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

PUBLIC COPY

[redacted]

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File: SRC 04 145 50423 Office: TEXAS SERVICE CENTER Date: NOV 01 2007

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 BENEFICIARY:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of vice president and operations manager to be employed in a new office in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a corporation organized under the laws of the State of Florida, claims to operate a restaurant known as [redacted] Florida. The petitioner also claims to have a qualifying relationship as a subsidiary with the beneficiary's purported employer abroad, [redacted] of Egypt.[1]

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Specifically, the director determined that, because the petitioner had ceded control over the petitioner's business operation to a franchisor under a franchise agreement, it failed to establish that the foreign entity controls the petitioner.

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 the foreign entity owns and controls the petitioner and, thus, it has established that it has a qualifying relationship with the foreign entity.

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

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[1]According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on October 1, 2004. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. *See* § 607.1421, Fla. Stat. (2006). Therefore, this would call into question the petitioner's continued eligibility for the benefit sought if the appeal were not being dismissed for the reasons set forth herein.

knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In addition, the regulation at 8 C.F.R. § 214.2(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 has a qualifying relationship with the foreign entity even though it has entered into a franchise agreement with the Quizno's Franchise Company.

Title 8 C.F.R. § 214.2(i)(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."

In this matter, the petitioner asserts that it is owned and controlled by the foreign employer. In support of this assertion, the petitioner submitted, *inter alia*, articles of incorporation and a copy of a stock certificate. The petitioner also asserts that its sole business interest is the operating of a Quiznos restaurant as a franchisee pursuant to a Franchise Agreement dated July 3, 2002 (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 Quiznos.

On July 7, 2004, 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, the petitioner asserts that it has established that the foreign entity owns and controls the petitioner and, thus, it has established that it has a qualifying relationship with the foreign entity.

Upon review, the petitioner'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 (BIA 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.

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, as the franchisee has failed to retain the necessary latitude to control, direct, and develop the enterprise, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer.

Furthermore, the petitioner has also failed to establish that it is owned by the foreign employer. As indicated above, the petitioner submitted articles of incorporation and a stock certificate as evidence of ownership by the foreign entity. In the Request for Evidence, the director requested further evidence of both the petitioner's ownership and control including the stock register and annual reports. However, the petitioner chose not to produce this evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

Finally, it must be noted that the Franchise 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 Quiznos restaurant pursuant to a Franchise Agreement, the Agreement, the lease for the purported restaurant, and the notice from Quiznos submitted by counsel on appeal uniformly indicate that [redacted] and not the petitioner, individually owns and operates the restaurant in question. The petitioner does not appear to be a party to the Franchise Agreement or the lease, and the record is devoid of evidence that the franchise was properly assigned to the petitioner. While the petitioner's absence from the Franchise 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 Quiznos restaurant, which is equally material to the petitioner's eligibility for the benefit sought in this matter. 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.

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 or to establish that an investment has been made in the United States operation. 8 C.F.R. § 214.2(l)(3)(v)(C).

As explained, the record indicates that [redacted] is, individually, the sole party to the Franchise Agreement and the sole lessee named in the restaurant lease. Exhibit 5 to the Franchise Agreement confirms that [redacted] owns the franchise as an individual, and not as a corporation, despite counsel's assertions to the contrary. As both the Franchise Agreement and the lease require approval of any assignment or transfer of [redacted] rights, and the record is devoid of any evidence that the franchisor or the lessor has consented to an assignment, it must be concluded that [redacted] is both the lessee and the franchisee. 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 Quiznos 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.

Likewise, the petitioner has not established that an investment has been made in the petitioner's business operation. Not only does it appear that the petitioner does not operate a business given its lack of any ownership interest in the Quiznos franchise, the evidence in the record regarding an investment in the enterprise concerns the transfer of funds to [redacted] personally. The record is devoid of any evidence that [redacted] was acting as an agent for the petitioner in his receipt of these funds. To the contrary, it appears that [redacted] who does not appear to own any stock in the petitioner, may have used these funds to acquire the Quiznos franchise individually. The record is devoid of any evidence that an investment has been made in the petitioner or in a business enterprise owned and operated by the petitioner, or by a stockholder of the petitioner. The investment in [redacted] individual business is irrelevant to these proceedings.

Accordingly, 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, Ashraf Basha is the lessee in the lease submitted by the petitioner as evidence that it has secured adequate physical premises to house its new operation. The record is devoid of any evidence that this lease was 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 has failed to establish that 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." 8 C.F.R. § 214.2(l)(3)(v)(B).

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 initial petition is unclear regarding whether the petitioner is alleging that the beneficiary worked in a managerial or in an executive capacity overseas. Given the lack of clarity, the AAO will consider the appeal as if the petitioner is asserting that the beneficiary was employed either in a managerial *or* an executive capacity.

Counsel to the petitioner described the beneficiary's job duties abroad in a letter dated June 19, 2004. As this letter is in the record, the job description will not be repeated here. Generally, the beneficiary is described as devoting most of his time to his duties as "deputy chairman" of the foreign entity. The petitioner also asserts that the beneficiary supervised eight employees abroad: a marketing manager, a financial manager, an administrator, a receiver, an accountant, a security guard, a laborer, and a warehouse manager. Three of the subordinate employees are described as having bachelor's degrees. The petitioner does not reveal whether any of the eight subordinate employees supervises additional subordinate employees.

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 and indicate whether such duties were either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has failed to establish that the beneficiary acted in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner states that the beneficiary directed, planned, and implemented "policies and objectives" and directed the "activities of [the] organization." However, the petitioner never specifically described these "policies and objectives" or explained what, exactly, he did to "direct" activities. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary was actually performing managerial duties. 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).

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the job descriptions for the subordinate staff members, the beneficiary appears to have supervised a staff of eight employees. However, the petitioner has not established that these employees were primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees were performing the tasks necessary to produce a product or to provide a service. In view of the above, the beneficiary would appear to have been primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established that the beneficiary managed professional employees.[2]

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[2]In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's

Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, the beneficiary appears to have been primarily employed as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary had been employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), 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 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and

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degree by a subordinate employee does not automatically lead to the conclusion that an employee was employed in a professional capacity as that term is defined above.

In the instant case, the petitioner has not established that a bachelor's degree was actually necessary to perform the duties ascribed to the beneficiary's various subordinates. Likewise, the record is devoid of any evidence confirming that these employees had actually earned degrees or that these degrees are equivalent to United States bachelor's degrees. Once again, 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.

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.