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U.S. Citizenship  
and Immigration  
Services

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File: SRC 04 800 29325 Office: TEXAS SERVICE CENTER Date: JUL 05 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

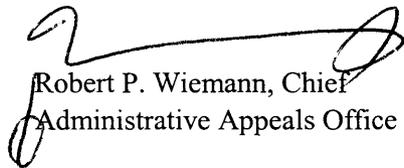
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 petition seeking to extend the employment of its head chef 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 corporation, operates a Thai restaurant. The petitioner claims that it is an affiliate of Loy-Lum Co., located in Bangkok, Thailand. The beneficiary was initially granted a one-year period in L-1A classification to be employed in a new office in the United States and the petitioner now seeks to extend the beneficiary's status for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

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 for the petitioner asserts that the beneficiary will be employed in a managerial or executive capacity, as he will function at a senior level within the petitioner's organization and supervise a manager. Counsel submits a brief and evidence in support of the appeal.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by 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.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 nonimmigrant petition was filed on July 16, 2004. The petitioner indicated on the Form I-129 that it would continue to employ the beneficiary as its head chef and stated that he would be: "Responsible for the menu, supervision of all kitchen staff, supervision of all matters related to food preparation."

The director issued a request for additional evidence on August 2, 2004, instructing the petitioner to provide the following: (1) a description of the specific nature of the beneficiary's duties, including the percentage of time spent on each duty and the number of employees he supervises; (2) a description of the current staffing level of the U.S. company, including names, job titles and duties, qualifications, hours worked per week, date hired and an organizational chart for the U.S. company; and (3) a copy of the petitioner's latest IRS Form 941, Employer's Quarterly Federal Tax Return. The director also requested a copy of the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2003.

In a response dated October 21, 2004, the petitioner provided an organizational chart identifying the beneficiary as head chef. The chart shows that the beneficiary reports to an executive chef, and supervises four servers, two dishwashers and one "prep" employee. The petitioner also submitted its quarterly wage information for the second quarter of 2004, which shows that the company had seven employees as of June 30, 2004. Finally, the petitioner provided a "master list" of employees showing "year to date" earnings, and showing the hire date, termination date and wages for a total of ten employees as of September 2004. The employee list confirms the employment of the petitioner's vice president of operations, executive chef, head chef (the beneficiary), a dishwasher, a kitchen prep employee, and one other employee as of the date of filing.

The director denied the petition on November 3, 2004, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary appears to be, at most, a first-line supervisor of non-professional employees and would not be performing any managerial duties.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a qualifying capacity as he will "function at a senior level," and "supervises a manager." In an appellate brief received on January 3, 2005, counsel emphasizes that the petitioner's restaurant recently expanded its hours of business, added delivery service, and "is poised for continued and explosive growth." Counsel further contends that the prep chef position supervised by the beneficiary is a professional position that is "directly involved in managerial functions" in the petitioner's restaurant, including assistance in menu preparation, supervision of kitchen staff, and supervision of food preparation. Counsel concedes that "many restaurants can survive with no subordinate professionals managers," but asserts that the petitioner's restaurant must be adequately staffed with "managerial professionals" such as the prep chef, whose role is claimed to be that of a "sous chef." Counsel provides job descriptions for "sous chef" and "executive chef" from a web site, [www.cooking-school.us.com](http://www.cooking-school.us.com), in support of his assertion that both the beneficiary's position and that of his immediate subordinate are in fact managerial in nature.

Counsel emphasizes that the beneficiary was previously granted L-1A status to serve as the petitioner's head chef and asserts that he "continues to be a first rate executive/manager." Counsel asserts that the beneficiary's supervisory duties and responsibility for directing a major function of the petitioner's business qualify him as a manager and executive pursuant to the statutory definitions.

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.*

The petitioner's initial description of the beneficiary's duties fell significantly short of establishing that he would be employed in a primarily managerial or executive capacity. The petitioner indicated that the beneficiary is "responsible for the menu, supervision of all kitchen staff, and supervision of all matters related to food preparation." The petitioner did not identify what specific managerial tasks are involved in supervising the kitchen staff or "all matters" related to food preparation, nor did it indicate how menu preparation would fall under the statutory definitions of managerial or executive capacity. 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 activities in the course of his 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).

As the petitioner failed to describe the beneficiary's proposed duties under the extended petition as required by 8 C.F.R. § 214.2(l)(14)(ii)(C), the director requested that the petitioner provide a detailed description of the beneficiary's duties, including the percentage of time he spends on each duty. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). Here, the evidence was critical, as the beneficiary's role as chef suggests that he will be directly involved in

preparing food, and the evidence submitted did not clearly establish that he would supervise a subordinate staff as claimed by the petitioner. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). In this case, preparing food is a routine duty that amounts to directly providing the product or service of the petitioner.

The petitioner failed to provide any additional evidence or explanation regarding the beneficiary's actual job duties in response to the director's request, and instead relied on conclusory assertions that the beneficiary is employed as a manager and executive. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel repeats conclusory assertions that the beneficiary qualifies as a manager and executive, yet fails to provide any additional evidence regarding the beneficiary's actual job duties. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, in light of the petitioner's failure to submit required initial evidence and evidence requested by the director, counsel's arguments are not persuasive.

Furthermore, rather than providing evidence of the beneficiary's job duties and those of his claimed subordinate within the context of the petitioner's business, counsel asserts that the beneficiary and his subordinate serve as "executive chef" and "sous chef," and therefore should be considered managers based on information describing "types of chefs," as found on a cooking school web site. The AAO cannot accept these generic job descriptions in lieu of descriptions of the actual job duties performed by the beneficiary and his claimed "managerial professional" subordinate employee within the context of the petitioner's business. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. at 1108. In addition, counsel, in claiming that the beneficiary's role as "head chef" is equivalent to that of an "executive chef" position, fails to take into account the petitioner's claim that the beneficiary's supervisor is in fact the petitioner's executive chef. 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).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner claims that the beneficiary will supervise "kitchen staff," yet the organizational chart shows that the beneficiary will also supervise dishwashers and servers. As discussed above, at the time of filing, the evidence shows that the petitioner employed a vice president of operations and executive chef, both of whom are senior to the beneficiary, as well as one prep cook or chef, one dishwasher and other employee who was likely a server. The petitioner does not claim that its dishwashers or servers are employed in managerial, supervisory or professional positions. Counsel claims on appeal that the "prep" employee is actually a sous chef with supervisory and professional responsibilities; however, the record shows that there are no lower-level employees involved in cooking or food preparation responsibilities. The record also fails to support counsel's claim that this employee is a professional, as the petitioner has not provided a job description for the position, evidence of the petitioner's requirements for the position, or evidence of this employee's educational credentials. Thus, the petitioner has not established that the beneficiary's subordinate requires or possesses a bachelor's degree, such that he could be classified as a professional. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel also claims that the beneficiary will be directing an essential function of the petitioning company. 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, 8 U.S.C. § 1101(a)(44)(A)(ii). 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(l)(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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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. In the case of a function manager, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's

authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

The petitioner concedes that the beneficiary is involved in some hands-on food preparation tasks. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In the present matter, the petitioner fails to document the beneficiary's actual duties, and does not indicate what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner describes the beneficiary's duties as managerial, but it fails to quantify the actual duties or the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "responsible for the menu," and "supervision of all matters related to food preparation" do not fall directly under traditional managerial duties as defined in the statute. 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 or executive, nor can it deduce whether the beneficiary is primarily performing 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).

Finally, the petitioner has not established that the beneficiary functions at a senior level within the petitioner's organizational hierarchy, or with respect to the function managed, as required by section 101(a)(44)(A)(iii). The beneficiary's immediate supervisor is the petitioner's executive chef, who presumably would perform any managerial duties associated with the kitchen and food preparation functions of the petitioner's restaurant.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational or administrative tasks, the petitioner is ineligible by regulation for an extension.

Here, the petitioner operates a restaurant with an executive chef, a head chef, and a prep cook or chef, and claims that the head chef and the prep chef are both employed in managerial positions. As all three chefs working for the petitioner's restaurant are claimed to be managers, the petitioner does not claim to have employees to actually perform the day-to-day non-qualifying tasks of preparing and cooking food and ordering and storing ingredients. Given the nature of the petitioner's business, it is reasonable to assume, and

has not been shown otherwise, that the beneficiary and his subordinate are both involved in the day-to-day tasks of preparing food for the petitioner's customers. The beneficiary's first-line supervisory and operational duties preclude a finding that he performs primarily managerial tasks. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On appeal, counsel references the petitioner's newly expanded operating hours and plans to expand its business. However, 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity under the extended petition. Accordingly, the appeal will be dismissed.

The AAO will address counsel's suggestion that the director erred in denying the petitioner's petition for an extension of the beneficiary's status when USCIS previously approved a petition based on similar facts. The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open or be employed in a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as *prima facie* evidence that eligibility has been established in the present proceedings.

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.