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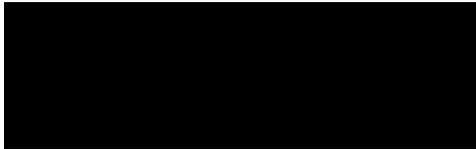
Date: JUN 09 2005

IN RE: Petitioner:
Beneficiary:



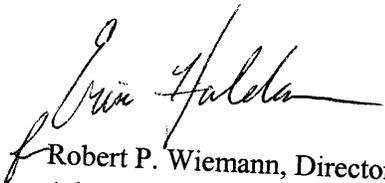
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been
returned to the office that originally decided your case. Any further inquiry must be made to that
office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration and entry of a new decision.

The petitioner endeavors to classify the beneficiary as a manager or executive 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 claims to be a subsidiary of Mass Apparels & Fabrics (Private) Limited, located in Pakistan. It is engaged in the discount retail sale of household items, gifts, and novelties. The initial petition was approved to allow beneficiary to open a new office in the United States. The petitioner now seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's president and general manager. The petitioner was incorporated in the State of Texas on November 30, 2000 and claims to have four employees.

On January 7, 2003, the director denied the petition because the petitioner failed to establish that it has a qualifying relationship with the foreign entity. Specifically, the director noted that the petitioner's operation as a franchise prohibited a finding of a qualifying relationship.

On appeal, the petitioner's counsel asserts that the director's conclusion was erroneous and claims that the petitioner is a subsidiary of the foreign entity. Counsel states that the petitioner's franchise agreement does not affect the foreign company's management and control of the U.S. company. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether a qualifying relationship exists between the petitioner and foreign entity. The regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

(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 operation division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns,

directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

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

On July 26, 2002, the petitioner submitted the Form I-129. On the Form I-129, the petitioner claimed that “[The petitioner], a Texas corporation, is a wholly owned subsidiary of [the foreign entity], a company organized under the laws of Pakistan.” The petitioner submitted its articles of incorporation, certificate of incorporation, a lease agreement, and a certificate of operation showing that the petitioner will be operating under the assumed name of Dollar Discount. The petitioner’s articles of incorporation indicate that the foreign entity is the initial shareholder of the U.S. company.

On September 20, 2002, the director issued a request for additional evidence. Specifically, the director requested that the petitioner clarify whether or not the Dollar Discount store is a franchise and provide a copy of the franchise agreement, if applicable.

In response to the request for additional evidence dated November 14, 2002, the petitioner stated, “Dollar Discount is a franchise.” The petitioner submitted the franchise agreement effective on January 17, 2001 between the franchiser, Dollar Discount Stores of America, Inc., and the franchisee, the beneficiary and the petitioner.

On January 7, 2003, the director denied the petition because the petitioner failed to establish that the “petitioner is a qualifying parent, branch, affiliate or subsidiary company.” The director noted that franchise and license relationships do not qualify under any definition of qualifying relationship and that since the petitioning company was operating as a franchise, the petition was not approvable.

On appeal, the petitioner’s counsel states that the petitioner is a subsidiary of the foreign entity and claims that the petitioner’s franchise agreement does not affect the company’s ownership and control.

On review, the director incorrectly focused on the petitioner’s operation of a franchise rather than on the necessary qualifying relationship between the beneficiary’s foreign employer and the U.S. petitioner. *See* 8 C.F.R. § 214.2(l)(3)(i) (requiring that the petitioner and the organization which employed the beneficiary are qualifying organizations). Evidence of the petitioner’s stock ownership is critical to determining whether a qualifying relationship exists. In this case, the director focused solely on petitioner’s operation of a franchise business. However, the decision

does not indicate that the director considered the claimed parent-subsidary relationship between the foreign entity and the petitioner. Accordingly, the director's decision will be withdrawn and the petition will be remanded to the director for entry of a new decision.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are "ownership" and "control." *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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.

In the present matter, the critical relationship is that between the beneficiary's overseas employer, Mass Apparels & Fabrics, Private Ltd., and the U.S. petitioner, [REDACTED]. Although the petitioner does business in the United States through a franchise agreement with Dollar Discount [REDACTED], the claimed relationship between the foreign entity and the petitioner 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.

Upon review, there is insufficient evidence for the AAO to conclude that the foreign entity and U.S. entity had a qualifying relationship at the time the petition was filed. However, the record contains no clear evidence of ineligibility, and it appears the noted deficiencies could be cured if the petitioner is allotted an opportunity to submit additional evidence. The petitioner has submitted its articles of incorporation dated November 30, 2000. The articles state that the petitioner is authorized to issue 100,000 shares of common stock with no par value, that it would commence business after receiving \$1,000 in consideration for issuance of shares, and that the initial shareholder would be the foreign entity. The petitioner also submitted its Form 1120, U.S. Corporate Income Tax Return for 2001, which indicates on Schedule K that the foreign entity was the sole shareholder. However, the petitioner has submitted no other evidence, such as stock certificates, its stock transfer ledger, minutes of board of directors meetings addressing the issuance of stock, or other corporate documents which would reflect the total number of shares issued and the number of shareholders at the time this petition was filed in July 2002.

In order to resolve these omissions and to clearly establish the claimed relationship between the two entities, the petition will be remanded to the director to request, at a minimum, copies of all stock certificates issued by the U.S. company, and its stock transfer ledger. Additional supporting evidence could include stock purchase agreements, minutes of any other relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Beyond the decision of the director, the record as presently constituted does not establish that the beneficiary will be employed in a managerial or executive capacity pursuant to sections 101(a)(44)(A) or (B) of the Act. The job description provided does not adequately describe the managerial or executive duties the beneficiary performs on a day-to-day basis. For example, the petitioner stated in a November 14, 2002 letter that that the beneficiary is responsible for "negotiating and supervising the drafting of purchase agreements" and "developing trade and consumer market strategies," but the petitioner does not describe any subordinate employees who perform routine purchasing or marketing tasks. Therefore, it is not clear that these duties, which comprise 30 percent of the beneficiary's time, are managerial in nature. Some of the other described duties, such as "developing and implementing plans" to ensure profitability, are too

broad to convey any meaningful understanding of what the beneficiary does on a day-to-day basis. 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.*

In addition, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. The petitioner claimed that it employed a store manager and two cashiers at the time of filing, and notes that it contracted the services of stock clerks when their services were needed. The petitioner provided no evidence of payments to the claimed independent contractors, and, based on the petitioner's wage records, it is not clear that its claimed employees were employed on a full-time basis or that the petitioner employed all three claimed subordinates at the time of filing. The petitioner claims that the store manager was hired in 2001, and that both cashiers were hired in March 2002. However, for the second quarter of 2002, the petitioner's Texas Employer's Quarterly Report shows that during this twelve-week period, the store manager worked for six weeks, and the cashiers worked three and five weeks, respectively. Only three employees were reported for the month of June 2002, the month preceding the filing of this petition.

Based on the record of proceeding as presently constituted, the petitioner has not established that the beneficiary's duties are primarily managerial or executive, or that the company employs a staff sufficient to relieve the beneficiary from primarily performing non-qualifying duties associated with the operation of the petitioner's retail store.

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. In this matter, the petitioner has overcome the specific objection of the director. However, an additional ground of ineligibility exists, and additional evidence is required in order to establish eligibility for the benefit sought. The director is instructed to issue an additional request for evidence addressing the issues discussed above, and any other evidence she may deem necessary.

ORDER: The decision of the director dated January 7, 2003 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision which shall be certified to the AAO for review.