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**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

[redacted]

D7

DATE: APR 13 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The director of the California Service Center, recommended denial of the nonimmigrant petition and certified the decision to the Administrative Appeals Office (AAO) for review, in accordance with 8 C.F.R. §103.4(a)(5). The AAO will affirm the director's determination and deny the petition.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware limited liability company, operates a Japanese restaurant in Hawaii. It claims to have an affiliate relationship with the beneficiary's last foreign employer, Nobu London Limited, and with the beneficiary's current U.S. employer, Nobu Associates (South Beach) L.P. The petitioner seeks to employ the beneficiary in the position of beverage and bar manager and requests a two-year extension of the beneficiary's L-1A status.

In a decision dated July 27, 2010, the director recommended that the petition be denied and certified the decision to the AAO for review. The director's recommendation was based on a finding that the U.S. petitioner does not have a qualifying relationship with the beneficiary's last foreign employer. In accordance with 8 C.F.R. §103.4(a)(2), the director notified the petitioner of the certification and provided an opportunity for the petitioner to submit a brief to the AAO within 30 days. As of this date, the AAO has received no brief or additional evidence and the record will be considered complete and ready for adjudication.

## I. The Law

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.

## II. The Issue on Certification

The sole issue before the AAO is whether the petitioner has established that it has a qualifying relationship with the beneficiary's last foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]
>
> * * *
>
> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
>
> * * *
>
> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
>
> (L) *Affiliate* means
>
> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

*(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The record consists of the Form I-129, Petition for a Nonimmigrant Worker and initial evidence, the director's request for additional evidence dated May 19, 2010 and the petitioner's response, and the director's certified decision recommending denial of the petition.

On the L Classification Supplement to Form I-129, the petitioner indicated that it is an affiliate of Nobu London Limited, the beneficiary's claimed employer from April 2005 until July 6, 2006. It described the company ownership and managerial control of each company as follows: [redacted] are all owned and controlled by same group of individuals with approx. same % per each."

The petitioner submitted its Certificate of Formation indicating that it was established as a Delaware limited liability company on February 13, 2006, as well as a copy of its operating agreement bearing the same date. Schedule A at page 15 of the Operating Agreement provides the following list of members and membership interests for [redacted]

[redacted]

Article 3 of the agreement describes the management of the corporation:

3.1 Management by Members; Major Decisions. The business of the Company shall be managed by the Members, acting by a Majority of Membership Interests, except for the following acts, which shall require the consent of the Members holding at least 80% of the Membership Interests:

(a) Selling or pledging all, or substantially all, of the assets of the Company;
(b) Subject to Article 2 hereof, admitting new members and approving transfers of Membership Interests;
(c) Engaging in any business activity other than that set forth in Section 1.3 hereof; or
(d) Effecting or approving any borrowing, lending or other transaction between the Company and any Member or Affiliate of a Member.

* * *

3.4 Rights Reserved Exclusively for Matsuhisa. Notwithstanding any provision in the Agreement to the contrary, so long as he shall remain a Member, [redacted] shall have exclusive creative control over the recipes, menu, décor and ambience of the Restaurant. Once established to the satisfaction of [redacted] such recipes, menu, décor and ambience shall not be changed or modified, and no creative or quality

> decision with respect to the Restaurant regarding food quality, recipe or restaurant operation shall be made without the prior written consent of [redacted]

Article 3.2 of the operating agreement refers to license and consulting agreements between the company and [redacted] as well as a consulting agreement between the company and [redacted] The petitioner has not provided copies of these agreements for review.

With respect to the beneficiary's last foreign employer, the petitioner submitted a copy of the "Joint Venture Agreement Related to [redacted] as well as the Articles of Association for [redacted] The joint venture agreement is between [redacted] (UK) LLC (a Delaware limited liability company) and [redacted] According to the Articles of Association, the company issued 70 shares to [redacted]

Finally, the petitioner submitted the operating agreement for [redacted]. Article 8.1 of the agreement provides that "the business and affairs of the Company shall be under the direction of the Members, who shall act by a majority of Members in interest entitled to vote." Article 8.5 of agreement states:

> Creative Control of [redacted] shall have exclusive creative control over the recipes, menu, décor and ambience of the Restaurant. Once established to the satisfaction of [redacted] such recipes, menu, décor and ambience shall not be changed or modified, and no creative or quality decision with respect to the Restaurant regarding food quality, recipe or restaurant operation shall be made, without the prior written consent of [redacted]

Exhibit A to the operating agreement lists the owners of [redacted]

[redacted]

In response to the RFE, and pursuant to the director's specific request, the petitioner also provided evidence related to the ownership and control of the beneficiary's current L-1A employer, [redacted] The partnership agreement was made between [redacted] as general partner and four limited partners, including [redacted]

Pursuant to Article 4, section 4.2 of the partnership agreement, the limited partners shall take no part in the management, conduct or control of the business of the partnership and shall have no right or authority to act for or to bind the partnership. The agreement at Article 3, Section 3.9 has a clause granting creative control over the recipes, menu, décor and ambience of the [redacted]

In a letter dated June 28, 2010, counsel for the petitioner noted that none of the [redacted] have generated "actual membership certificates," and asserted that each entity's operating agreement reflects the actual ownership of the companies.

Counsel emphasized that "despite the fact there are other members, [redacted] reserves the management control over both entities." Counsel noted the creative control granted to [redacted] in the operating agreements of [redacted] and the Agreement of Limited Partnership of [redacted] further stated:

> According to BIA note in [redacted] 18 I&N Dec. 289, 293 (Comm. 1982), states "Ownership need not be majority if control exists."
>
> We believe that actual shares and management control held for each entities by [redacted] qualifies their relationship as an affiliate.

In a decision dated July 27, 2010, the director determined that the petitioner failed to establish the claimed affiliate relationship between the U.S. and foreign entities. In reaching this conclusion, the director observed that the companies are not owned by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity.

The director also acknowledged counsel's alternative claim that the companies share common control by the same individual, [redacted] The director found this claim unpersuasive, noting that control means "the direct or indirect legal right and authority to direct the establishment, management and operations of an entity." The director determined that the "creative control" granted to [redacted] by the respective operating agreements is not equivalent to control to direct the establishment, management and operations of the two companies.

Upon review, the AAO will affirm the director's decision to deny the petition.

The regulation and precedent 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 (BIA 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'r 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.

The petitioning company is owned by four individuals, and no one individual owns a majority interest in the company. The beneficiary's foreign employer is directly owned by two companies: [redacted] is owned by four individuals, but it is not the same group of individuals that own the U.S. company. Despite the fact that the same three individuals have ownership interests in the petitioner and indirect ownership interest in the beneficiary's foreign employer through [redacted] USCIS has never accepted a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. Here, the petitioner has submitted no evidence that these three shareholders are bound together as a unit, and has not otherwise established that the companies are owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In response to the RFE, rather than maintaining its claim of common ownership by the same group of individuals, the petitioner claimed that a single individual, [redacted] controls both entities despite the fact that he holds only a minority interest in each entity. This claim is also unpersuasive.

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'r 1982). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

In this case, the U.S. entity is owned by four individuals and the foreign entity is owned by two companies. The company that holds a majority interest in the beneficiary's foreign employer is owned by three of the same four individuals who own the U.S. company. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities.

The AAO agrees with the director's conclusion that the "creative control" granted to [redacted] over the [redacted] menus, recipes and décor is not equivalent to "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. The foreign and U.S. entities appear to have separate licensing and consulting agreements with [redacted] and this element of control over the restaurant concept may stem from these contractual agreements, which have not been provided for USCIS' review. A petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, or any other factor affecting actual control of the entity. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) *(citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The companies may agree to the menu and restaurant concept developed by [redacted] but there is no evidence that he possesses legal rights or authority over the establishment, management and operations of the entities beyond that granted to other owners. According to the submitted operating agreements, such authority lies with the members/shareholders and requires decisions to be made by a majority of the voting interests in the company. Therefore, while the U.S. and U.K. restaurants may be related in name, concept and ownership, the petitioner has not submitted evidence to establish that the two entities maintain a qualifying relationship as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). Accordingly, the AAO will affirm the director's decision.

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, the petitioner has not sustained that burden.

**ORDER:** The director's decision is affirmed. The petition is denied.