



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-G- LLC

DATE: AUG. 1, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an elder homecare provider, seeks to temporarily employ the Beneficiary as the managing member and chief executive officer (CEO) of its new office under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director denied the petition on two separate grounds. The Director concluded that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity within one year of the approval of the petition. Further, the Director found that the Petitioner did not demonstrate “that the U.S. entity will have control over its organization” due to the terms of its franchise agreement.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and states that it has established that the Beneficiary would act in a managerial capacity overseeing other managers and professionals within the first year. The Petitioner further states that the Director misconstrued the terms of the franchise agreement and asserts that the company does not lack control over its own business operations.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for further action and entry of a new decision.

I. U.S. EMPLOYMENT IN A MANAGERIAL CAPACITY

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Upon reviewing the entire record of proceedings, including the Petitioner’s submission on appeal, we conclude that the record contains sufficient evidence to overcome the above referenced basis for the Director’s decision. The Petitioner has established by a preponderance of the evidence that the

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Beneficiary would be employed in a managerial capacity by the end of its initial year of operations. The record shows that the Petitioner has planned and forecasted for the cost of sufficient staff to relieve the Beneficiary from performing the day-to-day operations of the business within one year and otherwise established that her duties would be primarily managerial in nature. As such, the Director's decision as to this issue is withdrawn.

II. FRANCHISE AGREEMENT

The Director also denied the petition, in part, based on a finding that the terms and conditions of the Petitioner's franchise agreement with [REDACTED] demonstrated that "the U.S. entity lacks control over its own operations."

On appeal, the Petitioner states that "[U.S. Citizenship and Immigration Services (USCIS)] has been erroneously concluding that franchise agreements automatically result in applicants' lack of control over its own operations." The Petitioner asserts that the franchiser's role is limited to providing assistance, rather than exerting any control over the company's operation of the business.

Upon review, we find that the terms of the franchise agreement did not provide a proper basis for the denial of the petition.

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'l Comm'r 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").

By itself, the fact that a petition involves a franchise will not automatically disqualify a 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. 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 have 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 Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986).

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In the present matter, the Petitioner has submitted a copy of its agreement with the franchiser. The Director found the terms of the agreement to be so restrictive that she determined that ultimate control of the Petitioner's business would lie with the franchisor. Upon review of the documentation provided, we find that there is nothing in the provisions of the agreement that would negate an otherwise valid qualifying relationship between the foreign and U.S. companies. Therefore, this particular franchise agreement has no material bearing on the eligibility requirements for this visa classification, and the Director's determination will be withdrawn.

III. QUALIFYING RELATIONSHIP

Although the Director's decision will be withdrawn, the record as presently constituted does not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. Accordingly, we will remand the matter to the Director for further review of this issue and for the entry of a new decision.

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).

Here, as discussed, 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 petitioning company. See 8 C.F.R. § 214.2(l)(3)(i) (requiring that the L-1 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 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. See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Med. Sys., Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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 and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

Here, as discussed, the Director focused on the element of "control" exercised by the franchiser, rather than determining whether the petitioning company and the Beneficiary's foreign employer share common ownership and control.

On the Form I-129, the Petitioner stated that it is an affiliate of [REDACTED] the Beneficiary's foreign employer in the Philippines. The Petitioner provided an "Organizational Flowchart" describing the ownership and control of both the Petitioner and the foreign entity. The

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chart showed that the foreign entity was owned and controlled by a group of individuals exercising a “block of control,” described as follows:

- “Block of Control”
 - [REDACTED] - 15% ownership
 - [REDACTED] - 15% ownership
 - [REDACTED] - 15% ownership
 - [REDACTED] - 2% ownership
 - [REDACTED] - 2% ownership
 - [REDACTED] - 2% ownership
- “Others”- 47% ownership
- The Beneficiary- 2% ownership

Further, the chart indicated that the Petitioner was owned as follows:

- “Block of Control”
 - [REDACTED] - 10% ownership
 - [REDACTED] - 10% ownership
 - [REDACTED] 10% ownership
 - [REDACTED] - 10% ownership
 - [REDACTED] - 10% ownership
 - [REDACTED] - 10% ownership
- The Beneficiary- 40% ownership

The Petitioner submitted the foreign entity’s “Amended and Restated Operating Agreement” dated June 28, 2013. The operating agreement included a table reflecting capital contributions from a number of parties totaling 30,000 Brazilian Reals. The table specified in the third clause that [REDACTED] and [REDACTED] each hold a 15% ownership interest in the company. Further, the table specified that [REDACTED] and [REDACTED] along with three other individuals, each have a 2% ownership interest in the company. In addition, the table indicated that the remaining 28% of the company was divided evenly in 1% ownership shares amongst 28 individuals. The operating agreement stated in Article II, Clause 5th that “the units of ownership are indivisible, each of which grants its holder the right to 01 (one) vote on resolutions during members meetings.” Further, in Article II, Clause 6th, the agreement specified that “the company will be managed by members [REDACTED] and [REDACTED] and that they would receive compensation for these services and have the authority to execute agreements and other legal documents, sell assets, and open and close bank accounts.

In addition, the Petitioner provided its operating agreement indicating that it was owned by the following individuals holding the indicated percentage interests based on the listed capital contributions:

- [The Beneficiary], \$60,000 capital contribution- 40%

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- [REDACTED] \$15,000 capital contribution- 10%

The Petitioner's operating agreement reflected in Articles 2.4.2 and 2.4.3 that "consent of Members holding at least 51% of the Percentage Interest in company shall be required" for nearly every action of the company.

As noted, the Petitioner states that it has a qualifying affiliate relationship with the foreign entity. The regulations define affiliates as either: (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. 8 C.F.R. § 214.2(l)(1)(ii)(L).

Upon a review of the evidence of record, the Petitioner has not demonstrated that it is an affiliate of the foreign entity consistent with either part of the regulatory definition. The Petitioner does not present evidence reflecting that it and the foreign entity are owned and controlled by the same parent or individual. Further, the Petitioner asserts that the foreign entity is owned by 38 different individuals and that the Petitioner is owned by seven individuals, so we cannot find that the two entities are owned by the same group of individuals.

The Petitioner states that both entities are controlled by the same group of six individuals who exercise a "block of control" over each entity. However, USCIS cannot accept a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. Here, neither of the submitted operating agreements nor any other evidence substantiates that the six individuals who make up the "block of control," are obligated to vote in concert. 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 Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988). Without documentation substantiating the asserted "blocks of control," we are unable to determine the elements of ownership and control.

As such, the record as presently constituted does not contain sufficient evidence to establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer. At this time, we take no position on whether the Petitioner can meet this requirement and remand this matter to the Director. The Director should request any additional evidence deemed warranted to address the deficiencies noted with respect to the Petitioner's asserted qualifying relationship.

IV. CONCLUSION

Based on the foregoing discussion, although the Director's decision will be withdrawn, the evidence of record as presently constituted does not establish the Beneficiary's eligibility for the benefit sought. Accordingly, we will remand this matter to the Director for further action and entry of a new decision. As always in these proceedings, the burden of proof rests with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the Director, Vermont Service Center, is withdrawn. The matter is remanded to the Director, Vermont Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of I-G- LLC*, ID# 17934 (AAO Aug. 1, 2016)