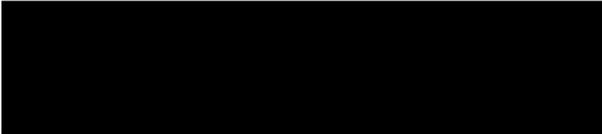




U.S. Citizenship
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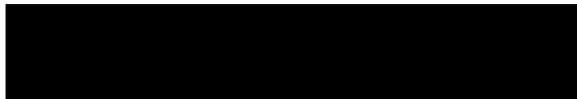
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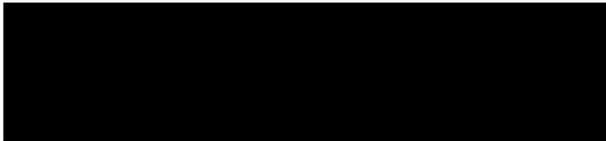
File: SRC 03 086 52614 Office: TEXAS SERVICE CENTER Date: OCT 03 2007

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)

IN 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, 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 visa petition seeking to extend the employment of its president 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 under the laws of the State of Georgia and allegedly operates a submarine sandwich shop.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) that the petitioner has been engaged in "doing business" for the prior year; or (3) that the petitioner has a qualifying relationship with the foreign entity because the petitioner is operating its business pursuant to a franchise agreement.

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, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager. Counsel further argues that the petitioner has been "doing business" and that its operation of a sandwich shop pursuant to a franchise agreement has not altered its qualifying relationship with the foreign entity. Counsel also submits a brief and additional evidence.

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.

As a threshold issue, it must be noted that the "new office" petition extension criteria found in 8 C.F.R. § 214.2(l)(14)(ii) are not applicable to the instant petition because the instant petition concerns a second petition extension. While the petitioner had originally obtained an approval of a "new office" petition for a one-year period in 2000 (SRC 00 055 54240), this initial petition was subsequently extended in 2001 for a two-year period (SRC 01 095 52910), and the current petition seeks to extend this second petition. Therefore, the director's direct application of the "new office" petition extension criteria in 8 C.F.R. § 214.2(l)(14)(ii) was in error and shall be withdrawn. That being said, the substantive bases for the director's decision were applicable to both "new office" petition extensions and to extensions generally of L-1A visa petitions filed on Form I-129. Namely, all petitioners seeking petition extensions must establish that the beneficiary will primarily perform qualifying duties and that the petitioner has a qualifying relationship with the foreign employer, which includes the requirement that the petitioner establish that it is "doing business" as defined in the regulations. Therefore, while the director's direct application of the "new office" petition extension criteria was technically in error, this error was harmless in this particular matter.

In view of the above, the first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 petitioner does not clarify in the initial petition whether the beneficiary will be primarily engaged in performing managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. On appeal, counsel implies that the beneficiary will be employed as either a manager or an executive. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed as either an executive or a manager and will consider both classifications.

The record as a whole indicates that the petitioner operates a single-location submarine sandwich shop pursuant to a franchise agreement with Blimpie International, Inc. The petitioner describes the beneficiary's job duties as "president" of the petitioner in a letter dated January 27, 2003 as follows:

[The beneficiary] has been serving as president and CEO since transferring on L-1A in February 2000. He has been very instrumental with our success and with our plans to expand our operations. He has responsibility over all finance, marketing and administrative operations of the company – over which he has been exercising complete discretionary authority. [The beneficiary] has hired staff and exercises full authority over them.

* * *

[The beneficiary] will continue to recruit and train the staff and have hiring and firing authority over them, as well as further development and execution of our marketing strategies. In addition [the beneficiary] continue to have responsibility for obtaining contracts and entering contractual obligations for and on behalf of [the petitioner].

The petitioner also submitted wage reports for the petitioner indicating that, in the quarter immediately preceding the filing of the instant petition, the petitioner employed three people including the beneficiary. Moreover, the salaries paid to the other two employees in that quarter (\$879.95 and \$1,760.00 respectively) indicate that these employees were more likely than not part-time employees. The beneficiary appears to be the petitioner's only full-time employee. The petitioner also asserted in the letter dated January 27, 2003 that it employs three people.

On June 20, 2003 the director requested additional evidence. The director requested, *inter alia*, descriptions of the job duties of the petitioner's employees.

In response, the petitioner submitted a letter dated July 16, 2003 describing the beneficiary's duties as follows:

1. Major decision making for petitioner relating to financing, marketing, personnel and advertising. [The beneficiary] deals directly with petitioner's bankers regarding obtaining loans and lines of credit. [The beneficiary] hires professional advertising agencies to promote the restaurant with ad campaigns and special promotions in connection with marketing to new market segment;
2. Approves renovations, remodeling and repairs for the restaurant; taking reports of maintenance problems from the manager, deciding when it is appropriate to hire outside service to perform repairs or maintenance and choosing what repair services to use;
3. Educates staff on promotions and organizes employee meetings regarding policy on customer service, dress code, etc.;
4. Develops expansion plans;
5. Advises accountant on how to deal with municipal and state agencies, making the business decisions on how to comply with the licensing requirements, preparing and submitting the required applications. The restaurant is inspected quarterly for compliance with license requirements, but he becomes involved in those inspections only if the inspectors report discrepancies;
6. Hires, fires and reviews performance of employees. Since the restaurant opened, [the beneficiary] has interviewed and hired a total of nine employees, including part time workers; three of those individuals no longer work for the restaurant. [The beneficiary] confers with the supervisor who determine [sic] when employees can have days off and, when necessary, has the authority to terminate employment;
7. Reports to the parent corporation in India on the company's performance, business activities, plans of expansion, current profit, loss and overall performance, often daily;
8. Liaise with restaurant's landlord;
9. Negotiates and signs all business contracts entered into by [the petitioner], including loans, and being responsible for investigating opportunities to open similar restaurants at other locations. He has also recently identified another site in Naperville, Illinois for a restaurant and is currently negotiating the acquisition of this location and equipment;
10. [The beneficiary] also oversees specialized administration relating to contracts for purchasing, sale and administrative accounting and management controls; and

11. [The beneficiary] provides management leadership relating to establishing human resources policies and procedures and to administer employee health, insurance, savings and hiring programs.

The petitioner described the amount of time the beneficiary will devote to each of his duties as follows:

1. Time spent on Management Decisions	20%
2. Time for Organizational Development	15%
3. Representing the Company	20%
4. Financial Representations	20%
5. Supervising day to day operations	10%
6. Negotiating Business deals	15%

The petitioner also submitted an organizational chart for the United States operation. The chart shows an entirely vertical organizational structure with the beneficiary at the top of the organization supervising a manager/accountant who, in turn, supervises an assistant manager who, in turn, supervises a front desk/cashier worker, who, in turn, supervises a sandwich maker who, in turn, supervises a cleaner/helper. The beneficiary is also shown to directly supervise temporary workers hired through an outside agency, and the manager/accountant and the assistant manager are shown as jointly supervising yet another sandwich maker. However, the wage reports for the petitioner only account for the manager/accountant and the assistant manager and, as indicated above, these employees appear to be employed on a part-time basis. The other workers identified in the organizational chart no longer appear to be employees of the petitioner as they do not appear in the petitioner's most recent wage report.

Furthermore, the petitioner submitted evidence that it employed temporary workers to help staff its submarine sandwich shop pursuant to an agreement with a third party agency. In 2002, it appears that the petitioner paid the third party agency approximately \$8,600.00 for these workers. At the \$9.00 per hour rate identified in the invoices, this would amount to approximately 956 hours of staff time, which would be equal to less than one half-time employee. The petitioner offered no evidence that it is currently employing temporary workers.

Finally, the petitioner described the two subordinate employees in the letter dated July 16, 2003. The "manager/accountant" was described as follows:

Manage restaurant selling sub sandwiches and beverages providing fast efficient service to customers during peak hours. Formulate pricing policies, coordinate sales promotion, manages inventory levels and serves as the company's accountant. Reconcile cash reports and prepare and summarize daily and monthly operating reports. She holds a bachelor's degree in Business Administration & Accounting.

The "assistant manager" was described as follows:

The assistant manager has responsibility over cashiers and sales clerks, over inventory and day-to-day running of the business. The assistant manager has direct contact with the public regarding customer relations and customer satisfaction.

On March 22, 2004, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager.

Upon review, counsel's assertions are not persuasive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* As indicated above, the record as a whole indicates that the petitioner operates a single-location submarine sandwich shop in Stone Mountain, Georgia, pursuant to a franchise agreement with Blimpie International, Inc.¹ The beneficiary appears to be the sole owner and operator of this establishment. However, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity in his operation of the sandwich shop.

First, 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 will do on a day-to-day basis. For example, the petitioner states that the beneficiary will engage in decision making "relating to financing, marketing, personnel and advertising;" will educate the staff; will develop expansion plans; will negotiate and oversee the administration relating to contracts; and will provide "management leadership relating to establishing human resources policies and procedures." However, the petitioner does not explain how, exactly, the beneficiary will implement his decisions when the petitioner only employs two part-time subordinate employees; how the petitioner will finance and research its expansion plans; or what, exactly, the beneficiary will do in overseeing and negotiating contracts. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. 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). 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).

Second, it appears that the beneficiary will be performing primarily non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the

¹It is noted that, in response to the Request for Evidence, the petitioner submitted evidence regarding additional business ventures involving the petitioner. However, this evidence refers to business activity taking place after the date the instant petition was filed. Therefore, this evidence is irrelevant and will not be considered. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

petitioner states that the beneficiary will be responsible for virtually all aspects of the operation of the sandwich shop including financing, marketing, advertising, training, renovations, contracting, and personnel matters. However, such duties constitute administrative or operational tasks when the tasks inherent to these duties, such as bookkeeping, banking, and working as a first-line supervisor of non-professional employees, are performed by the beneficiary. As the organizational chart, wage reports, and job descriptions for the subordinate employees fail to identify any employees or contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to the general operation and management of the business, it must be concluded that he will perform these tasks. While the record indicates that petitioner employs two part-time employees and has occasionally employed temporary workers, it has not been demonstrated that these workers will relieve the beneficiary of the need to perform non-qualifying duties other than the most basic customer service functions, e.g., making sandwiches and taking orders. Moreover, as these workers appear to be part-time, it has not been established that the beneficiary will even be relieved of the need to prepare food and directly serve the sandwich shop customers. As the petitioner has not established how much time the beneficiary devotes to such non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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. 593, 604 (Comm. 1988). The fact that the beneficiary is the sole "managerial" employee, or the sole owner of the petitioner, does not establish that he will primarily be employed as a manager or executive.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, the beneficiary appears to supervise a staff of two employees and, occasionally, the provision of services by temporary workers. However, the petitioner has not established that the two employees are primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees are performing the tasks necessary to produce a product or to provide a service, i.e., working at the submarine sandwich shop. Furthermore, inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. Not only has the petitioner failed to establish the ongoing employment of most of the workers identified in the organizational chart, it is simply not credible that a single-location submarine sandwich shop would require so many employees to perform supervisory or managerial duties. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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 will manage professional employees.²

²In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require 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

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

Similarly, the petitioner has failed to establish that the beneficiary will act 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"

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 degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that bachelor's degrees are actually necessary to perform the duties of the subordinate employees.

³While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties will be managerial functions, if any, and what proportion will be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees working at the sandwich shop and/or will be engaged in performing non-qualifying operational or administrative tasks related to the operation of the sandwich shop. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will primarily be employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the petitioner's description of its staffing is rife with inconsistencies. For example, while the petitioner asserts in its organizational chart that it employs seven people in addition to temporary workers, the most recent wage report for the petitioner indicates that it actually employs only three people. The petitioner offers no explanation for this serious inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

The second and third issues in the present matter concern whether the petitioner has established that it has a qualifying relationship with the foreign entity.⁴

The regulation at 8 C.F.R. § 214.2(1)(3)(i) states that a petition filed on Form I-129 shall be accompanied by:

⁴In considering the second issue in the present matter, it is noted that the director concluded that the petitioner failed to establish that it has been "doing business" for the previous year. Upon review, the AAO disagrees and will withdraw this portion of the director's decision. The petitioner has submitted evidence sufficient to establish that it is more likely than not that it has been engaged in business in a continuous, systematic, and regular fashion. The petitioner has submitted a franchise agreement and other materials related to its acquisition of the sandwich shop business from a prior franchisee; tax returns; corporate organizational documents; invoices related to the petitioner's acquisition of supplies; rent invoices; and bank statements reflecting frequent withdrawals and deposits, some of which appear to concern credit card purchases by customers of the sandwich shop. In view of the bank statements, the director's determination that the petitioner has submitted no evidence of being engaged in business appears to have been erroneous. However, because the petitioner has otherwise failed to establish that it has a qualifying relationship with the foreign employer given the ceding of control to the franchisor, the petition will nevertheless be denied.

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.

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." An "affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual."

In this matter, the petitioner asserts that both the United States entity and the foreign employer are owned and controlled by the beneficiary. Therefore, if true, the two employers would meet the definition of "affiliate" under the regulations. The petitioner also asserts that it has been doing business for the past year as the operator of a submarine sandwich shop pursuant to a franchise agreement with Blimpie International, Inc. In support of its petition, the petitioner submitted a franchise agreement and other materials related to its acquisition of the sandwich shop business from a prior franchisee; tax returns; corporate organizational documents; invoices related to the petitioner's acquisition of supplies; rent invoices; and bank statements reflecting frequent withdrawals and deposits, some of which appear to concern credit card purchases by customers of the sandwich shop. The franchise agreement sets forth numerous rules and regulations regarding the petitioner's operation of a Blimpie submarine sandwich shop. These rules control the location and operation of the sandwich shop including the petitioner's purchase of supplies, employee training, hours of operation, and advertising. Importantly, the franchise agreement restricts the petitioner's involvement in outside business interests in article 10.

On June 20, 2003, the director requested additional evidence. The director requested, *inter alia*, evidence regarding the petitioner's business activities for the past year.

In response, the petitioner submitted additional invoices, bank statements, and wage reports.

On March 22, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that it has been "doing business" as defined in the regulations. The director further concluded that, since the petitioner is operating a business under a franchise agreement, it failed to establish that it has a qualifying relationship with the foreign entity.

On appeal, counsel argues that the petitioner has been "doing business" for the past year and that its operation of a sandwich shop pursuant to a franchise agreement has not altered its qualifying relationship with the foreign entity.

Upon review, counsel'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; *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

