by facts other than the Record in the proceeding," and states that the director did not consider all of the evidence submitted on rebuttal. Counsel further argues that the director misconstrued the meaning of "franchise" and its effect on qualifying relationship for immigration purposes. Counsel contends that the evidence does not support the director's determination that the petitioner is not doing business as contemplated by the regulations. Counsel asserts that the record contains sufficient evidence that the beneficiary is employed in a managerial position. Counsel also alleges that the arrest of the beneficiary's husband and son is related to the "interference" in the present matter. Counsel concludes that the director has "ignored the facts of Record, the Record in related cases, Regulations, and the standard interpretation of those Regulations."

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.

Under CIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the director provided a detailed statement of the grounds for the revocation but did not cite to the specific provision of the regulations as a basis for the revocation. Referring to the eligibility criteria at 8 C.F.R. §§ 214.2(l)(3)(i) and (ii), the director reviewed the rebuttal evidence and concluded that the petitioner had not established that the petitioner was a qualifying organization or that the beneficiary will be employed in a managerial or executive capacity. Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. *See Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations relating to the revocation of a nonimmigrant L-1 petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986)(Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987)(Final Rule). As an example of gross error in the L-1 context, the drafter of the regulation stated:

> This provision was intended to correct situations where there was gross error in approval of the petition. For example, after a petition has been approved, it may later be determined that a qualifying relationship did not exist between the United States and the foreign entity which employed the beneficiary abroad.

Id. Accordingly, upon review of the regulatory history and the common usage of the term, the AAO interprets the term "gross error" to be an unmitigated or absolute error, such as an approval that was granted contrary to the requirements stated in the statute or regulations. Regardless of whether there can be debate as to the legal determination of eligibility, any approval that CIS determines to have been approved contrary to law must be considered an unmitigated error, and therefore a "gross error." This view of "gross error" is consistent with the example provided in the Federal Register. *See* 52 Fed. Reg. at 5749.

Upon review, the present petition was properly revoked as the director clearly approved the petition in gross error, contrary to the eligibility requirements provided for in the regulations.

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 first 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.

In the initial petition submitted on December 30, 1999, the petitioner indicated that it was an affiliate of the foreign company and described its stock distribution as follows:

Name	**Shareholding**
Ghai Hotels & Investments Co. Pvt. Ltd.	50%
[redacted]	25%
	25%

No supporting documentary evidence of either the petitioner's or the foreign company's ownership was submitted in support of the petition. The director approved the petition on January 26, 2000 without requesting the required evidence. On August 16, 2001, the director re-opened the case on service motion and issued a notice of intent to deny the petition on the basis that the petitioner had not established a qualifying relationship with the foreign entity. The director noted that the ownership of the foreign company is as follows:

Name	**Shareholding**
[redacted]	25%
	25%
	25%
	25%

Based on the stock distributions noted above, the director determined that, absent additional evidence regarding the ownership and control of the two companies, the petitioner had not established an affiliate relationship or a parent-subsidiary relationship between the United States and foreign entities.

In a reply dated August 21, 2001, the petitioner explained that the stock distribution of the U.S. company had changed pursuant to a resolution of the petitioner's board of directors on February 15, 1999. Pursuant to this resolution, the petitioner claimed that the board canceled the stock certificates issued in the name of the Indian company and re-issued the stocks in the names of the individual shareholders of the Indian company. The petitioner noted that it "inadvertently did not provide the necessary documentation to prove that the

shares were held 'In Trust' [for the Indian stockholders] as well as the transfer that took place in February 1999."

Therefore, at the time the petition was filed, the petitioner's actual stock distribution was as follows:

Name	Shareholding
[redacted]	25%
	16.66%
	16.66%
	16.66%
	25%

The petitioner further explained that [redacted]25 percent interest in the U.S. company was held by her "in trust" for [redacted] and [redacted], and that her share "was in fact controlled by the remaining three Indian company stockholders." The petitioner stated that "the 100% stock holders of the Indian Company directly held 75% of the stock of the U.S. company," that "the 25% held by [redacted] was in fact controlled by the remaining three Indian company stockholders," and that "ownership of the U.S. Company has in fact always directly or indirectly been controlled by the stockholders of the Indian company."

In support of its assertion that [redacted] stock was held "in trust" for three of the Indian shareholders, the petitioner submitted a letter dated August 25, 2001, signed by [redacted] The letter provides the following explanation:

> This is to confirm that the 25% stockholding held by me in "[sic]Ghai Investments, Inc.; a California Corporation, were held in my name till April 15, 2001 'In Trust' for my Sisters-In-Law [redacted] wives of my late brother-in-la[redacted] [redacted]d my brother-in-law [redacted] equally, to avoid the necessity of any of them having to travel to U.S.A. for board meetings required to pass resolutions required by Lenders etc. The said stock was transferred to their individual names on April 15th, 2001. The control excerisable [sic] by virtue of that stock was always done by me at their direction and as per their wishes.

The director eventually denied the petition based on a qualifying relationship issue related to the petitioner's franchise agreement, which will be discussed further below. The AAO subsequently noted in its May 19, 2004 decision that the petitioner had failed to establish an affiliate relationship between the United States and foreign entities.

After the AAO remanded the matter, the director issued a notice of intent to revoke the approval on September 14, 2004. The director observed that the petitioner provided evidence establishing that the foreign company is owned in equal shares by four stockholders and that the United States company is owned by five stockholders, four of which are shareholders of the foreign corporation. The director concluded that, as the "same group of individuals" does not own or control both organizations, the petitioner has failed to satisfy the definition of affiliate provided in the regulations at 8 C.F.R. § 214.2(l)(ii)(L)(2). Quoting from the AAO's decision, the director noted that "the record does not contain any documentation establishing the existence of

a trust instrument which would indicate that [redacted]s 25% interest is held for the benefit of three of the petitioner's shareholders."

In an October 13, 2004 letter submitted in response to the notice of intent to revoke, counsel for the petitioner stated:

> The petitioner was directly and indirectly controlled by the same stockholders who own the foreign company. We have already explained how the shares attributed to [redacted] do not diminish the control of the U.S. entity by the foreign stockholders. What was ignored was the fact that without counting [redacted]'s shares, the foreign stockholders own 75% - which is more than sufficient for control. Indeed the SEC considers that a foreign company controls an American entity when it owns as much as 5% of the domestic enterprise.

Counsel also stated that the director had previously agreed that the requirements of affiliation had been proven, noting that the director stated in his June 19, 2002 decision that the petitioner submitted sufficient evidence to overcome the issue of whether there was a qualifying relationship based on common ownership and control between the foreign and United States entities.[1]

On January 11, 2005, the director revoked the approval of the petition, concluding that the petitioner had not overcome the grounds of revocation with respect to the qualifying relationship issue. The director again noted that the record contains no evidence of a trust instrument to establish tha[redacted] held the petitioner's shares in trust for three of the Indian shareholders. The director concluded that the unequal number of shareholders precludes a finding that the petitioner had a qualifying affiliate relationship with the foreign entity.

In response to the notice of certification, counsel for the petitioner addresses the director's reference to the absence of a "trust deed" and asserts "[w]hile it is clear that a written document is essential if the parties do not agree to keep their word, there is nothing in the law that requires a trust deed when the parties are honorable." Counsel further stated "the central assumption of your decision relating to affiliation and all that flows from it is, at best, erroneous."

On review, the record does not demonstrate that the U.S. and foreign corporations were qualifying organizations at the time the petition was filed. 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*, 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*, *supra* at 595.

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[1] The AAO withdrew the director's June 19, 2002 decision on May 14, 2004. In its decision, the AAO noted that the director erred in finding a qualifying affiliate relationship between the United States and foreign entities based on common ownership and control.

As noted above, the regulation at 8 C.F.R. § 214.2(l)(ii)(L)(2) defines an affiliate as one of two legal entities owned and controlled by the same group on individuals, each individual owning and controlling approximately the same share or proportion of each entity. In support of the petition, the petitioner provided evidence establishing the foreign company is held in equal shares by four stockholders. The U.S. company, however, is owned by five stockholders, four of which are shareholders of the foreign entity. As the "same group of individuals" does not control both organizations, the petitioner has failed to satisfy the requirements set forth in the regulations. Although counsel has referenced other definitions of "affiliation" in his arguments, the only definition applicable in these proceeding is that found at 8 C.F.R. § 214.2(l)(ii)(L).

The petitioner has asserted that it meets the above-stated requirement by explaining that the fifth stockholder of the U.S. company, [redacted] held her 25% interest in trust equally for three of the petitioner's other shareholders – [redacted] and [redacted] – thereby increasing each shareholder's interest in the U.S. company to 25%. The petitioner further asserts that the U.S. company has always "directly or indirectly been controlled by the stockholders of the Indian company." As noted above, the record, however, does not contain documentation establishing the existence of a trust instrument, which would indicate that [redacted]'s 25% interest is held for the benefit of three of the petitioner's shareholders. The AAO recognizes the petitioner's submission of a letter from [redacted] stating that she voted according to the wishes of the three above-named stockholders. This letter was provided only after the petitioner disclosed that it had "inadvertently" failed to indicate the company's significant change in stock distribution at the time it filed the petition. As noted above, all of the documents submitted with the petition indicated that there had been no change in ownership since the filing of the first I-129 petition on behalf of this beneficiary, and that the foreign company still owned 50 percent of the U.S. company's shares, with the other 50 percent divided equally between [redacted] and [redacted] In fact, the stock ownership changed ten months prior to the filing of the instant petition. The petitioner has not adequately explained why it omitted this critical information at the time of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

All of the petitioner's documents dated prior to August 2001 identify [redacted] as an individual stockholder of 25% of the company and as a company officer. Additionally, the U.S. corporation's stock ledger contains a subsequent transfer of stock from [redacted] to the three other stockholders. Again, there is no indication in any of the documentation that the stock is held in trust for the benefit of others. 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. at 591-92. Furthermore, the letter of [redacted], written after CIS pointed out the deficiencies in the petition, will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. Finally, the AAO cannot give any evidentiary weight to counsel's assertion in response to the notice of certification that "there is nothing in the law that requires a trust deed when the parties are honorable." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 544, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel alternatively asserts that an affiliate relationship exists "without counting [redacted] shares," because the four foreign stockholders collectively hold 75% of the U.S. company's shares. This argument is not persuasive. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. 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). Neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity so that the group may claim majority ownership unless the group members are legally bound together by voting agreements of proxies.

As already noted, in this case the U.S. entity is owned by five individuals and four individuals own the foreign entity. Absent documentary evidence such as voting proxies or agreements of the four shareholders of the foreign company to vote in concert so as to establish a controlling interest in the United States company, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the United States and foreign organizations. For this reason, the approval must be revoked.

The second related issue in this proceeding is whether the petitioner has established that it is a qualifying organization doing business in the United States pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

The regulation at 8 C.F.R. 214.2(l)(1)(ii)(H) defines "doing business" as:

> The regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In this case, the petitioner claims that the United States company is operating a Burger King fast food restaurant. However, as noted by the director in his January 11, 2005 decision, the franchise agreement submitted by the petitioner identifies the franchisees as two of the petitioner's shareholders, not as the petitioner. The director determined that there was therefore insufficient evidence to establish that the petitioner was engaged in providing goods and services through the fast food industry, and revoked the petition on the grounds that the petitioner had not established that it was a qualifying organization.

Upon review of the record, the director's decision on this issue will be withdrawn. In response to the September 1, 2004 notice of intent to revoke approval, the petitioner submitted evidence, namely a "Conditional Consent to Assignment of Franchise Agreements and Leases," which indicates that the franchisees, [redacted] and [redacted] assigned "all of [their] right, title and interest in the Franchise Agreements" to the petitioning company on September 30, 1998, with the consent of the franchisor, Burger King Corporation. The director did not acknowledge receipt of this agreement in his decision. Upon review of the agreement and the record, there is sufficient evidence to establish that the petitioner is in fact doing business as a Burger King restaurant. The director's decision is withdrawn as it relates to this issue. However, the petitioner approval will be revoked on other grounds.

A third issue related to the petitioner's qualifying relationship with the foreign entity concerns its franchise agreement with Burger King Corporation. This issue was not fully discussed in the director's decision based on the erroneous conclusion that the petitioner was not doing business as Burger King, thereby making the franchise arrangement, in the director's opinion, moot. Nevertheless, as the effect of the franchise agreement on the petitioner's ownership and control has previously been at issue in this matter, specifically in the director's June 19, 2002 decision, and as counsel addresses this issue in response to the notice of certification, the franchise agreement will be given further discussion here for purposes of clarification.

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. See also,* 9 FAM 41.54 N7.1-5; O.I. 214.2(l)(4)(iii)(D) (noting that associations between companies based on factors such as ownership of a small amount of stock in another company, or licensing or franchising agreements, do not create affiliate relationships between the entities for L-1 purposes).

By itself, the fact that a petition involves a franchise will not automatically disqualify the petitioner under section 101(a)(15)(L) of the Act. When reviewing a petition that involves a franchise, the director must carefully examine the record to determine how the franchise agreement affects the claimed qualifying relationship. As discussed, if a foreign company enters into a franchise, license, or contractual relationship with a U.S. company, that contractual relationship can be terminated and will not establish a qualifying relationship between the two entities. *See Matter of Schick,* 13 I&N Dec. at 649. However, if a foreign company claims to be related to a U.S. company through common ownership and control, and that U.S. company is doing business as a franchisee, the director must examine whether the U.S. and foreign entities possess a qualifying relationship through common ownership and management under section 101(a)(15)(L) of the Act.

Nonetheless, it is critical in all cases that the petitioner fully disclose the terms of any franchise agreement, especially as the agreement relates to the transfer of ownership, voting of shares, distribution of profit, management and direction of the franchisee, or any other factor affecting actual control of the entity. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-65.

In the present matter, the critical relationship is that between the beneficiary's overseas employer, Ghai Hotels and Investments Co. Ltd., and the U.S. petitioner, Ghai Investments, Inc. Although the petitioner does business in the United States through a franchise agreement with Burger King Corporation, the claimed relationship between Ghai Hotels and Investments Co. Ltd and Ghai Investments Inc. 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. As discussed above, the petitioner has not established a qualifying relationship between the foreign and United States entities. The petition must therefore be revoked regardless of the effect of the franchise agreement on the ownership and control of the petitioner.

However, it is noted that the share certificates of the U.S. entity bear a legend which states "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 & the restrictive provisions of the Charter and By-Laws of this corporation." It is further noted that section 15 of the franchise agreement sets forth certain conditions that may be imposed upon the transfer or assignment of the agreement to a corporation. Since Garanjit and Amarjeet Ghai assigned this agreement to the petitioning corporation, the restrictions discussed in this portion of the franchise agreement would presumably apply to the petitioner. Without reviewing additional documentation, including the company's corporate charter and by-laws referenced on the stock certificate legend, the AAO cannot determine whether the terms of this franchise agreement would affect the petitioner's qualifying relationship with the foreign entity. Therefore, the AAO could not render a decision on this issue based on the evidence contained in the current record of proceeding. Absent this restriction regarding stock transfer, which may indeed affect the ownership and control of the petitioner in this case, the AAO would concur with counsel that the fact that the petitioner operates a franchise should not, in and of itself, prohibit a finding of a qualifying corporate relationship with the foreign entity.

The final issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity under the extended petition.

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.

At the time of filing the petition on December 30, 1999, the petitioner stated that the beneficiary would be responsible for "managing the company's fastfood [sic] business, expansion through acquisition, construction [of] new units, negotiating leases, lending, hiring." The petitioner also submitted an employment contract signed by the petitioner, the foreign entity and the beneficiary on December 1, 1999, which described her job duties as follows:

> Scope of job to include monitoring the setup, funding, lease acquisitions, hiring, training of the proposed venture whilst acquiring the necessary skills herself to be able to qualify us for expanding the fast food trade on her return to India.

The petitioner also submitted evidence that the beneficiary had completed training courses with Burger King Corporation in "Applied Foodservice Sanitation" and "Increased Productivity Through People Management." The petitioner indicated that the beneficiary supervised "all managers and assistant managers." Based on the petitioner's description of its organizational structure, the petitioner employed one restaurant manager, one assistant manager, three shift supervisors and 18 hourly crew members at the time the petition was filed. On the Form I-129 Petition, the petitioner indicated that it had 20 employees.

As noted above, the petition was initially approved on January 26, 2000 based on the evidence included in the original submission. In his September 14, 2004 notice of intent to revoke, the director concluded that the beneficiary would not be employed in a managerial or executive position. The director noted that the petitioner had failed to provide: (1) a detailed description of the beneficiary's managerial or executive job duties, and (2) a sufficient description of the petitioner's staffing during the year 1999.

In a response received on October 14, 2004, the director petitioner provided the following description of the beneficiary's duties.

JOB DUTIES	PERCENTAGE OF TIME
Perform General Management activities such as overseeing management functions and day to day operations: ▪ Professional staff management. ▪ Management of Franchise operations of the company.	

▪ Human Resources management: hiring, firing, training, delegation of assignments ▪ Menus and utilization of food taking into account[:] marketing conditions, popularity of various dishes, and regency of menu ▪ Purchases or requisitions of food and kitchen supplies.	30%
Ensuring compliance with company policies and procedures: ▪ Meeting with various Mangers [sic] to make sure that corporate philosophy is being followed. ▪ Setting or changing polices and procedures in accordance with corporate standard. ▪ Conducting performance reviews and ensuring that the managers and staff follow all corporate procedures. ▪ Ensuring proper food safety laws are being followed. ▪ Representing the concerns and requirements of Managers to the company directors.	30%
Ensuring liaison between the petitioner and shareholders: ▪ Regular communications with overseas shareholders regarding the company's progress and discussing profit and loss. ▪ Arranging for finance for new and current projects. ▪ Approval for future expansion projects from the shareholders. ▪ Approval of the company's quarterly and annual budgets.	30%
Managing Expansion Activities such as: ▪ Communicating development directions of Ghai Investments to its directors. ▪ Negotiating deals for new projects. ▪ Meetings with architects for new projects. ▪ Purchasing new machinery for efficient production output levels	10%

The petitioner also submitted an organizational chart reflecting the petitioner's organization as of 2004, including names, job titles, salaries and educational levels for the beneficiary and her subordinates. The petitioner did not provide the requested information regarding the petitioner's staffing in 1999, as requested by the director. The only evidence on record with respect to the relevant time period are Forms DE-6, Quarterly Wage and Withholding Report, for the first three quarters of 1999, which confirm employment of approximately 20 employees on average during that year.

In his January 11, 2004 decision to revoke the petition, the director determined that the petitioner had not established that the beneficiary will be performing in a managerial or executive capacity. The director noted that the since the petitioner had not established a relationship between the petitioner and the Burger King restaurant, "the restaurant employees that are claimed to be managed by the beneficiary while rendering his services in the United States cannot be considered for purposes of qualifying in a managerial or executive capacity."

In response to the notice of certification, counsel asserts that the petitioner has submitted sufficient evidence to establish that it is doing business as a Burger King restaurant and that "the Decision concludes that the beneficiary is not in a managerial position, not withstanding the clear and constant interpretation the Service has given to the definition of managerial capacity in Section 214.2(l)(1)(ii)(B)."

The AAO notes that the director's basis for denying the petition with respect to this issue is erroneous, as the petitioner has submitted sufficient evidence that it was doing business and operating the Burger King restaurant at the time the petition was filed. However, upon review of the petition and evidence, the petitioner has not established that the beneficiary will primarily be performing duties that are managerial or executive.

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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary primarily performs these specified responsibilities and does not spend the majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F. 2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The initial description of the beneficiary's duties, which indicated that she would be responsible for "lending," "hiring," "training," "negotiating leases," and "managing the business" was vague and non-specific, and failed to demonstrate what the beneficiary did on a day-to-day basis. The petitioner has provided a lengthy description in response to the notice of certification. However, this job description is still insufficient to establish that the beneficiary will perform primarily managerial or executive duties. Furthermore, it is not clear whether this job description represents the beneficiary's duties as of the time the petition was filed in 1999, or her current duties as of 2004. The AAO recognizes that the beneficiary's role has expanded since the filing of the instant petition. However, 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). The beneficiary's job description is vague with regard to her role in communicating with the foreign shareholders and managing expansion activities. The petitioner refers to her involvement in "expansion projects," and "arranging financing for new and current projects," but has not described the nature of these projects or how the beneficiary's duties relate to the high-level responsibilities specified in the definition of managerial capacity. The petitioner also describes the beneficiary as allocating 30 percent of her time to communicating with the company's overseas shareholders. The AAO notes that while the petitioner's current organizational structure depicts the beneficiary as reporting to the company's board of directors/shareholders, at the time the petition was filed, she reported to the "director of operations." 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). Furthermore, the initial job description did not mention any duties related to shareholder reporting. For these reasons, the AAO assumes that the job description provided describes her current duties, which would have naturally expanded subsequent to the filing of the instant petition in 1999.

The petitioner further indicates that the beneficiary devotes 30 percent of her time to "general management" over its franchise operations but lists specific duties that cannot be deemed managerial, such as purchasing food and kitchen supplies, and reviewing menus. The petitioner also describes the beneficiary as training employees and delegating assignments, but it did not specify the specific tasks involved or which employees she trains and assigns. If she is providing training to and assigning the tasks of hourly fast food crew workers, these duties could not be considered managerial in nature. Similarly, the petitioner indicates that the beneficiary will allocate 30 percent of her time to "ensuring compliance with company policies and procedures" and "setting or changing polices and procedures in accordance with corporate standard" but again does not describe the policies or procedures enforced, or the type of changes in policy and procedures the beneficiary is authorized to make. The petitioner did not specify what managerial duties are involved in ensuring compliance with food safety laws, nor did it specify whether the beneficiary conducts performance evaluations for managerial employees only or for all employees of the restaurant, including the hourly workers. 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 actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to sufficiently determine the many of the actual tasks that the beneficiary will perform such that they can be classified as managerial.

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional or managerial. *See* section 101(a)(44)(A)(ii) of the Act. In the director's intent to revoke the petitioner, he specifically noted that while the petitioner submitted payroll records for the year 1999, it did not submit documentation explaining the capacity in which these individuals are employed. In response, the petitioner submitted its current organizational chart and recent payroll records. These documents do not assist the AAO in determining whether the beneficiary supervised managerial, supervisory or professional employees at the time this petition was filed.

At the time the petition was filed, the petitioner did submit a document labeled "Organizational Structure of Ghai Investments, Inc., CA as on December 01, 1999." This document indicated that the beneficiary directly supervised "all managers and assistant managers." The petitioner identified one restaurant manager, one assistant manager and three shift supervisors by name and the payroll records confirmed employment of these employees. However, without a description of the duties these employees perform, the AAO cannot conclude that they could be classified as managers, supervisors, or professionals. The AAO does not deem a position to be professional, supervisory or managerial by title alone. Furthermore, as noted above, based on the petitioner's description of the beneficiary's duties, it is likely that she directly supervises all employees in the restaurant, including the hourly employees who cook, operate the cash registers and provide janitorial services. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional or managerial. *See* section 101(a)(44)(A)(ii) of the Act.

Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a

beneficiary. An individual whose duties encompass duties of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner has not submitted sufficient evidence to establish that the beneficiary's subordinates hold managerial, supervisory or professional positions or a job description which adequately describes the managerial duties performed by the beneficiary on a day-to-day basis. As observed above, 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. at 190.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Based on the record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties or whether the beneficiary primarily performs operational and/or first-line supervisory duties. In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in a managerial capacity. Therefore, the director's decision to revoke the petition on this additional ground shall be affirmed.

Counsel refers to prior adjudications including the petitioner's submission of previous and subsequent L-1A intracompany transfee petitions and a multinational manager immigrant petition on behalf of this beneficiary. It is noted for the record that out of the four petitions filed, the director denied or revoked three petitions. Counsel appears unaware that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). Counsel's claim that prior adjudications did not consider all of the deficiencies contained in the director's January 11, 2005 decision is not relevant to this proceeding. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged error as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd,* 248 F.3d1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO acknowledges counsel's request for oral argument. However, the regulations provide that the requesting party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factor or issues of law to be resolved. Counsel merely makes a vague allegation of a "lack of fidelity in adjudication" and asserts that CIS has ignored the facts in the record, the regulations and

standard interpretations of regulations. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the decision of the director will be affirmed and the petition approval will be revoked.

ORDER: The petition approval is revoked.