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U.S. Citizenship
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FILE: LIN 03 233 51828 Office: NEBRASKA SERVICE CENTER Date: **AUG 30 2006**

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

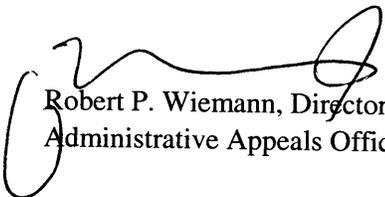
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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.

According to the documentary evidence contained in the record, the petitioner was established in 1990 and claims to be a Japanese restaurant. The petitioner claims to be a subsidiary of [REDACTED] located in Okayama, Japan. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as a general manager of its restaurant for three years, at a weekly salary of \$4,200.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity or that the entity is of sufficient complexity to support a managerial or executive position other than that of the president/general manager.

On appeal, counsel disagrees with the director's decision and states that the evidence is sufficient to establish the beneficiary will be employed by the U.S. entity in a managerial or executive capacity and that the entity is able to support such a position.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (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 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 issue in this proceeding is whether the petitioner has established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity and whether the entity is of sufficient complexity to support such a position.

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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a letter dated July 24, 2003, the petitioner described the beneficiary's duties as:

[The beneficiary] has been responsible for the day-to-day operations of the restaurant including making all personnel and budgeting decision[s] for the restaurant. In addition, [the beneficiary] will continue to determine the long range goals and objectives of the restaurant and company in the United States, as well as direct and coordinate the formulation of financial programs designed to provide funding for new or expanded operations to maximize return on investments and increase profitability. [The beneficiary] will continue to serve as a liaison between the US Company and the parent company on the running of the US operations.

The director determined that the documents submitted by the petitioner were insufficient to warrant favorable consideration of the petition and thereafter, requested:

Please provide a comprehensive, detailed description of the beneficiary's specific day-to-day duties, including a delineation of the proportion of time devoted to specific duties. Also discuss the duties of the beneficiary's subordinates. Provide an organizational chart which illustrates the structure of the organization and the beneficiary's placement within such organization.

In response to the director's request for evidence on the subject, the petitioner stated that the beneficiary's duties are not that of a first line supervisor and that he does not prepare the food. The petitioner described the beneficiary's duties as:

[The beneficiary] currently holds the position of restaurant manager for one of the 5 branch restaurants of the sushi chain.... In this capacity, he is the most senior manager responsible for the daily operations of the restaurant, including the supervision of subordinate assistant managers, who supervise the Sushi Chef, wait staff and kitchen staff. [The beneficiary] has ultimate responsibility for all personnel actions within the restaurant. As the top manager, [the beneficiary] is responsible for the daily financial aspects of the restaurant, including establishing financial goals and setting budgets; performing financial review; directing the subordinate assistant managers in the food preparation, menu planning and related activities, such as dining room and banquet operations. As a manager of the restaurant, [the beneficiary] is also responsible for attending general manager [sic] to report on all the overall

management of the restaurant under his supervision, including the meeting of financial targets.

The petitioner submitted a copy of the U.S. entity's organizational chart, which depicted the hierarchical structure of the five sister restaurants. In reference to the restaurant that employed the beneficiary, the chart showed that the beneficiary as restaurant manager was under the direction of the president/general manager. The chart also showed that an assistant/trainee, Sushi Chef, waiter/waitress, and kitchen helper and dishwasher were all under the direction of the beneficiary. The petitioner also submitted a detailed chart showing the daily activities of the beneficiary to be:

DUTIES	DAILY TIME INVOLVED/HOURS	% OF DAILY SCHEDULE
Supervising manager-oversee store and staff	4	38.10%
Supervising part-time staff	1	9.52%
Sales forecasting and goal setting	1	9.52%
Sales goals implementation/promotion	1	9.52%
Financial review and inventory management	1.5	14.29%
Attending board meetings	0.65	6.19%
Employee shift management	0.20	1.90%
Part-time employee hiring	0.05	0.48%
Labor cost management	0.10	0.95%
Customer service related	0.05	4.76%
Instruction of Sushi making and fish cutting	0.05	4.76%

The director subsequently denied the petition. The director noted that the petitioner owned a chain of Japanese restaurants of which the beneficiary would be general manager of one. The director also noted that the structure of the restaurant was not discussed by the petitioner, and that the beneficiary's duty description was generalized in nature. The director further noted that there was no indication as to the types of employees overseen by the beneficiary, or that the entity was of sufficient complexity to warrant a managerial or executive position. The director stated that the petitioner had failed to submit evidence describing the subordinate employees' duties, and the duties of the assistant/trainee to show that they were professional, managerial, or supervisory in nature. The director further stated that it appeared from the record that the beneficiary would spend the majority of his time overseeing non-professional employees, and that there was no evidence to demonstrate that the beneficiary would be relieved from performing non-qualifying duties. The director also noted that the description of the U.S. entity's organizational structure failed to indicate that

the entity was of sufficient complexity to support a managerial or executive position other than that of the president/general manager.

On appeal, counsel disagrees with the director's decision and asserts that based on established AAO precedent, a "general manager" of a specialty restaurant qualifies as "manager" under 8 C.F.R. § 214.2(l)(1)(ii)(B). Counsel contends that Citizenship and Immigration Services (CIS) mischaracterized the beneficiary's duties, and that in actuality the evidence demonstrates that he will be spending the majority of his time "overseeing the running of the store and staff." Counsel further contends that the beneficiary does not engage in the actual preparation of the restaurant's food. Counsel also contends that the beneficiary's duties, including overseeing the overall running of the restaurant, supervising an assistant manager, performing sales forecasting, goal setting, and other financial aspects of running a restaurant are consistent with a "managerial" function. Counsel claims that the instant matter is consistent with prior AAO precedent cases (none were cited), which counsel claims have found a general manager of a specialty food restaurant eligible for L-1A status.

Counsel's assertions are not persuasive. On reviewing the petition and the evidence, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Further, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions, and that the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The record shows that the beneficiary will be primarily supervising the restaurant staff rather than primarily performing managerial or executive duties. Consequently, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include setting goals, implementing plans, and overseeing the running of the store and staff. The petitioner did not, however, define the petitioner's plans and sales goals, or clarify the particular tasks performed by the beneficiary in running the store and staff. 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). Specifics are clearly 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).

Further, the petitioner has failed to overcome the objections made by the director. In the request for evidence, the director requested that the petitioner discuss the duties of the beneficiary's subordinates. The petitioner failed to submit such evidence in response. This evidence is critical, as it would have established the number of subordinates employed by the petitioning restaurant as well as their duties and responsibilities. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. The beneficiary's immediate subordinate is characterized in the entity's organizational chart as "assistant/trainee." In the response to the director's request for evidence the immediate subordinate is described as "subordinate assistant manager." The petitioner failed to describe the subordinate's duties as requested by the director.

There is no evidence to show that the subordinate staff is employed in a professional or supervisory capacity, nor is there any evidence in the record to demonstrate that the staff is employed on a full-time basis. It is noted by the AAO that the petitioner indicated that the beneficiary is responsible for "supervising part-time staff" and "part-time employee hiring." It appears from the record that the beneficiary will primarily be engaged in the day-to-day activities of the business and supervising non-professional subordinate staff. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

On appeal, counsel refers to an unpublished decision. Counsel asserts that in this matter, the AAO found that "the General Manager supervised a subordinate staff, oversaw the general running of the restaurant, and did not engage in the actual preparation of the food." The record does not support counsel's claim, as counsel has not provided a copy of the decision. The assertions of counsel 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). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Although the petitioner claims that the beneficiary directs and manages the petitioner's sales and accounting/financial activities, it does not claim to have anyone on its staff to actually perform the sales and accounting/financial functions. Thus, it appears that the beneficiary himself is performing the sales and accounting/financial functions. If the beneficiary is performing the sales and accounting/financial functions, the AAO notes that 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).

Counsel contends that the beneficiary is a function manager in that he oversees the overall running of the restaurant, supervises an assistant manager, performs sales forecasting, sets goals, and performs other financial aspects of running a restaurant. Contrary to counsel's contention, the evidence of record fails to demonstrate that the beneficiary is employed by the U.S. entity in a function manager position. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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, supra*. In this matter, the

petitioner has not provided evidence that the beneficiary manages an essential function. 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*. Based upon a review of the record, it appears that the beneficiary will be responsible for the day-to-day activities of the organization and for supervising non-professional restaurant employees. Therefore, the petitioner has failed to demonstrate that the restaurant is of sufficient complexity to support an executive or managerial position. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the minimal documentation of the parent company's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In addition, there is insufficient evidence contained in the record to demonstrate that the foreign entity will continue doing business pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H). The record fails to show that the foreign entity will be engaged in the regular, systematic, and continuous provision of goods and/or services during the beneficiary's temporary stay in the United States. For these additional reasons, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.