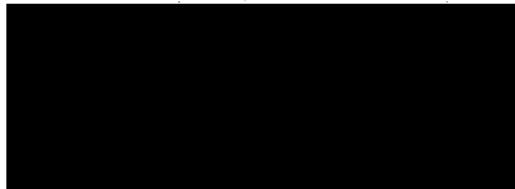


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 01 294 54483 Office: CALIFORNIA SERVICE CENTER

Date: MAR 28 2003

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:



PUBLIC COPY

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 Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (Administrative Appeals Office) on appeal. The Administrative Appeals Office will dismiss the appeal.

The petitioner, [REDACTED] Inc., claims to be a subsidiary of a Japanese company, [REDACTED]. The U.S. entity was incorporated in the State of Hawaii on May 18, 2000. The petitioner owns and operates a Japanese restaurant in Honolulu, Hawaii. In September 2000, the petitioner petitioned the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1). The Bureau approved the petition as valid from October 15, 2000 to October 15, 2001. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's general manager at an alleged annual salary of \$3,000. The director determined, however, that the beneficiary did not qualify as an executive or a manager. Consequently, the director denied the petition. On appeal, the petitioner's counsel asserts that the beneficiary works in an executive or managerial capacity and that the petitioner needs more than one year to establish itself as a successful business.

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 meet certain criteria. 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. Furthermore, 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.

Under 8 C.F.R. § 214.2(1)(3), 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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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.

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.

When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). A September 15, 2001, letter appended to Form I-129, described the beneficiary's U.S. duties:

As the top manager of the company, [the beneficiary] has been instrumental for [sic] the establishment and operation of [the foreign entity's] Hawaii[an] restaurant. [The beneficiary] has been and will continue to be responsible for making all personnel decisions such as recruiting and hiring local employees, and for making all financial decisions such as establishing financial goals and budgets and monitoring expenses. She will also be responsible for conducting market research to find suitable sites for the opening of additional restaurants.

In response to the director's request for evidence, the petitioner submitted an organizational chart. The chart listed four employees. The beneficiary was at the top of chart. In her capacity as general manager, she supervised [redacted] who was identified as the kitchen manager/chef. In turn, [redacted] supervised two kitchen helper/waitresses: [redacted] and [redacted]. The director's request for evidence asked the petitioner to briefly describe the employees' duties; however, the chart listed only job titles.

The petitioner described the beneficiary's duties in extremely broad terms, largely paraphrasing the statutory and regulatory executive and managerial requirements. Such broad descriptions do not allow the Bureau to determine the beneficiary's exact day to day job duties. Going on record without supporting documentary evidence is insufficient to meet the burden of proof

in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's failure to provide even a brief description of the employees' duties makes it impossible for the Bureau to determine whether the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing her nonqualifying duties. Based on the job titles of the beneficiary's subordinate employees, the beneficiary's duties demonstrate that she, at most, functions as a first-line supervisor of non-professional employees, not as an executive or a manager. See 8 U.S.C. § 1101(a)(44)(a)(ii).

Even if the petitioner had described the job duties in more detail, the beneficiary's responsibilities largely comprise market research which, by definition, qualifies as performing a task necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

In addition to asserting that the beneficiary functions as a manager or an executive, the counsel contends that the petitioner needs more than one year to establish itself as a successful business. Under 8 C.F.R. § 214.2(l)(3)(v)(C), a United States entity must, within one year of opening a new office, be able to support an executive or managerial position as defined at 8 C.F.R. § 214.2(l)(1)(ii)(B) or (C). The petitioner's September 15, 2001, letter admits that the U.S. restaurant opened in 1998. The record reveals that the U.S. entity filed its articles of incorporation on May 18, 2000. Therefore, the U.S. entity existed more than one year prior to September 21, 2001, the date on which the petitioner filed its Form I-129. The regulations do not provide for an extension of time available to open a new office. Furthermore, as previously determined, the beneficiary does not qualify as either a

manager or an executive. In sum, the petitioner cannot avail itself of the new office provisions to qualify the beneficiary as either a manager or an executive.

Finally, the director concluded - and the Administrative Appeals Office agrees - that it is questionable whether the U.S. entity generates enough revenue to pay the number of employees it claims to have. Pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C)(2), the Bureau may consider, "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" First, the profit and loss statement for January 2001 through June 2001 reported only \$2,871.00 in gross wages paid to regular employees. Second, during that period the restaurant operated at a \$6,534.09 loss. In sum, the minimal wages and loss undercut the petitioner's claim to support four, presumably, full-time employees.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.