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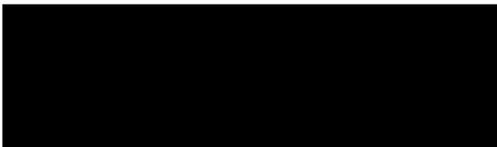
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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
Box S, AAO, 20 Mass, 3/F
Washington, D.C. 20536



AUG 19 2003

File: LIN 02 138 52798 Office: NEBRASKA SERVICE CENTER Date:

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)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a restaurant specializing in traditional cuisine from the Rio Grande do Sul region of Brazil. It seeks authorization to employ the beneficiary temporarily in the United States in a capacity involving specialized knowledge, namely as a Churrasqueiro (churrasco-style barbecue cook). The director determined that the petitioner had not established that the beneficiary had been employed or would be employed in a capacity that involves specialized knowledge. The director also concluded that the evidence presented did not demonstrate that a qualifying relationship existed between the U.S. entity and the foreign entity.

On appeal, counsel for the petitioner submits a brief and additional evidence. Counsel asserts that the position offered is a specialized knowledge position. Counsel further maintains that there is sufficient common ownership and control between the U.S. and foreign entity to create a qualifying corporate relationship.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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.

According to the evidence submitted, the petitioner is an affiliate

of [REDACTED] located in Brazil. The petitioner was incorporated in 2001 and claims to be a restaurant chain offering traditional cuisine from Rio Grande do Sul region of Brazil. The petitioner declared an estimate of 54 employees. The petitioner seeks the beneficiary's services in order to render services in a specialized knowledge capacity, namely churrasco-style barbecue cook for a period of one year, at a monthly salary of \$1,500.

The first issue in this proceeding is whether the petitioner has established that the beneficiary possesses specialized knowledge, and has been and will be employed in a specialized knowledge capacity.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184 (c)(2)(B), provides:

For purposes of section 101(a)(15)(L) [of the Act, 8 U.S.C. § 1101 (a)(15)(L)], an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge":

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

In the letter written in support of the initial petition and dated January 8, 2002, the petitioner described the beneficiary's duties while working for the foreign entity as follows:

As a Churrasqueiro, [the beneficiary] has been and will continue to be responsible for the following specialized duties:

- Selecting and preparing cuts of meat for cooking, including trimming the meat as necessary, adding the appropriate seasonings and spices, and placing the meat on skewers;
- Cooking the meat over an open-flame grill, turning the meat by hand as it cooks to ensure that the

meat is properly and fully cooked;

- Circulating between the grill and dining areas, with skewers of freshly cooked meat and a machete-style knife in hand, to ensure that customers are being served promptly;
- Advising customers on all menu selections, the various types of *churrasco*, and the differences in the quality, taste and preparation of each;
- Answering questions regarding the *gaúchos* history and culture;
- Serving customers portions of *churrasco* by slicing meat from the skewer with a machete-style knife reminiscent of those carried by *gauchos*; and
- Observing the highest standards of health and safety with respect to handling, preparing and serving meat.

The petitioner continues by describing the beneficiary's proposed duties in the United States by stating, in pertinent part, that:

The position of *Churrasqueiro* offered to [the beneficiary] is specialized in nature because it requires extensive training to (i) learn basic preparation techniques for the full range of *churrasco* offered in our *churrascarias*; (ii) develop the physical skill required to safely serve *churrasco* from a heavy skewer using a machete-style knife; (iii) perfect the culinary skill requires [sic] to cook several pieces of meat on a single skewer and achieve different levels of preparation (*i.e.*, rare, medium, well done); and (iv) capture the essence of the *gaucho* tradition in a manner unique to our *churrascarias*. Moreover, due to the unique cultural history of *churrasco*, this type of training is distinct from that which might be provided at other types of restaurants that specialize in grilled meat, and is not widely available outside of the Rio Grande do Sul Region of Brazil.

The petitioner further maintains that the beneficiary's previous training and experience has provided him with in-depth knowledge of the petitioner's unique *churrascaria* concept. He argues that the beneficiary's specialized knowledge includes:

- (i) The special combinations of seasonings, spices and recipes that make our menu items

distinct and delicious;

- (ii) Our internal health and safety procedures regarding the selection, storage, handling and disposal of meat and other perishable food items, which ensure that we consistently serve the highest quality products; and
- (iii) Our corporate policies with respect to service, which ensures that our customers consistently receive the highest level of attention and care.

In response to the director's request for additional evidence regarding the nature of the beneficiary's specialized knowledge, counsel stated that the beneficiary has received extensive training within their organization; and that his advanced level of knowledge and expertise would be extremely valuable to the petitioner's ability to successfully introduce their churrascaria concept to the United States market and develop a competitive presence in the U.S. restaurant industry. Counsel quotes from a 1994 INS Memorandum which is not a part of the present record of proceeding by stating: "an individual may possess specialized knowledge if s/he possesses knowledge that (i) is valuable to the employer's competitive position in the market place; or (ii) can normally be gained only through prior experience with that employer."

Counsel continues by referencing training information contained in copies of the Summary of the Practical Aspects of the Training of *Churrascqueiros*, with English translations; a Course Description for Qualification and Skill Development of *Churrascqueiro*; and the Manual on Using Knives for Cutting Meat, which was provided as evidence. Counsel further maintains that the beneficiary possesses specialized knowledge of the petitioner's processes and procedures for selecting cuts of meat, cooking Churrasco, and for presenting and serving Churrasco. Counsel continues by again quoting from the 1994 INS Memoranda stating that "an individual may possess specialized knowledge if s/he possesses knowledge regarding the organization's products or processes which cannot be easily transferred or taught to another individual, such that the United States or foreign firm would experience a significant interruption of business in order to train a new worker to assume those duties." Counsel concludes by noting that it can take up to 18 months of training with a senior *Churrasqueiro* and quality supervisors before a new *Churrasqueiro* is given responsibility for his own place, and that it can take up to four years for a *Churrasqueiro* to become fully experienced.

A copy of the beneficiary's resume with English translation was also submitted in support of the petitioner's specialized knowledge claim. According to the evidence submitted, the beneficiary is a

high school graduate. The beneficiary has six years' experience in the field. His work experience includes a position as Churrasqueiro at the Churrascaria Jardineira Grill from July 1995 to June 1999, and a position as Churrasqueiro at the Churrascaria Complexo Grill from August 1999 to the present. The resume reflects that the beneficiary has prepared meat seasonings, possesses knowledge of the cutting of meat, is skilled in dealing with customers and employees, and has carried out all tasks relating to restaurant cleanliness and organization. It is also noted in the resume that the beneficiary has handled all types of meat, and is experienced in serving with sharp knives and using a roasting spit.

The director denied the petition after determining that the petitioner had not established that the beneficiary had been or would be engaged in a position involving specialized knowledge. The director noted that as with other individuals working as cooks and chefs in various types of restaurants, the beneficiary's skills are skills that are learned and carried over by those in the field from one type of cooking to other types of cooking. The director also declared that being a skilled worker does not qualify one as having specialized knowledge.

On appeal, counsel for the petitioner asserts that the beneficiary's position of "Churrasqueiro" is a specialized knowledge position. Counsel continues by stating that the new facts would show that the Churrasqueiros are also responsible for menu development, inventory management, training, and health and safety compliance. Counsel further maintained that Churrasqueiros also serve as "cultural ambassadors" who provide customers with an insight on the lifestyle of the 19th century gauchos of Brazil. Counsel refers to the case of *1765, Inc. v. The Attorney General of the United States of America* that has not been made a part of the present record of proceeding. In conclusion, counsel avers that the beneficiary's knowledge and training acquired as a Churrasqueiro, in combination with the aforementioned skills, differentiates him as a Churrasqueiro from other cooks and chefs in the U.S. restaurant industry. No additional evidence was submitted in support of the appeal with respect to the specialized knowledge issue.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed in a specialized knowledge capacity or that the beneficiary is to perform duties involving specialized knowledge in the proffered position.

The record does not establish that the beneficiary has advanced or special knowledge of the petitioning organization's products or their application in the United States and international markets as claimed. The beneficiary's selection and preparation of choice cuts of meat, his interaction with the restaurant customers, his

advisory capabilities, and his hygienic practices while serving meat do not constitute special knowledge. The beneficiary's knowledge of the foreign entity's operations does not constitute special or advanced knowledge. Counsel argues that the beneficiary's training and experience have given him knowledge that is specialized because it is specific to the petitioning entity. However, job training at any restaurant teaches the procedures of that establishment.

Finally, counsel contends that the beneficiary possesses specialized knowledge in that he possesses knowledge that is valuable to the employer's competitive position in the market place; or can normally be gained only through prior experience with that employer. A restaurant may benefit from the employment of a skilled chef, but that does not make a skilled worker eligible for classification as an alien employed in a specialized knowledge capacity.

In conclusion, the record does not establish that the beneficiary has been employed in a specialized knowledge capacity or that the beneficiary is to perform duties primarily involving specialized knowledge skills for the U.S. entity. The record is not persuasive that the beneficiary's knowledge of the preparation of the petitioner's cuisine constitutes specialized knowledge as that term is used in the Act. The petitioner has failed to demonstrate that its preparation techniques of selecting cuts of meat, seasoning, barbecuing, slicing, and serving choice meats are so distinctive and uncommon that they can be achieved only by someone possessing an advanced level of knowledge of the processes and procedures of the petitioning restaurant. The knowledge possessed by the beneficiary is a skill in specialty food preparation, not a special knowledge of the petitioner's product, processes, or procedures.

In accordance with the statutory definition of specialized knowledge, a beneficiary must possess "special" knowledge of the petitioner's product and its application in international markets, or an "advanced level" of knowledge of the petitioner's processes and procedures. Here, the beneficiary possesses the skill required to work as a cook, not a special knowledge of the petitioner's processes and procedures. Accordingly, the petitioner has not established that the beneficiary has been employed in a specialized knowledge position or that the beneficiary would be employed in a position involving specialized knowledge.

A second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the United States petitioner and the overseas entity.

On appeal, counsel claims the petitioner is an affiliate of the Brazilian company. The pertinent regulations at 8 C.F.R. § 214.2(1)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

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

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

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

(J) *Branch* means an operation division or office of the same organization housed in a different location.

(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.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and

foreign entities for purposes of this nonimmigrant visa petition. *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, 595 (Comm. 1988) (in immigrant visa proceedings). 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 International, supra.*

The initial petition lists the following individuals as owners of the affiliate company, [REDACTED] located in Brazil:

<u>Name</u>	<u>Percentage of Shares Owned</u>
1. Mr. [REDACTED]	30%
2. Mr. [REDACTED]	28%
3. Mr. [REDACTED]	27%
4. Mr. [REDACTED]	15%

Evidence of record reveals that at the time the petition was filed, the petitioner, [REDACTED] was owned by the following individuals:

<u>Name</u>	<u>Percentage of Shares Owned</u>
1. Mr. [REDACTED]	10%
2. Mr. [REDACTED]	19%
3. Mr. [REDACTED]	08%
4. Mr. [REDACTED]	7.504%
5. Mr. [REDACTED]	7.496%
6. Mr. [REDACTED]	10%
7. Mr. [REDACTED]	10%
8. [REDACTED]	04%
9. [REDACTED]	08%
10. [REDACTED]	16%

Pursuant to a Request for Evidence from the Service dated March 29, 2002, the petitioner was requested to submit evidence to establish the qualifying corporate relationship between the United States business entity and the foreign business entity. In response counsel argues that:

- (1) [REDACTED] and [REDACTED] are affiliates in that two common shareholders [REDACTED] and [REDACTED] own a majority of stock and control the management and administration of both entities;

- (2) Pursuant to the private agreement, all decisions relating to the business of [REDACTED] must be adopted by a joint resolution of [REDACTED] and [REDACTED] exclusively; and
- (3) [REDACTED] and [REDACTED] are passive shareholders only, and cannot intervene in management of business decisions relating to [REDACTED]

Counsel concluded that therefore, [REDACTED] and [REDACTED] owned a majority of the stock and controlled the management and administration of [REDACTED]

In reference to the U.S. entity, counsel claimed that:

- (1) Two of the corporate shareholders [REDACTED] and [REDACTED] were controlled by one shareholder, Mr. [REDACTED]
- (2) The third corporate shareholder, [REDACTED] was controlled by another shareholder, [REDACTED]
- (3) [REDACTED] directly controls 10% of the stock in [REDACTED] and directly controls an additional 12% of the stock through his controlling interests in [REDACTED] and [REDACTED] and [REDACTED]
- (4) [REDACTED] directly controls 19% of the stock in [REDACTED] and indirectly controls an additional 16% of the stock through his controlling interest in [REDACTED]

Counsel concluded that [REDACTED] controls a total of 22% of the stock in [REDACTED] and [REDACTED] controls a total of 35% of the stock in [REDACTED]. Counsel therefore deduced that together, [REDACTED] and [REDACTED] controlled 57% of the stock in [REDACTED]

Counsel further maintained that eight of the investors from Brazil had formed a consortium to coordinate the management of their interest in [REDACTED]. He went on to say that the consortium operates under the name of [REDACTED] restaurants [REDACTED] (the [REDACTED], and that under the terms of the agreement [REDACTED] and [REDACTED] had the authority to represent the other consortium members in all legal matters. They had also been entrusted with all of the business of the consortium. Counsel concluded by stating that [REDACTED] and [REDACTED] not only controlled 57% of the stock in [REDACTED] but also controlled the overall operation and management of the U.S. entity.

Counsel asserts that based upon the foregoing information the foreign entity and the U.S. entity share a qualifying affiliate relationship. Counsel also noted that of the ten investors in New Star Inc., only two are not members of the consortium, and that therefore the remaining eight investors owned 80% of the stock in New Star Inc.

The director determined that the evidence had not established that a qualifying corporate relationship existed between the foreign entity and the U.S. entity. The director noted that the ownership of stock in the two entities were not similar. The director further maintained that the control of the two entities by Mr. [REDACTED] and Mr. [REDACTED] was not sufficiently demonstrated, as there exist different combinations of ownership, which could lead to different control of the two entities. The director concluded by stating that the evidence presented did not demonstrate that the foreign entity and the U.S. entity would be controlled in the same manner based upon the significant differences in the ownership of the two organizations.

On appeal, counsel submits that on November 30, 2002, the [REDACTED] was dissolved and a new Brazilian limited liability company was formed with the name [REDACTED].

Counsel further asserts that [REDACTED] assumed all of the assets and liabilities of the [REDACTED] including the consortiums equity interest in [REDACTED]. Counsel contends that [REDACTED] now owns eighty-five percent (85%) of [REDACTED] with the remaining fifteen percent (15%) now owned by an individual U.S. investor, [REDACTED].

In reference to the foreign entity, counsel states that at the time the initial petition was filed the foreign entity was also majority owned and controlled by Mr. [REDACTED] and Mr. [REDACTED]. Counsel further states that on November 30, 2002, the foreign entity, [REDACTED] merged into [REDACTED] and as a result of the merger [REDACTED] now owns 100% of [REDACTED] 2000. He concludes that because [REDACTED] now owns 85% of [REDACTED] and 100% of [REDACTED] a qualifying corporate relationship continues to exist between the U.S. and foreign entity.

Counsel's assertions are not persuasive. There has been no evidence submitted to establish adequate control of one entity over the management of another. The record does not establish that the control of the entity is *de jure* or *de facto*, and to what extent proxy votes are utilized. *Matter of Hughes*, 18 I&N Dec. 289 (BIA 1982). In addition, the petitioner failed to submit sufficient evidence to overcome the issues initially raised by the director. On appeal, the petitioner now submits evidence that was not submitted to the director and which was not in existence at the time the petition was filed. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence

does not establish filing eligibility at the time the application or petition was filed." It is noted that the initial petition was filed on March 19, 2002. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The Service cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Bureau requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate a qualifying relationship between the United States entity and the foreign entity. For this reason, the grounds for denial of the petition by the director have not been overcome, and the appeal will therefore be dismissed.

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.