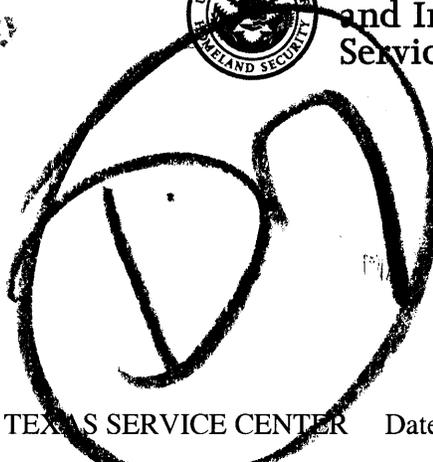


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Services

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FILE: SRC 03 199 53187 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

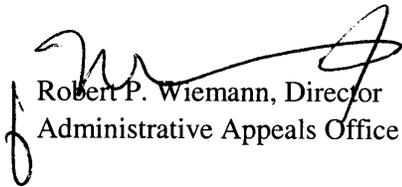
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition will be remanded to the Service Center for entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ 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 is a corporation organized in the State of Texas that is operating as a Murphy's Deli restaurant. The petitioner claims that it is the subsidiary of Burki International, located in Lahore, Pakistan. The beneficiary was granted a one-year period of stay to be employed in a new office in the United States, and the petitioner now seeks to extend his stay.

The director denied the petition concluding that the petitioner had not established a qualifying relationship between the United States and foreign entities. Specifically, the director discussed portions of the franchise agreement signed by the petitioning company, and stated "the primary franchise company, [REDACTED] would actually be in control of the U.S. business, rather than the foreign entity exercising the control over the U.S. operations." The director further stated, "the L1A manager/executive transferee classification was not created to establish self-employment, nor was it intended to create partnerships with U.S.-based franchises."

On appeal, counsel asserts that any franchiser will exercise some control and direction over the franchisee and the franchised business, and that the specific terms raised by the director are common to all franchises. Counsel further asserts that the "objectionable" terms identified by the director in the franchise agreement do not substantially affect the qualifying parent-subsidiary relationship between the foreign and United States entities. Counsel submits a brief and a copy of *Matter of Kung*, 17 I&N Dec. 260 (Comm. 1978) in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present proceeding is whether the beneficiary's foreign employer and the U.S. entity are qualifying organizations as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i).

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On the Form I-129 Petition submitted on July 14, 2003, the petitioner indicated that the United States company is a wholly-owned subsidiary of the foreign entity. As evidence of ownership, the petitioner submitted its articles of incorporation indicating that the sole initial shareholder of the company would be the foreign entity, and a copy of the front and back of its stock certificate number one, indicating that 100,000 shares of common stock with no par value were issued to the foreign entity on November 26, 2001. The back of the stock certificates indicates that the shares have not been transferred. The articles of incorporation and the stock certificate both indicate that the petitioner is authorized to issue 100,000 shares of stock. The articles of incorporation further indicate that the corporation will commence business upon receipt of consideration valued at \$1,000.00. The petitioner's financial statement indicates that its common stock is valued at \$1,000.00. The petitioner also submitted a copy of its corporate by-laws, a copy of its franchise agreement with [REDACTED] copies of two lease agreements, for an office and for its restaurant, and documentation regarding the foreign entity.

On October 24, 2003, the director issued a request for additional evidence requesting in part that the petitioner “clarify the relationships of all companies involved in this petition” and “demonstrate control and ownership of all subsidiaries, branches or affiliates that may be involved.” Specifically, the director asked the petitioner to respond to the following:

1. Is the U.S. business tied directly to the parent business in practices and policies? Does the foreign company own businesses from which patterns of business for the U.S. company are derived? Does the parent company determine how the United States business is conducted?
2. Who is in control of the [REDACTED] indicate a qualifying relationship between the U.S. enterprise and the foreign operation. Is [the foreign entity] in Lahore, Pakistan directly related to the deli franchise in Houston?

In a response dated January 4, 2004, the petitioner stated that the U.S. company is a wholly owned subsidiary of the foreign entity and “as such we have to comply with all the guidelines set forth by the parent company in Pakistan.” The petitioner further stated the U.S. company is expected to follow guidelines of the parent company and to “report all significant developments, dealings and results to the parent company periodically.” With respect to the franchise agreement, counsel stated:

The scope of [REDACTED] limited to setting product related standards and training. The U.S. company has the authority to run the business as it deems fit. The U.S. firm continue[s] to exercise authority with respect to hiring, firing, promotions, financials and overall manner of running the operations. The U.S. company exercise[s] this authority in line with the established policies of the parent company of Pakistan. The U.S. firm reports all developments to the parent company of Pakistan and seeks their input from any strategic issue. While the parent company of Pakistan is not related to the Murphy’s Deli Corporation. However the parent company still enjoys ultimate decision making through the U.S. company.

* * *

[The petitioner] of Texas has entered in to a franchise arrangement with Murphy Delis’ Franchising, Inc. This franchise arrangement provides sales and marketing support to [the petitioner] in running the deli business.

However, [the petitioner] still enjoys all key management decision making authority. Since [the petitioner] is a wholly owned subsidiary of the [foreign entity] in Lahore Pakistan, it stands to reason that the [foreign entity] has the ultimate say in the running of the business by [the petitioner].

In addition, the petitioner re-submitted copies of its articles of incorporation and stock certificate.

In a decision dated March 22, 2004, the director concluded that the petitioner had failed to establish a qualifying relationship between the beneficiary's foreign employer and the U.S. entity. The director noted that the requisite factors for a qualifying relationship are ownership and control, and stated that, because the petitioner entered a franchise agreement, the beneficiary's foreign employer and claimed parent company cannot control the United States company. The director cites certain provisions from the franchise agreement, including terms related to the existence of a franchise Operation Manual, payment of royalty fees to the franchiser, rules regarding leasing of property, and other details regarding expectations and restrictions. The director notes that the franchiser has "control of the restaurant businesses that are operated under its jurisdiction," and that by signing such agreement the petitioner agreed "to conduct business by proven operational standards governed by the large franchise entity." The director concluded that the franchise company, Murphy's Deli, would actually be in control of the U.S. business, rather than the foreign entity exercising control over the U.S. operations.

In an appeal filed April 21, 2004, counsel contends that the director applied an inappropriate standard of "control" in her decision, and asserts "if these criteria were applied to every L-1A petition involving a franchise, none would qualify since these standards are common to all franchises." Counsel states that the franchise agreement clearly states that the franchisee is an "Independent Contractor" and that there is no agent, representative, subsidiary, joint venture, partner, employee or servant relationship." Counsel concludes that the parent company has sufficient control over the U.S. corporation's current business activity to satisfy the regulatory qualifying relationship requirement. Counsel cites *Matter of Kung*, 17 I&N Dec. 260 (Comm. 1978), a case in which a beneficiary seeking classification as a nonimmigrant treaty investor under section 101(a)(15)(E)(ii) of the Act, 8 U.S.C. § 1101(a)(15)(E)(ii) had purchased a restaurant under a franchise agreement. In that case, the Commissioner determined that the limiting requirements inherent in the agreement were overcome by nonlimiting requirements which were sufficient to establish that the owner actually controlled the business.

On review, both the director and counsel 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 the effect of the petitioner's franchise agreement on control of the United States entity. However, the decision does not indicate that she considered the claimed parent-subsidiary relationship between the foreign entity and the petitioner or other factors necessary to establish a qualifying relationship, such as whether the foreign entity continued to do business pursuant to 8 C.F.R. 214.2(l)(2)(G)(ii). 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(I)(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 petitioner provided a copy of the franchise agreement with the initial petition. The director found the terms of the

agreement to be so restrictive that she determined the foreign entity could not exercise control over the United States petitioner.

Case law provides that 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). In this case, the petitioner claims that the foreign entity owns 100 percent of its outstanding stocks and submits evidence in support of this claim. If the claimed relationship exists, the foreign entity in this case is therefore assumed to have "de jure" control over the petitioner and the petitioner's burden has been met with respect to establishing ownership and control. Accordingly, the director's request for an explanation as to how the petitioner is "tied directly to the parent business in practices and policies" or how "the parent company determine[s] how the United States business is conducted" was not appropriate.

Upon review of the franchise agreement, the AAO concurs with counsel that there is nothing in the provisions of the agreement that would negate an otherwise valid claimed parent-subsiary relationship between the foreign and U.S. companies. The provisions cited in the director's decision are neither unusual for this type of agreement nor unduly restrictive. As noted above, 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.

In the present matter, the critical relationship is that between the beneficiary's overseas employer, Burki International and the U.S. petitioner, [REDACTED]. Although the petitioner does business in the United States through a franchise agreement with [REDACTED], the claimed relationship between Burki International and [REDACTED] 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. As noted above, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The petitioner has submitted its stock certificate, articles of incorporation, corporate-by-laws, and the minutes of the organizational meeting of its board of directors, dated November 27, 2001. These documents suggest that the foreign entity is in fact the sole shareholder of the petitioner. However, page 3a of the petitioner's organizational meeting minutes includes the board's resolution regarding stock issuance in exchange for real property. Although the meeting minutes have been signed by the board's directors, this portion of the minutes has not been completed. Accordingly, this document does not identify to whom the stock was issued or identify the type or amount of consideration provided in exchange. This document also refers to a written offer from the purchaser, and states that such offer is annexed to the minutes of the meeting. The petitioner did not submit an annexure.

In order to resolve this omission and to clearly establish the claimed relationship between the two entities, the petition will be remanded to the director to request, at a minimum, the missing annexure from the minutes of this meeting, documentation of monies, property, or other consideration furnished to the U.S. entity in exchange for stock ownership, and the petitioner's stock transfer ledger, to confirm that no change in ownership has occurred. 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. In order to establish that the United States and foreign entities are qualifying organizations, the petitioner must also establish that the foreign entity continues to do business. *See* 8 C.F.R. § 214.2(l)(2)(G)(ii). Although the petitioner submitted evidence to document the foreign entity's business operations, most of the documentation submitted is from 2001 or earlier. Since the petitioner was not notified of this deficiency, it shall be given an opportunity to provide the required evidence of the foreign entity's ongoing business operations on remand.

Beyond the decision of the director, the record as presently constituted does not establish that the petitioner and beneficiary are eligible for an extension of the initial one-year "new office" validity period. The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. The evidence submitted with the initial petition was insufficient to establish that the petitioner and beneficiary satisfied all of the evidentiary requirements. However, as the director's request for additional evidence focused primarily on the franchise agreement, the petitioner shall be given an opportunity on remand to submit the required evidence. Specifically, the record does not contain evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner submitted a one-page financial statement for the month of December 2002. The petitioner is required to establish through evidence that it has been doing business since July 2002, when the beneficiary's initial petition was approved. In addition, the petitioner has not submitted sufficient evidence to establish that the beneficiary will serve in a primarily managerial or executive capacity under the extended petition, or sufficient evidence of the financial status of the United States operation. Again, the petitioner shall be given an opportunity to submit the required evidence on remand.

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, additional evidence is required in order to establish eligibility for the benefit sought. Accordingly, the petition is remanded to the director for further review consistent with the above discussion and entry of a new decision.

ORDER: The petition is remanded to the Texas Service Center.