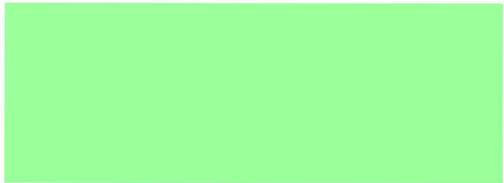




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **NOV 13 2014** OFFICE: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. 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.

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.<sup>1</sup>

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, 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 Puerto Rican limited liability company established in October 2012, states that it will operate a retail and international trade business. The petitioner claims to be an affiliate of the beneficiary's foreign employer, [REDACTED] located in Bulgaria. The petitioner seeks to employ the beneficiary as the president and chief executive officer (CEO) of its new office for a period of three years.<sup>2</sup>

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. In denying the petition, the director observed that "although the U.S. entity may be legally affiliated with a foreign entity, it does not appear that the U.S. entity has a qualifying relationship pursuant to 8 CFR 214.2(I)(1)(ii)(G)."

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director's decision was erroneous as a matter of law.

## 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 evidentiary requirements for an L-1 petition are set forth at 8 C.F.R. § 214.2(I)(3). The regulation at 8 C.F.R. § 214.2(I)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

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<sup>1</sup> The petitioner indicated it previously filed an L-1A petition on behalf of the beneficiary which was denied and also appealed to the AAO. The AAO recently dismissed the petitioner's previous appeal. The previous petition was denied based on a finding that the petitioner did not establish that the beneficiary was employed abroad in a managerial or executive capacity or that he would be employed in the United States in a managerial or executive capacity within one year of the approval of the new office petition. The evidence submitted with the current petition is sufficient to establish that these two eligibility requirements have been met. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof.

<sup>2</sup> If the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year. 8 C.F.R. § 214.2(I)(7)(i)(A)(3).

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

## II. QUALIFYING RELATIONSHIP

The sole issue addressed by the director is whether the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's 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 (1)(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;

\* \* \*

(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.

A. Facts

The petitioner indicates that it is an affiliate of [REDACTED], the beneficiary's employer in Bulgaria, based on common ownership and control of both companies by the beneficiary. Specifically, the petitioner states that the beneficiary is the sole owner of [REDACTED] and that he and his spouse each own 50% of the petitioning company. The petitioner submitted evidence of the beneficiary's ownership of the foreign entity, along with its own certificate of organization, limited liability company operating agreement, and membership certificates.

The petitioner provided evidence that it was already operating a franchised [REDACTED] retail clothing store at the time of filing, and indicated that it was finalizing plans to open a franchised [REDACTED] retail clothing store in the same shopping center during the upcoming year. In addition, the petitioner stated that it would be importing construction materials to Puerto Rico through its Bulgarian affiliate, and noted that it was already appointed the exclusive distributor for several Bulgarian and international manufacturers.

The director issued a request for evidence (RFE) on January 3, 2014, which stated, in relevant part, the following:

The documentation submitted shows that you own the U.S. entity. As a franchise holder of a retail store, the evidence submitted does not establish that you have ultimate control to exercise authority over one of the components of the components of the U.S. entity, the [REDACTED] franchise store. A review of the franchise agreement between you and [REDACTED] shows that [the petitioner], the franchisor [sic], is contractually obligated to adhere to the operating methods and operating procedures of the franchiser. You are also in negotiations to open a [REDACTED] franchise business. Accordingly, the evidence shows that two out of the three operational components that comprise [the petitioner] will not be ultimately under the control of the U.S. entity.

The director requested that the petitioner submit a copy of its franchise agreement with [REDACTED] as well as any other relevant documentation to demonstrate its "right and authority to direct the management and operation of the U.S. entity."

In a letter submitted in response to the RFE, counsel stated that, although the operation of franchised retail stores is partially governed by the franchise agreements, "these agreements do not confer any decision making authority over the internal business activities of [the petitioner] to the franchisor." Counsel further emphasized that the petitioner "maintains its autonomy as a separate business entity with control over its own business operations and development in Puerto Rico."

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. The director acknowledged that although the petitioner provided evidence of the companies' common ownership by the beneficiary, the petitioner could not establish that the beneficiary has ultimate control over the U.S. entity due to the terms of the franchise agreement. In this regard, the director observed that the petitioner, as a franchisee, must implement the franchisor's "distinctive business format and method of operation as outlined in the Operating Procedures and utilizing the Intellectual Property, and training and assistance provided by the Franchisor."

On appeal, counsel asserts that the director placed undue emphasis on the petitioner's operation of a franchise rather than on the requisite qualifying relationship between the petitioner and the beneficiary's foreign employer. Counsel asserts that the evidence establishes that the beneficiary owns and exercises majority control over both the petitioner and the foreign entity in Bulgaria sufficient to establish an affiliate relationship between the two companies. Further, counsel contends that the director imputed an exaggerated degree of control to the franchisor which is in excess of the actual terms and conditions of the submitted franchise agreement. In this regard, counsel notes that the type of control exercised by the franchisor is consistent with protection of its trademarked clothing line, distribution methods and the maintenance of quality and uniformity in its brand image, while the petitioner maintains control of its own day-to-day business affairs. In addition, counsel emphasizes that the franchisor does not have any voting rights to participate in business management decisions made by the petitioner.

#### B. Analysis

Upon review, the petitioner has established that it has an affiliate relationship with the beneficiary's foreign employer. Accordingly, the director's decision will be withdrawn.

Here, the director 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 ownership is critical to determining whether a qualifying relationship exists.

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.

The petitioner submitted probative documentary evidence to establish that the beneficiary owns 100% of the foreign entity and 50% of the petitioning entity, with the other 50% being owned by his spouse. The director acknowledged this evidence of ownership and the fact that the companies are "legally affiliated," but found that the terms of the franchise agreement made it impossible for the beneficiary to exercise "ultimate control" over the petitioner's retail business.

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.*

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, USCIS will 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 petitioner claims to be related to a foreign entity 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 has submitted a copy of its agreement with the franchisor. The director found the terms of the agreement to be so restrictive that she determined that ultimate control of the franchised component of the petitioner's business would lie with the franchisor. Upon review of the documentation provided, we agree with counsel that there is nothing in the provisions

of the agreement that would negate the otherwise valid affiliate 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.

The critical relationship in this matter is between the petitioner and the beneficiary's foreign employer. The petitioner submitted sufficient evidence to establish that the two companies have an affiliate relationship based on common ownership and control by the same individual owner. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). As the director denied the petition based solely on a finding that the petitioner failed to establish a qualifying relationship with the foreign entity, the director's decision will be withdrawn.

### III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has met that burden and the appeal will be sustained.<sup>3</sup>

**ORDER:** The appeal is sustained.

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<sup>3</sup> The beneficiary is eligible for one year of L-1A status per 8 C.F.R. § 214.2(l)(7)(i)(A)(3).