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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



DEC 12 2003

FILE: SRC-02-042-52490 Office: TEXAS SERVICE CENTER Date:

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

PETITION: Petition for 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:  
[Redacted]

INSTRUCTIONS:

PUBLIC COPY

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 Citizenship and Immigration Services (CIS) 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 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 is a Florida-based company engaged in restaurant consulting and restaurant management operations. As a new office, it employed the beneficiary as president, and now seeks to extend the beneficiary's employment for an additional two years. In a petition dated November 15, 2001, the petitioner requested that the beneficiary be granted L-1A status as an executive and manager.

The director denied the petition concluding that the petitioner failed to establish the following: (1) that a qualifying relationship existed between the foreign and United States companies; (2) that the petitioning company had been doing business in the United States; and, (3) that the beneficiary had been and will be employed in a primarily managerial or executive capacity. The director noted the existence of inconsistencies in the tax forms submitted by the petitioner, as well as the petitioner's failure to identify any individuals employed in the petitioning company.

On appeal, counsel for the petitioner submitted a brief and asserted that the petitioner had met the requirements of a new office as outlined in the regulations at 8 C.F.R. § 214.2(1)(3)(v). Counsel also cited an AAO decision in support of his assertion that the petitioning organization, as a new office, be given additional time to "naturally evolve into a business worthy of recognition by the INS."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Pursuant to the regulation at 8 C.F.R. § 214.2 (1)(14)(ii), a visa petition involving the opening of a new office may be

extended by filing a new Form I-129 and submitting the following evidence:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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 first issue in this proceeding is whether the foreign and United States companies are qualifying organizations.

The pertinent regulations at 8 C.F.R. § 214.2(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 (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 operating 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.

On the petition, the petitioner noted that the stock ownership and managerial control of the foreign and U.S. companies was such that the beneficiary owned the foreign company as a sole proprietorship, and "owns 100% of the shares of [the petitioning organization]." In both the petition and a letter submitted with the petition, the petitioner identified the two companies as affiliates however, no further information was provided in support of such assertion.

The director determined that the petitioner did not establish a qualifying relationship between the foreign and U.S. companies. She noted that the beneficiary owned the total number of shares issued by the U.S. company, yet the record did not provide evidence of any foreign ownership. On appeal, the petitioner did not address the director's finding that the companies lacked a qualifying relationship.

On review, there is insufficient evidence in the record to conclude that the foreign and U.S. companies are qualifying organizations. The petitioner asserted in the petition that the two companies are both owned by the beneficiary, and are therefore affiliates. Yet, the petitioner failed to provide sufficient evidence that the beneficiary owns and controls the foreign entity. The only documentation submitted to establish the beneficiary's relationship with the foreign company is a translated extract from the Register of Commerce and Companies in Tours, France. This document, registered on November 8, 1985, identifies the beneficiary as the individual in whom the names of two restaurants are registered. It also states that the beneficiary purchased the businesses from the former proprietor. However, this document, by itself, does not establish the beneficiary's ownership and control of the foreign company. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the assertions of the petitioner and counsel that the two companies are related are not evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is further noted that the petitioner has not submitted any evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary*, p. 1398 (7<sup>th</sup> Edition). As the beneficiary claims to be the owner and sole proprietor of the foreign business, the fact that the beneficiary is currently in the United States raises the question of whether the foreign business continues to do business abroad. The lack of current evidence leads the AAO to conclude that the foreign sole proprietorship is no longer doing business.

For the foregoing reasons, and because of the petitioner's failure to address this issue on appeal, the AAO is compelled to uphold the finding of the director. Therefore, the record does not establish the existence of the requisite qualifying relationship between the foreign and U.S. companies.

The AAO will next address the issue of whether the U.S. company has been doing business since its inception one year ago as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states that the phrase "doing business" means:

the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States or abroad.

The Articles of Incorporation reflect that the petitioning company was established on February 14, 2000 by the beneficiary. The petitioner asserted in a letter submitted with the petition that the company has since developed into two divisions, consulting services and restaurant management operations. The petitioner claims to be providing professional consultation to restaurants, as well as operating a restaurant through a license agreement with a third party. The license agreement, dated October 1, 2001, grants the petitioner the right to operate and maintain a restaurant owned by the licensor for two years.

The petitioner submitted a copy of a service agreement as additional evidence of doing business in the United States. The lease agreement, entered into on June 1, 2000, provides the petitioner with office space, as well as cleaning, maintenance and secretarial services. The petitioner also provided copies of the Employer's Quarterly Tax return for the periods ending on September 30, 2001, December 31, 2001, and March 31, 2002.

The director requested additional evidence that the petitioner was operating as a business, including sales contracts, invoices, bills of lading, shipping receipts, orders, U.S. customs forms, and copies of insurance, licenses and permits. In response, the petitioner provided an occupational business license, effective October 1, 2001, a food service license, a certificate of registration, a Resort Tax Registration certificate, and a temporary Alcoholic Beverage and Tobacco license, which was dated December 27, 2001. The petitioner also submitted a copy of the petitioner's insurance policy for its restaurant, which reflected a policy coverage period of November 8, 2001 through November 8, 2002. In addition, the record contains copies of rental agreements for linens, entered into in or around November 2001.

In her decision, the director found that the petitioner did not demonstrate that it was doing business in the United States, as required by the regulations. On appeal, the petitioner failed to submit any additional evidence to refute the director's decision.

On review, the record does not establish that the petitioning organization has been doing business in the United States, as this phrase is defined in the regulations. In order to satisfy this requirement, the petitioning organization must be engaged in the continuous provision of goods or services. The petitioner has submitted licenses, rental agreements, and an insurance policy, each dated and effective on or after October 1, 2001. This is approximately twenty months after the petitioner was established as a U.S. company. Although the petitioner has provided ample evidence of its intent to do business in the United States, the documentation does not support a finding that it has already been performing the regular and continuous provision of services in the United States as required by the regulations. 8 C.F.R. § 214.2(l)(14)(ii)(B). As the petitioner failed to address this issue on appeal, the AAO will uphold the decision of the director.

The AAO will now address the issue of whether the beneficiary has been or will be employed in a primarily managerial or executive capacity in the United States.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

In the petition, the petitioner identified the beneficiary's proposed job duties in the United States as directing and developing the company's operations with the authority to hire and fire the managerial staff, directing the marketing policy and growth strategy, performing due diligence on acquisition targets, and insuring the company's operational excellence. In an accompanying letter, the petitioner noted that the beneficiary, as president, is responsible for company decisions and policy-making, and manages outsourced professionals.

An organizational chart, submitted with the petition, identified the beneficiary as president, in which he oversees the two divisions of the company, the consulting services and restaurant operations, as well as outsourced professional services. The consulting services division employs two individuals, an administrative assistant and a management consultant. The restaurant operations division, which was established under the license agreement, is comprised of one manager and one assistant

manager. The services obtained from outsourced professionals are identified as legal, accounting, and information technology services. No additional information, such as educational levels, salaries or job requirements, was provided in regards to the beneficiary's subordinates.

In her request for evidence, the director asked that the petitioner submit the following: (1) a description of the beneficiary's daily business activities and percentage of time spent on each; (2) evidence of business conducted by the petitioner during the past year; (3) evidence of the current staffing level in the petitioning organization, including position titles, job duties, and educational backgrounds; and, (4) quarterly state tax returns for the years 2001 and 2002.

In response, the petitioner submitted a letter outlining the beneficiary's job duties as follows:

- (1) Direct[s] start up of [the restaurant] operations 35% of time including: Establishment and development of vendor relationships, development of marketing and customer base, obtention [sic] of all licenses and permits and supervision of management staff
- (2) Manage[s] outsourced professional services including accounting, legal and business procurement brokers who present business acquisition targets, restaurants in trouble where we may take over the management and operate the business similar to our first such operation in the U.S. [restaurant]. 25% of time.
- (3) Direct[s] and develop[s] our Consulting Services to the management of other restaurants takes up 25% of the time.
- (4) Liaising with management at the French restaurant operations takes up 15% of the time.

In addition, the petitioner provided the same U.S. organizational chart as previously submitted, and quarterly tax forms. The three Employer's Quarterly Tax returns were for the periods ending on September 30, 2001, December 31, 2001, and March 31, 2002. On the tax return ending in September 2001, the petitioner reported employing zero employees, yet indicated total wages and tips paid for the quarter in the amount of

\$5,800.00. On the December tax return, the petitioner declared that it employed three individuals, while on the March tax return, the petitioner identified only two employees, each different from those employed in the previous quarter. No further information was provided as to the job titles, duties, or educational levels of the identified employees.

The director concluded that the petitioner had failed to establish that the beneficiary has been or will be employed in a primarily managerial or executive position. In her decision, the director noted that, according to the tax forms submitted by the petitioner, the petitioning organization did not employ any individuals for five months, and failed to include the beneficiary as an employee during the first quarter of the year 2002. In addition, the director found that the petitioning organization lacked an organizational structure sufficient to support an executive or managerial position. The director further noted that the beneficiary did not have managerial control or authority over a function, department, subdivision, or component of the company, nor did the beneficiary manage a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. Consequently, the director determined that the beneficiary's position in the U.S. company was not primarily managerial or executive.

On appeal, counsel cited the regulation at 8 C.F.R. § 214.2(1)(3)(v), and asserted that the beneficiary satisfied each requirement at the time his initial visa application was approved. Counsel also referred to an AAO decision in which the AAO applied a less stringent interpretation of managerial capacity during the start-up period of the U.S. operation. Finally, counsel asserted that at the time of the appeal, September 6, 2002, the beneficiary was in negotiations to acquire an additional restaurant, and the petitioner had made a deposit in consideration of the agreement.

On review, the record is not sufficient in proving that the beneficiary has been or will be employed in a primarily managerial or executive capacity. In examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. 8 C.F.R. § 214.2(1)(3)(ii). The description must be sufficient to determine that the duties to be performed are primarily managerial or executive in nature. *Id.*

The petitioner has failed to provide sufficient evidence to substantiate the beneficiary's role in the U.S. company as primarily managerial or executive. The petitioner first asserted that 35% of the beneficiary's time would be spent directing the start-up of the restaurant. This would include establishing vendor relationships, developing a customer base, obtaining licenses and permits, and supervising the management staff. The petitioner failed to identify any managerial or executive duties the beneficiary would perform in the start-up of the restaurant. The job responsibilities outlined by the petitioner are non-qualifying duties, which clearly establish that the beneficiary is performing the functions and services of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Although the petitioner identified a manager and assistant manager of the restaurant on the organizational chart, it failed to provide any explanation, even though requested by the director, as to how these employees would relieve the beneficiary from performing non-managerial or non-executive functions. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Next, the petitioner asserted that the beneficiary would spend 25% of his time managing outsourced professionals, such as those providing accounting, legal, and business services. The petitioner failed to specifically identify these professionals, except to say that the beneficiary will manage them. There is no evidence in the record that the petitioner actually has the authority to control the manner in which these professionals provide their services to the petitioner. The petitioner cannot assert that the beneficiary is the manager of outsourced professionals simply because they provide a service to the petitioning company and work in conjunction with the beneficiary. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.*

The petitioner also stated that the beneficiary would spend 25% of his time directing and developing the consulting services division of the company. From the brief statement provided, it appears the beneficiary will be selling the company's consulting services to owners or managers of other restaurants. In other words, the beneficiary will again be performing the tasks necessary to provide a service, and therefore, cannot be

considered to be functioning in a managerial or executive capacity. See *Matter of Church Scientology International, supra*.

There are also several inconsistencies in the record as to the number of individuals employed by the petitioning organization. Each of the three quarterly tax returns submitted by the petitioner identify a different number of individuals employed by the petitioner for that quarter. The tax return submitted for the quarter ending in March 31, 2002 also identifies two employees different from those previously declared on the December 2001 quarterly tax return. The petitioner has not provided any explanation for this discrepancy. In fact, the petitioner does not even mention in what position each claimed employee is employed.

In addition, although the petitioner reported on the quarterly tax return submitted in September 2001 that it had zero employees, it declared that its wages and tips paid for that quarter amounted to \$5,800. The director addressed this discrepancy in her decision, yet the petitioner failed to submit any documentation explaining the inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In regards to counsel's arguments on appeal, it appears that counsel believes that because the petitioner's initial petition for a new office was approved in November 2000, the petitioner's subsequent request for the beneficiary's visa extension should automatically be granted. Counsel fails to consider the regulation at 8 C.F.R. § 214.2(l)(14)(ii), which requires the petitioner satisfy additional criteria in order to extend a visa petition's validity for a new office. As explained above, the petitioner has failed to provide sufficient evidence that it meets the requirements in this regulation.

Counsel further asserted that since the director's denial of the petition, the petitioner has begun negotiations and made a deposit for a restaurant. This information is irrelevant to the AAO's analysis of this issue. 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). Also, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, the beneficiary's level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, counsel referred to an AAO decision in which the AAO applied a less stringent interpretation of managerial capacity during the start-up period of the U.S. operation. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished AAO decision. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, *supra*. Furthermore, although published AAO decisions may serve as a precedent in CIS proceedings, unpublished decisions are not similarly binding. 8 C.F.R. § 103.3(c).

Beyond the decision of the director, the petitioner indicates that the beneficiary is the sole owner of the U.S. company. Therefore, it remains to determine whether the beneficiary's services are for a temporary period. 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.