



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JUL 27 2015**

PETITION RECEIPT #: [Redacted]

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:
[Redacted]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to extend the beneficiary's status 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 Texas limited liability company, established in 2013, operating as a [REDACTED] franchise. The petitioner states that it is an affiliate of [REDACTED] Private Limited located in [REDACTED] India. The beneficiary was previously granted one year in L-1A nonimmigrant status in order to open a "new office" in the United States. The petitioner now requests a two year extension of the beneficiary's status so that he can continue to serve as its managing member.

The director denied the petition concluding that the petitioner had not established that it has a qualifying relationship with the beneficiary's foreign employer. In denying the petition, the director stated that the petitioner does not exercise control over its franchised motel under the terms of the submitted franchise agreement.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to us. On appeal, the petitioner asserts that the petitioner has sufficient ownership and control over its franchise to establish a qualifying relationship with the foreign entity.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit 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.

II. QUALIFYING RELATIONSHIP

The issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign employer.

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

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



(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

* * *

(L) *Affiliate* means

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

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

A. Facts

This petition was filed on May 20, 2014. The petitioner asserts that it operates a [redacted] franchise located in Fort Worth, Texas. The petitioner claims to employ 17 people and states that it received \$253,530.00 in gross income in 2013, the year the company was established.

On the Form I-129, the petitioner stated that it is an affiliate of [redacted] Private Limited, located in India, based on common ownership by the beneficiary (3,300 shares), [redacted] (3,300 shares), and [redacted] (3,400 shares).

As evidence of the foreign entity's ownership, the petitioner provided a copy of its certificate of incorporation dated August 18, 2011, as well as its Memorandum and Articles of Association which

corroborates the ownership of the company as stated on the Form I-129. The memorandum includes a chart depicting shares subscribed by the individuals, as listed above. The petitioner also provided a document summarizing a company resolution made by the foreign entity's board, granting the beneficiary the authority to invest and perform "other procedures" in order to set up a "venture of motels in the United States" on behalf of the foreign entity.

The petitioner submitted a number of documents relating to the foreign entity including bank records from 2013 and 2014, a tax return for 2013, and an unaudited balance sheet dated March 31, 2013 with a footnote referencing the shareholders as stated above.

With respect to the ownership of the petitioning company, the petitioner submitted a copy of its own certificate of formation filed with the State of Texas on January 24, 2013, which identifies the foreign entity as its managing member.

The petitioner also submitted a copy of the IRS Form 1040, U.S. Individual Income Tax Return, filed by the beneficiary and his wife for the 2013 tax year. The tax return included a Schedule C, Profit or Loss from Business, naming the beneficiary as the proprietor/sole member of the petitioning company.

The director issued a request for evidence (RFE) on May 29, 2014, advising the petitioner to submit evidence to establish the beneficiary's duties for the previous year and those to be performed under the extended new petition. The director also requested, among other things, evidence relating to the staffing of the petitioning company.

The director issued a second RFE on July 29, 2014, advising the petitioner to provide all evidence relating to any franchise agreements necessary for the petitioner's operation. In addition, the director requested additional evidence relating to the qualifying relationship such as: meeting minutes; stock purchase agreements; stock certificates; stock ledger; proof of stock purchase or capital contribution in exchange for ownership such as wire transfer receipts, bank statements, and canceled checks; documents outlining the details of investment in the company; articles of incorporation or bylaws with names of members and percentage of their membership interests; partnership agreement and registration documents with the names of partners and limits of their liability; and the franchise purchase agreement.

In response to these RFEs, the petitioner submitted additional documents including a copy of its franchise agreement with [REDACTED] International, Inc. The agreement provides the petitioner with the authority to direct and control the [REDACTED] franchise.

In a letter dated October 23, 2014, the petitioner explained that the foreign entity is its managing member and identified the foreign entity's members as the beneficiary, [REDACTED], and [REDACTED]. The petitioner further explained that the three members listed above gave authority to the beneficiary to act on behalf of the foreign entity with regards to the petitioning entity. The petitioner submitted its undated operating agreement signed by the beneficiary, [REDACTED], and

[REDACTED]. The agreement identified the beneficiary as the initial company manager and defined "member" as any person executing the operating agreement as of the date of the agreement as a member or admitted to the Company as a member after the agreement was signed. The agreement includes numerous provisions including the following information regarding the petitioner's ownership:

ARTICLE IV CAPITAL CONTRIBUTION:

4.01 Initial Contributions. Contemporaneously with the execution by such Member of this Operating Agreement, each Member shall make the Capital Contributions described for that Member in Exhibit "A".

The operating agreement included an Exhibit A depicting the following:

<u>Name and Address</u> <u>Each Member</u>	<u>Initial Capital Units of</u> <u>Commitment</u>	<u>Participation</u>
(Beneficiary)	\$330,000	33
[REDACTED]	\$340,000	34
[REDACTED]	\$330,000	33

The petitioner also submitted a letter from its accountant, [REDACTED], CPA, dated October 22, 2014, acknowledging that he prepared the petitioner's 2013 tax return as a sole member LLC with a Schedule C. The accountant explained that later "it was identified" that the petitioning company "has three members and based on that, the tax return should be prepared as a partnership." The accountant states that he corrected the error and sent the corrected forms to the petitioner.

The petitioner provided a copy of its IRS Form 1065, U.S. Return of Partnership Income, for 2013, filed with the IRS on October 20, 2014. The Form 1065 indicates at Schedule B, Other Information, line 16, that it has a single foreign partner and the accompanying Schedule K-1, Partner's Share of Income, Deductions, Credits, etc., shows the foreign entity as the sole owner.

In response to the RFE, the petitioner also submitted a letter dated October 23, 2014, explaining that the beneficiary, [REDACTED], and [REDACTED] each executed the foreign entity's memorandum and articles of association as company members and executed the petitioner's operating agreement as the petitioner's members.

The director denied the petition, finding that the petitioner had not established that it had a qualifying relationship with the foreign entity. The director stated that the submitted evidence indicated that the petitioner did not have ownership and control over the company. The director emphasized that the franchise agreement with [REDACTED] International, Inc. demonstrated that [REDACTED] controls the franchise, including dictating the services, marketing, appearance, computer systems, and certain operating policies and procedures.

On appeal, the petitioner asserts the director denied the petition in error. The petitioner asserts that it is not controlled by the franchisor as found by the director. The petitioner asserts that the franchise agreement allows for the franchisee to use the franchisor's processes and trademarks for a fee and that the petitioner's agreement provides for its right and authority to direct the management and operation of the franchise, so that the franchisor does not control the franchise. The petitioner cites to its duties under the franchise agreement which state that it is "solely responsible for exercising ordinary business control over the Hotel."

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it has a qualifying relationship with the foreign entity.

The director's analysis focused on the petitioner's operation of a franchise business 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). Although the director's conclusion will be affirmed, the director's analysis and comments regarding the petitioner's franchise agreement are withdrawn.

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 franchisor, and, in return, the franchisor 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 franchisor'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, it is necessary 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 control under section 101(a)(15)(L) of the Act.

In the present matter, the critical relationship is that between the foreign entity, [REDACTED] Private Limited, and the petitioner. Although the petitioner will do business in the United States through a franchise agreement with [REDACTED] International Inc., the claimed relationship between the foreign entity and the petitioner is based on ownership and control and not the franchise agreement. In order to determine whether a qualifying relationship exists, it is necessary to determine the actual ownership and control of both the U.S. and foreign entity.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986). Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(1)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the identification of a member of an LLC into the means by which this membership interest was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for the membership interest. Additional supporting evidence would include an operating agreement, minutes of relevant membership or management meetings, or other legal documents governing the acquisition of the ownership interest.

Here, the petitioner has not demonstrated that it has a qualifying relationship with the foreign entity as it has provided conflicting evidence regarding its ownership. The petitioner asserted on the Form I-129 that it has an affiliate relationship with the foreign entity based on common ownership by a group of individuals; specifically, the beneficiary at 33%; [REDACTED] at 34%; and [REDACTED] at 33%.

However, despite the petitioner's claim that it is owned by these three individuals, the petitioner's certificate of formation identifies the foreign entity "[REDACTED] Private Limited" as its "managing member." In response to the RFE, the petitioner submitted its operating agreement signed by the three individuals listed above as members, but we cannot determine when the capital contributions specified in the agreement were actually made. Further, the petitioner did not provide

evidence such as financial records, membership certificates, ledgers, or meeting minutes to demonstrate that the individuals actually invested in the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Moreover, the petitioner submitted the beneficiary's personal federal tax return for 2013 in which he claimed to be the sole owner of the petitioning company. Subsequently, the petitioner submitted a Form 1065 and explained that the beneficiary's Form 1040 was filed in error, indicating that the Form 1065 was prepared after it was later discovered that the company had three members. However, neither the petitioner nor the accountant provided an actual explanation for this error. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the petitioner's Form 1065 indicates that the foreign entity is the petitioner's sole owner, despite the accountant's assertion that he prepared the Form 1065 only after learning that the petitioner has three members. The Form 1065 does not list any of the foreign entity's shareholders as owners of the petitioning company. Therefore, rather than resolving inconsistencies regarding ownership of the petitioning company, the tax returns merely introduce an additional discrepancy. While we acknowledge that a parent-subsidiary relationship would be established if the petitioner established that the foreign entity is its sole owner, it is the petitioner's burden to consistently explain and document the nature of its corporate relationship with the beneficiary's foreign employer.

Due to the petitioner's conflicting evidence as to ownership it cannot be determined whether the two companies are qualifying organizations. 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. *Id.* at 591-92.

Therefore, the petitioner has not demonstrated that it has a qualifying relationship with the foreign entity. For this reason, the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY

Since the identified basis for denial is dispositive of the petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the petitioner seeks to employ the beneficiary as an L-1A employee in the proffered position, it will submit sufficient independent objective evidence to address this additional ground in any future filing.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner submitted a

description of the beneficiary's duties that describes general managerial functions, with little information regarding what he 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The record indicates that the petitioner operates a 109-room hotel that provides a daily complimentary breakfast and offers its guests evening drinks and a complimentary buffet dinner.

The petitioner stated on its Form I-129 that it had 17 employees as of May 20, 2014 when the petition was filed. The petitioner's Texas quarterly wage report for the second quarter of 2014 indicates that the petitioner had 17 employees in May 2014, and 14 employees in June 2014. There is also a discrepancy in the petitioner's quarterly wage reports, as the petitioner reported on its IRS Form 941, Employer's Quarterly Federal Tax Return, that it paid total wages of \$75,140.16 in the second quarter of 2014, but reported on its Texas state quarterly wage report that it paid only \$51,760 during the same period. Again, 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. at 591-92.

The petitioner indicates that its staff includes three subordinate managers: a housekeeping manager who oversees housekeeping staff; a hotel manager who also acts as a bartender for evening receptions with guests, and who oversees three part-time front desk staff and a breakfast attendant; and a maintenance manager who has no subordinates but is directly responsible for property maintenance. The petitioner has not established that these subordinates would relieve the beneficiary from performing non-qualifying duties associated with the day-to-day administrative functions associated with operating the hotel, such as handling relationships with suppliers, vendors, and contractors, and human resources and payroll functions, nor has the petitioner established that he would be relieved from first-line supervision of non-professional personnel in ensuring the proper day-to-day management of the hotel. Given the typical extended operating hours of a hotel, it is also unclear who supervises subordinate lower-level personnel and responds to guest inquiries, requests and complaints during the many hours when the hotel manager and housekeeping manager are not available. While the petitioner indicates that it considers a staff of 16 employees to be "optimal," we cannot determine how this level of staffing fully covers its needs in terms of front desk, back office, food and beverage, and housekeeping operations. Based on the current record, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by our office even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that we review appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.