U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 1 1 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 The director's decision will be withdrawn and the matter will be remanded for further action and entry of a new decision.

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 Florida limited liability company established in February owns and operates a franchise and provides other home maintenance services. The petitioner indicates that it is a subsidiary of the beneficiary's foreign employer located in Brazil. The petitioner seeks to employ the beneficiary as the president of its new office for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. The director concluded that because the petitioner could not establish that it has control over the U.S. entity, control has been compromised by the restrictions imposed by its franchise agreement with

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, the petitioner asserts that the evidence of record establishes that the terms of the franchise agreement do not significantly impact its right and authority to direct the management and operation of its own business. The petitioner submits a brief from counsel and additional evidence in support of the appeal.

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(l)(3). The regulation at 8 C.F.R. § 214.2(l)(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:

(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 (l)(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 (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.

A. Facts

The petitioner, a Florida limited liability company, indicates that it is a subsidiary of Specifically, the petitioner states that the foreign entity owns a 51% membership interest, while the remaining interest in the U.S. company is held by the beneficiary (48%) and (1%). The petitioner provided copies of its membership certificates, articles of organization, and operating agreement, all of which corroborate the petitioner's stated ownership.

The petitioner also provided evidence that it owns and operates a franchise. The petitioner provided a complete copy of the franchise agreement with exhibits, a franchise disclosure document, and a letter from the franchiser. The petitioner emphasized that the terms of the franchise agreement state that the petitioner is an independent contractor and must advertise that it is an independently owned and operated company. In addition, the petitioner highlighted that the terms of the franchise agreement state that the petitioner "will exercise full and complete control over, and have full responsibility for, all of your contracts, daily operations, labor relations, employment practices and policies, including recruitment, selection, hiring, disciplining, firing, compensation, work rules, and schedules of your employees." The petitioner maintained that although the franchise agreement requires the petitioner to adhere to standards for uniformity and quality of services, it maintains independent control of the business.

The petitioner further noted that it intended to expand to offer new services outside the scope of the franchised housecleaning business in the coming year, and may offer painting, handyman, pool cleaning, pressure washing and other services.

The director issued a request for evidence (RFE) on October 22, 2012, which stated:

> The evidence previously submitted indicates that the U.S. entity is a franchise. Ownership and control of the entities are the factors for establishing a qualifying relationship between the business entities for purposes of [section] 101(a)(15)(L) of the Act. Ownership is the legal right of possession with the full power and authority to control and control is the right and authority to direct the management and operations of the business entities. United States Citizenship and Naturalization Service is not questioning the ownership of the business. The control of the business is what is in question. There are numerous places in the franchise agreement that [state] the franchiser can dictate the actions of your company.

The director requested that the petitioner provide "additional documentation to establish your right and authority to direct the management and operation of the entity" and "evidence that you have total control over the business and the beneficiary."

In response to the RFE, the petitioner emphasized that it is a majority-owned subsidiary of the Brazilian entity, and that its parent "exercises its legal right and authority to direct the establishment, management and operations." The petitioner emphasized that since the petition was filed, it had carried out its plans to offer additional services in addition to the housecleaning services, including window cleaning, pressure watching, carpet cleaning and pool services, which were being promoted under the company's legal name and not its fictitious name.

The petitioner also maintained that it should not be disqualified from obtaining L-1classification solely because it operates a franchise. The petitioner cited specific terms of the franchise agreement in support of its claim that it the agreement is not unduly restrictive, noting that the petitioner is able to set their own prices and has full authority to deal with its own customers, contracts and employees. The petitioner maintained that it controls the operation of the franchise and the business services that if offers outside of the franchise agreement. The petitioner submitted promotional materials and invoices to corroborate that it provides window cleaning, pool cleaning and other services under its registered name,

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. The director cited certain terms of the franchise agreement and determined that the petitioner did not establish control of the U.S. entity because it has relinquished significant control to the franchiser.

On appeal, the petitioner contends that its franchise agreement with gives it sufficient independence for the purposes of meeting the qualifying relationship requirements for the requested classification. The petitioner also emphasizes that its business does not consist entirely of the franchise, but also includes other home maintenance services which are completely separate from the franchise.

B. Analysis

Upon review, the petitioner has established that it is a qualifying subsidiary of the foreign entity. 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. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

The petitioner submitted probative documentary evidence to establish that the foreign entity owns a 51% majority interest in the U.S. limited liability company. The director acknowledged that the ownership of the company is not in question, but found that the terms of the franchise agreement made it impossible for the petitioner or its parent to exercise "ultimate control" over the petitioner's 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 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 franchised component of the petitioner's business would lie with the franchiser. Upon review of the documentation provided, we agree with petitioner that there is nothing in the provisions of the agreement that would negate the otherwise valid parent-subsidiary 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. Further, the director did not consider that the franchise is only one component of the petitioner's business.

The critical relationship in this matter is between the petitioner and the beneficiary's claimed foreign employer. The petitioner submitted sufficient evidence to establish that the two companies have a parent-subsidiary relationship based on the foreign entity's majority ownership of the U.S. company. 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. ADDITIONAL ISSUES

The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the totality of the evidence submitted, we find that the record as presently constituted does not contain evidence that all eligibility requirements for L-1A classification have been met. Accordingly, as the director focused solely on the franchise agreement, we will remand this matter to the director for further action and entry of a new decision in accordance with the discussion below.

A. Beneficiary's Foreign Employment

In order to establish eligibility, the petitioner must establish that the beneficiary has been employed by the foreign entity for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B). In accordance with 8 C.F.R. § 214.2(l)(3)(iii), the petitioner must establish that the beneficiary's one year of continuous employment was on a full-time basis.

The petitioner provided evidence that the beneficiary is a 25% owner of the foreign entity and indicates that she has served as its president continuously since 2005. However, the record contains a copy of the beneficiary's resume, which states that she was also employed as a teacher with from 2002 until 2007, as a teacher with from 2009 until 2010, and as owner of ' from 2010 until 2012.

The petitioner did provide evidence that the beneficiary received payments from its foreign parent company in 2010 and 2011. The petitioner provided a Brazilian "Proof of Income and Income Tax Withheld" for 2011 which states that she received 27,783.91 in non-taxable income from the foreign entity that was categorized as "amounts paid to owner or partner in micro-businesses or small business, except salaries, rents or services rendered." Her name does not appear on the payroll documents submitted for the foreign entity and it is unclear whether her payments were based on part- or full-time services rendered to the company or simply based on her partial ownership of the company.

As it appears that the beneficiary had concurrent employment with unrelated entities during the three years preceding the filing of the petition, the petitioner will need to provide additional evidence to establish that the beneficiary was employed by the foreign entity in a full-time capacity for at least one continuous year during that period.

In addition, the record contains only a brief description of the beneficiary's position in Brazil which is insufficient to establish that her duties were primarily in a managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act. For example, the petitioner stated that she "developed executive functions including all commercial relationships with suppliers and customers" and was "in charge of all marketing efforts and systems to provide maximum comfort, hygiene, banquet services with all electronic devices to all local and international clients." This description provides little insight into what she actually did on a day-to-day basis or whether her duties were primarily managerial or executive in nature.

Finally, the petitioner submitted a chart indicating that all three owners of the foreign company were jointly responsible for the oversight of the business, so further clarification as to how the management was allocated among them would aid in understanding the nature of the beneficiary's role within the organization.

B. Beneficiary's Proposed U.S. Employment

The record as presently constituted lacks a meaningful description of the beneficiary's proposed day-to-day duties. For example, the petitioner stated that the beneficiary will allocate 18 hours per week to responsibilities that include "planning, developing and establishing polices" and an additional 9 hours per week to "directing, planning and implementing policies." Many of the beneficiary's remaining duties are similarly vague and include "analyzing operations," directing "the whole management of the organization" and "exercising wide latitude in discretionary decision making." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the record does not contain position descriptions for the beneficiary's subordinate employees, and, as such, it is difficult to ascertain whether such employees will relieve the beneficiary from primarily performing non-managerial duties associated with operating the franchise and provision other home maintenance services. Further evidence will be required to establish that the beneficiary would perform primarily managerial or executive duties within one year.

III. CONCLUSION

Based on the foregoing discussion, we will withdraw the director's decision and remand the petition to the director for further review, issuance of a new request for evidence, and entry of a new

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decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision dated January 14, 2014 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse, shall be certified to the Administrative Appeals Office for review.