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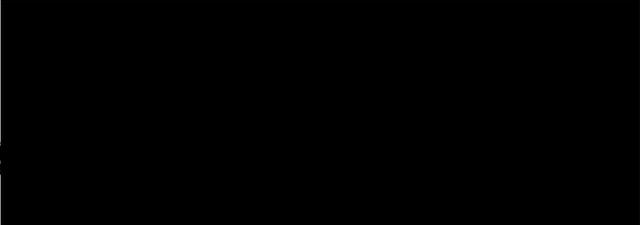


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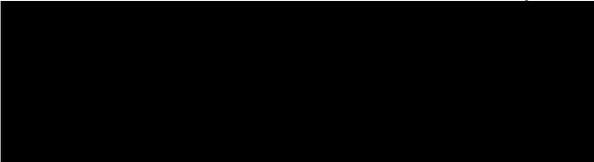


FILE: WAC 01 291 51783 Office: CALIFORNIA SERVICE CENTER Date:

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

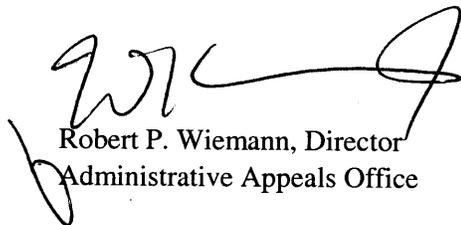
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a U.S. limited liability company that provided management and consultancy services to corporate clients. Additionally, the petitioner provides management services to its claimed U.S. subsidiary company, which is in the business of acquiring and operating franchises, specifically, Atlanta Bread Company. The petitioner seeks to extend the beneficiary's temporary employment as "leisure and hospitality manager," and filed a petition requesting an extension of the beneficiary's current status as a nonimmigrant intracompany transferee.

The director denied the petition concluding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive position. The director also noted that the record contained contradictory evidence as to the petitioner's ownership of the claimed U.S. subsidiary, and therefore, the petitioner had not demonstrated the existence of a qualifying relationship.

On appeal, counsel for the petitioner contends that the director mischaracterized the nature of the case, and made a "gross error in the application of law to the facts." Specifically, counsel claims that, despite documentary evidence submitted by the petitioner, the director incorrectly concluded that the beneficiary's position was not of a managerial nature. Additionally, counsel asserts that the director mischaracterized the law by determining that the petitioner did not have ownership and control over the U.S. subsidiary. Counsel submits additional evidence in support of these claims.

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.

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 AAO will first address whether the record supports a finding that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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 a letter appended to the petition, the petitioner stated that in the position of leisure and hospitality manager, the beneficiary would perform the following job duties:

[He] will continue to plan, direct, and establish the policies and objectives of leisure and hospitality business organizations in accordance with board directives. Specifically, he will confer with company officials to plan the day to day leisure and hospitality business operations, to develop organization[al] policies to coordinate functions and operations between divisions and departments; establish responsibilities and procedures for attaining objectives; review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; and direct and coordinate formulation of leisure and hospitality programs to provide funding for new or continuing operations. [The beneficiary] will have hiring/firing authorities and be responsible for all major leisure and hospitality business functions for the company's operations. His principal focus will be to assist with the continued establishment of the operations and later transfer those functions to U.S. workers, which includes directing and coordinating all leisure and hospitality business activities and reviewing and analyzing expenditures, financials, and operations reports to determine requirements for increasing profit.

In a Request for Evidence, the director noted that the beneficiary's duties as leisure and hospitality manager are unclear, and requested that the petitioner submit the following information with regard to the beneficiary's role in the petitioning organization: (1) an organizational chart of the U.S. company indicating the beneficiary's position within the company's hierarchy, as well as the names and job titles of all employees under the beneficiary's supervision; (2) a detailed description of the beneficiary's job duties in the United States, including the percentage of time spent on each of the listed duties; (3) a description of the job duties and immigration status of all employees supervised by the beneficiary; (4) an explanation as to why the petitioner is in need of a leisure and hospitality manager and how the beneficiary's duties will differ from current managers or executives; (5) quarterly wage reports for all U.S. employees for the last four quarters; and, (6) the petitioning company's payroll summary, including the W-2 and W-3 tax forms evidencing wages paid to employees for the year 2000.

In response, the petitioner submitted an organizational chart in which the beneficiary is identified as the vice-president of hospitality and catering, who reports to the vice-president of operations. Subordinate to the beneficiary is a regional manager, and four employees who are under the direction of the regional manager. The petitioner also noted that "pursuant to the terms of [the] Management Agreements, [the beneficiary] has responsibility over outside junior managers and staff at [the] client sites."

The petitioner also submitted a letter in which it provided the following explanation as to the beneficiary's responsibilities in the United States:

[The beneficiary's] duties in [the petitioning organization] is [sic] similar to that of the duties he performed for [the foreign company] in South Africa, including identifying in-house and outside catering functions (30%), working with the Operations Managers in establishing menu options, managing the key personnel in contracting the relevant facility, equipment, etc. (30%), and then overseeing that all operations in this regard run correctly, which include stock purchasing, stock control, viability reports, cost of sale analysis, (25%) and reporting of weekly, monthly and annual reports to the President of Food Operations (15%), who in turn reports to the CEO.

The petitioner further noted that at the beginning of the year 2002, the petitioning organization created a separate division for catering, which is the responsibility of the beneficiary.

In his decision, the director concluded that the beneficiary would not be employed in a primarily managerial or executive capacity in the United States. The director noted several discrepancies in the evidence submitted by the petitioner, including its failure to report any income or employees on the U.S. Return of Partnership Income tax form. Additionally, although specifically requested, the petitioner did not submit any quarterly wage reports or W-2 tax forms, and therefore, failed to establish that it employed any individuals in the United States. The director concluded that because the beneficiary did not appear to be directing any employees, the beneficiary was likely performing all non-qualifying duties of the hospitality and leisure division rather than managing a subordinate staff.

On appeal, counsel asserted that the director “inappropriately deem[ed] the beneficiary’s position not managerial in scope despite the documentary evidence submitted with the response to the request for evidence that lays out the organizational hierarchy of the Petitioner.” Although counsel submitted additional documentation on appeal, none of the evidence applied to the beneficiary’s employment in a managerial or executive capacity.

On review, the record is not sufficient to support a finding that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

When examining the managerial or executive 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In the present case, the petitioner has failed to provide a detailed description of the beneficiary’s job duties sufficient to establish that the primary responsibilities of the beneficiary would be managerial or executive in nature. The petitioner stated that the beneficiary would “plan the day to day leisure and hospitality business operations,” “develop organizational policies to coordinate functions and operations,” “establish responsibilities and procedures for attaining objectives,” and “revise objectives and plans in accordance with current conditions.” These descriptions fail to provide a clear explanation of the actual duties to be performed by the beneficiary. The petitioner neglected to identify the beneficiary’s “objectives” as leisure and hospitality manager; nor has the petitioner explained the true nature of the beneficiary’s responsibilities or the specific operations of the leisure and hospitality department. Specifics are an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the additional job descriptions provided by the petitioner are merely a restatement of the regulations, in which the terms “managerial capacity” and “executive capacity” are defined. The petitioner noted that the beneficiary “will have hiring/firing authorities and be responsible for all major leisure and hospitality business functions for the company’s operations.” Conclusory assertions regarding the beneficiary’s employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although specifically requested by the director, the petitioner again failed to submit additional evidence either explaining the beneficiary's role as a manager or executive, or describing the job duties of the beneficiary's subordinates. The director asked in his request for evidence that the petitioner "[s]ubmit a much more detailed description of the beneficiary's duties in the U.S.," including an assigned percentage of time allocated to each job. Likewise, the director noted that the petitioner should "be specific." The director also requested twice in his request for evidence a description of the job duties and immigration status for all employees supervised by the beneficiary. Although the petitioner submitted a detailed organizational chart in response to the director's request, the petitioner neglected to describe the job functions performed by the beneficiary's subordinates. As noted above, the petitioner also gave the following brief description of the beneficiary's job responsibilities:

[The beneficiary's] duties in [the petitioning organization] is [sic] similar to that of the duties he performed for [the foreign company] in South Africa, including identifying in-house and outside catering functions (30%), working with the Operations Managers in establishing menu options, managing the key personnel in contracting the relevant facility, equipment, etc. (30%), and then overseeing that all operations in this regard run correctly, which include stock purchasing, stock control, viability reports, cost of sale analysis, (25%) and reporting of weekly, monthly and annual reports to the President of Food Operations (15%), who in turn reports to the CEO.

The job description fails to provide further clarification of the nature of the beneficiary's job. It is unclear who are the "key personnel" with whom the beneficiary will be working, what leisure and catering responsibilities the "key personnel" will perform, what tasks must be performed by the beneficiary in "identifying in-house and outside catering functions," and whether this responsibility would include managerial and executive functions only. Again, as the petitioner did not submit any job descriptions for the beneficiary's subordinates, or quarterly wage reports verifying the employment of subordinates, the AAO is unable to determine whether the petitioner employs personnel who will relieve the beneficiary from performing non-managerial or non-executive functions. 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). Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of description, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Further, the record contains inconsistencies as to the number of people supervised by the beneficiary and the role that the beneficiary actually has in the petitioning organization. First, the petitioner claimed in its response to the director's request for additional evidence that, according to the management agreements with its clients, the beneficiary "supervises outside junior managers and staff." However, the petitioner has failed to support this assertion with ancillary evidence, such as copies of the management agreements. The record contains one management agreement between the petitioner and its claimed subsidiary; there is no language in the document assigning managerial or supervisory authority of the subsidiary's employees to the beneficiary. 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). Further, 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).

In its response to the director's request for evidence, the petitioner also noted that beginning in the year 2002, a separate division of the hospitality and leisure department was created for catering. The petitioner stated that this division was the beneficiary's responsibility. The beneficiary was also identified on the U.S. organization chart as vice-president of hospitality and catering. However, in the remaining evidence submitted by the petitioner, including the particular job descriptions, the beneficiary is referred to as "leisure and hospitality manager" or "vice president of leisure and hospitality." It appears from the record that the petitioner created a new position for the beneficiary during the current proceedings, yet failed to document the associated job duties. The petitioner has not clearly explained how, if at all, the beneficiary's duties as vice-president of hospitality and catering differ from those as vice-president of leisure and hospitality. Again, 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, supra*.

For the foregoing reasons, the director correctly concluded that the petitioner had failed to provide sufficient evidence that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The AAO will next consider whether the foreign and United States entities are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G).

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

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

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; 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.

In the present matter, the petitioner claimed in its petition that the United States company is a wholly-owned subsidiary of the foreign company. The petitioner further explained in an attached letter that the petitioning organization operates in the United States through its subsidiary company, of which it owns half of the subsidiary's issued stock. The petitioner also noted that the subsidiary company operates as a franchisee of Atlanta Bread Company in the state of Arizona. The petitioner submitted Articles of Organization and the Operating Agreement for the petitioning entity, which indicate that the foreign company "shall own 100% of the company and which shall be evidenced by 100 ownership units."

In his request for additional evidence, the director asked that the petitioner provide signed and certified copies of the U.S. company's Federal Income Tax returns for the year 2000, and the franchise agreement between the U.S. subsidiary and the franchisor.

In response, the petitioner submitted the following documents: (1) the year 2001 Annual Report for the foreign company; (2) a membership certificate issued by the petitioner to the foreign company reflecting ownership of 100 units; (3) membership certificates issued by the U.S. subsidiary identifying the petitioning organization as the owner of 50 units and an unrelated company as the owner of the remaining 50 units; and, (4) tax forms relating to the foreign and U.S. entities.

In his decision, the director determined that the evidence submitted by the petitioner contained discrepancies, and concluded that a qualifying relationship did not exist. Specifically, the director noted that the petitioner claimed to own 50% of the U.S. subsidiary, yet the Schedule K-1 (Tax Form 1065), Partner's Share of Income, Credits, Deductions, indicates that the petitioner's capital ownership is 46%. The director further determined that because the company through which the petitioner is doing business is a franchisee, this relationship failed to satisfy the ownership and control necessary for a qualifying relationship.

On appeal, counsel stated the following assertions:

(1) the [Citizenship and Immigration Services (CIS)] erroneously characterizes the legal relationship as an affiliate relationship, when in fact it is a parent/subsidiary relationship; (2) the [CIS] mischaracterizes the existence of a management agreement with Arizona Food Company, LLC, which is a subsidiary of [the] Petitioner as being the decisive entity, when in

fact the parent company . . . is the Petitioner; (3) the [CIS] mischaracterizes the law as it relates to ownership and control of the managed client, Arizona Food Company, LLC due to its franchise agreement with Atlanta Bread Company, stating that Atlanta Bread Company has ownership and control of the company, which is completely incorrect and an assumption of both law and fact by the [CIS]

On review, it appears that the director and counsel are incorrectly focusing on determining a qualifying relationship between the petitioner, a U.S. company, and its claimed U.S. subsidiary. In fact, the issue is whether the foreign company and the U.S. petitioning company are qualifying organizations. *See* 8 C.F.R. § 214.2(l)(3)(i).

The record contains several inconsistencies that preclude the AAO from determining that the foreign and U.S. organizations have a qualifying relationship. The evidence submitted by the petitioner includes the U.S. company's Operating Agreement, a membership certificate, Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, and Schedule K-1, Partner's Share of Income, Credits, Deductions. In the Operating Agreement, the foreign company is named as owner of "100% of the company," which shall be evidenced by 100 ownership units. The membership certificate likewise reflects that the foreign company holds 100 units in the U.S. petitioning organization. However, contrary to the information provided in these two documents, both tax forms indicate an additional owner of the petitioning company.

Specifically, the U.S. company's Return of Partnership Income tax Form 1065 reflects that there are two accompanying Schedules K-1, thereby implying two owners of the U.S. company. Additionally, the only Schedule K-1 contained in the record identifies the foreign company as the owner of 90% of the petitioner's capital. The petitioner has neglected to provide evidence identifying the owner of the remaining 10% of the petitioning organization. In fact, the petitioner failed to acknowledge the existence of an additional owner, and instead asserted in both the petition and its response to the director's request for evidence that the U.S. company was a wholly-owned subsidiary of the foreign organization. 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, supra*. Moreover, 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, supra*.

Consequently, the evidence is not persuasive that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.