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U.S. Citizenship
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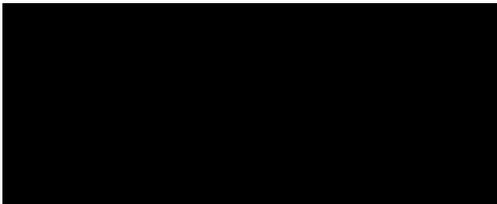


FILE: SRC 04 017 53087 Office: TEXAS SERVICE CENTER Date: JUN 10 2005

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

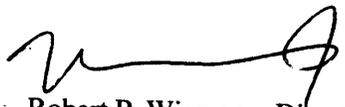
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Texas 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 1973 and claims to be a chain of Japanese restaurants. The petitioner claims to be a subsidiary of [REDACTED] located in Tokyo, Japan. It seeks to employ the beneficiary temporarily in the United States as the general manager for a period of three years, at a weekly salary of \$750.00. The director determined that the petitioner failed to submit sufficient evidence to establish that (1) the foreign entity has been doing business; and (2) that the beneficiary had been employed by the foreign entity in a managerial or executive capacity.

On appeal, counsel submits a brief in opposition to the director's decision. Counsel asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a managerial or executive capacity.

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 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.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the foreign entity is doing business as defined in the regulations.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

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 and abroad.

In the instant matter, the petition was filed on October 23, 2003. The petitioner initially stated in the petition that the U.S. entity was a subsidiary of [REDACTED] located in Tokyo, Japan and that the beneficiary had been employed by the foreign entity since 2002. As evidence the petitioner submitted copies of the foreign entity's Articles of Incorporation, Certificate of Registration, financial report, and a profit and loss statement, both covering the tax period from July 1, 1998 through June 30, 1999.

In the request for evidence, the director specifically stated: "Submit evidence of the business conducted by [REDACTED] during the past year. Submit current financial records, such as tax records, banking records, employee rosters, evidence of business conducted, such as receipts or invoices."

In her decision to deny the petition, the director stated that although Citizenship and Immigration Services (CIS) requested evidence of the foreign entity doing business, no evidence that the company abroad was doing business as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) was submitted.

On appeal, counsel does not address the director's finding. Therefore, the director's finding that the petitioner had not shown that the foreign entity is doing business will be affirmed. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). Further, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not met the regulation at 8 C.F.R. § 214.2(l)(3)(i). For this reason, this petition may not be approved.

The second issue in the proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity 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.

The petitioner initially stated in the petition that the beneficiary had been employed by the foreign entity from September 2002 to the present. The petitioner described the beneficiary's past duties as:

Administrative manager of Japanese restaurant operation since September 2002. Duties include marketing, public relations, account management, supervision of staff, human resource management and bilingual communication. 3/1998 to 3/1999; 12/2000 to 8/2002: administrative manager with Trad [REDACTED]

In a letter of support, dated October 17, 2003, counsel for the petitioner stated that it was the petitioner's intention to employ the beneficiary for a period of three years, so that he can set up, define, and put into place the general management program for the U.S. entity's operations in accordance with the Japanese style of restaurant management.

In a letter of support, dated October 17, 2003, the petitioner described the beneficiary's duties at the foreign entity as:

[The beneficiary] has been working for our parent company in Tokyo since September 2002 as Administrative Manager. His duties include marketing, public relations and communications (in Japanese and English), account management, supervision of personnel, human resource management and application of modern business administration techniques. [The beneficiary's] expertise is his bilingual management skills backed by his education and his prior management expertise of more than three years with [REDACTED] in Osaka, Japan.

[The beneficiary] has worked closely with [REDACTED] who trained him in management of Japanese restaurants and [REDACTED] who supervised him in restaurant accounting. His job has been focused on managing the Japanese restaurant operations and the future general management of our restaurants in the United States....[The beneficiary is also responsible for all accounting matters and he reports directly to our director in charge of accounting, who has trained him in financial and accounting matters of our restaurant operation.

The petitioner submitted a copy of the U.S. entity's organizational chart and translated letters of employment verification from abroad. The first translated letter, dated September 3, 2003, states that the beneficiary was employed by [REDACTED] in Osaka, Japan from March 1998 to March 1999 and from December 2000 to August 2002. Trader Vic's company manager described the beneficiary's job title as "Floor Manager/Administrative Manager," and his duties as: floor manager, quality control, cost control, and personnel training. The second translated letter, dated September 9, 2003, was from the foreign entity, and stated that the beneficiary had been employed by the foreign entity as administrative manager from September 2002 to the present. It was further stated in the letter:

[The beneficiary's] duties at our office are mainly to oversee U.S. restaurant management and accounting operations, to be responsible for the accounting matters of each restaurant of [REDACTED], and to research the market and develop new menus under the supervision [REDACTED] Director of [REDACTED]

[The beneficiary's] leadership skills enable him to oversee and supervise his employees; he also has a thorough knowledge of the operations of [REDACTED]. and works closely with [REDACTED] who is one of our directors and is well known in the Japanese restaurant industry.

In the request for evidence, the director specifically stated:

Submit a definitive statement describing the foreign and U.S. employment of the beneficiary, including:

- List all duties.
- Percentage of time spent on each duty.
- Number of subordinate managers/supervisors or other employees who report directly to the beneficiary.
- A brief description of their job titles and duties; give their educational background; if the beneficiary does not supervise other employees, specify what essential function within the organization he manages.
- Specific dates his employment began and ended in each position with your company.
- Indicate the qualifications required for the position.
- Indicate the level of authority held by the beneficiary.
- Indicate whether or not the beneficiary functions at a senior level within the corporation.
- Specify his position within the organizational hierarchy.
- Indicate who provides the product sales/services or produces the product of the business.

Submit a copy of the petitioners and the beneficiary's foreign employer organizational chart.

Submit copies [of] the State, Employer's Quarterly Tax Returns from January 2002 to the present for [REDACTED]

Submit copies of Quarterly Wage Reports for all employees from 2002 to present.

In response to the director's request for evidence, counsel described the beneficiary's duties abroad as: "Duties: Beneficiary has been working for petitioner's parent company in Tokyo since September 2002 as Administrative Manager. His duties include marketing, public relations and communications (25%); account management (25%); supervision of personnel (25%) and human resource management and administration (25%)." The petitioner submitted a copy of the foreign entity's organizational chart that showed the beneficiary as administrative manager, under the direction of [REDACTED] director of accounts and administration. The organizational chart also depicted a president and vice-president, with a construction, real estate, restaurant, and export division under their direction. The petitioner also submitted a copy of the U.S.

entity's organizational chart that showed an executive hierarchy to include a president, vice-president, and general manager. The chart also depicted five restaurant managers and staff, all of whom are under the direction of the executive hierarchy. Counsel stated that all ten of the subordinate managers (two for each designated U.S. restaurant) would report directly to the beneficiary as general manager. The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporate Income Tax Return for the fiscal year 2002-2003, and IRS Form 941, Employer's Quarterly Federal Tax Return for 2002 and 2003, including a roster of all employees.

The director subsequently denied the petition after determining that the petitioner had failed to submit sufficient evidence to establish that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that contrary to the petitioner's definition of the beneficiary's duties abroad, the evidence showed that no employees, divisions or functions are listed under the beneficiary's title of administrative manager. The director further noted that while the beneficiary carried the title "administrative manager," the record showed that he actually performed various marketing and administrative functions himself. The director stated that the petitioner had failed to submit evidence to demonstrate that the beneficiary worked through others to accomplish the goals of the organization. The director concluded that the petitioner had failed to demonstrate that the beneficiary has been employed abroad in an executive or managerial capacity.

On appeal, counsel disagrees with the director's decision and asserts that the list of the beneficiary's job duties including: public relations and communications, account management, supervision of personnel, and human resource management and administration, clearly demonstrate that the beneficiary's job duties abroad are managerial or executive in nature. Counsel emphasizes that human resource management and supervision of personnel require the supervision and management of other employees. Counsel further asserts the beneficiary's duties described by the foreign entity meet the definition of manager or executive. Counsel contends CIS "misconstrued" the foreign entity's organizational chart in determining that the beneficiary had not been employed abroad in a managerial or executive capacity. Counsel contends the beneficiary is employed by the foreign entity as an administrative manager, and that in this position he reports directly to [REDACTED] who is the senior director in charge of the accounts and administration. Counsel further contends that [REDACTED] at the same level and parallel to the president of the foreign entity, and likewise, the beneficiary's position is at the same level as the vice-president of the company. Counsel asserts that in "Japanese style business culture," the president and vice-president are responsible for "overseeing the general management affairs, policies, procedures and objectives of the corporation and its fiscal matters," while the director and the beneficiary "oversee all accounting and administrative matters of the corporation." In support of this assertion, the petitioner submitted a translated letter on appeal written by the foreign entity in which it is stated in part:

This is to certify the duties of the above mentioned employee who is employed with us as Administrative Manager since September 2002, and his level of authority in the organizational chart of our Corporation.

We have in our organization the positions of President and Vice President. Parallel to these two positions, we have the positions of a senior executive [REDACTED] who oversees the accounts and administrative matters. [REDACTED] our senior most director, which is a full time corporate employee position. Directly under, and parallel to the position of Vice President, is the position of Administrative Manager which [the beneficiary] holds. The position of Vice President and his position are equivalent in authority and responsibility.

[The beneficiary] spends half of his time in supervision of personnel, and human resource management of our four divisions, especially the Restaurant Division and he spends the other half of his time in public relations, communications, marketing and account management pertaining to these divisions. The heads of these four divisions report directly to him in matters concerning accounting, personnel and human resources and administrative matters. They report directly to the Vice President on matters other than the above, such as general policies, sales, budgetary expenses and allied fiscal matters.

Counsel argues that the vice-president supervises four divisions of the foreign entity, including “staff/employees” and that therefore, the beneficiary performs his duties through the four divisions and their employees, thus accomplishing the goals of the organization. Counsel further argues that [REDACTED] is senior director of the foreign entity and that this position is on par with that of the company president, as is the beneficiary’s position in the foreign entity on par with that of the company’s vice president. Counsel concludes by arguing that the beneficiary does not spend the majority of his time performing marketing and administrative functions, but rather spends 50 percent of his time on the supervision of personnel and human resource management and administration.

When examining the executive or managerial 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). The petitioner 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.* The petitioner asserts that the beneficiary has been employed by the foreign entity in a managerial capacity in that his job duties include: public relations, communications, account management, supervision of personnel, human resource management and administration. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does 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). There has been insufficient evidence submitted to demonstrate how the beneficiary performs the job duties abroad or what the duties actually entail. In the instant matter, there has been insufficient evidence and/or explanation given to establish that the beneficiary primarily performs high-level responsibilities at the foreign entity that can be defined as managerial or executive in nature.

Counsel asserts on appeal that the foreign entity’s organizational structure is based upon the “Japanese style business structure,” which depicts the director of accounts and administration and the administrative manager position to be on par with that of the president and vice president’s positions. However, there has been no independent documentary evidence submitted to substantiate the assertion. 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, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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).

The petitioner fails to document what proportion of the beneficiary’s duties have been managerial functions and what proportions have been non-managerial. For example, the petitioner lists the beneficiary’s duties as

“marketing, public relations and communications (25%); account management (25%); supervision of personnel (25%) and human resource management and administration (25%)” but fails to quantify in detail the time the beneficiary spends performing each function. Further, the petitioner fails to state whether the beneficiary performs bookkeeping functions or manages professional CPAs as his “account management” duties. This failure of documentation is important because several of the beneficiary’s daily tasks, such as marketing, public relations, and administration do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The inconsistencies between counsel’s assertions and the submitted evidence raise serious doubts regarding the claim that the foreign company employed the beneficiary in a qualifying capacity. *See* 8 C.F.R. § 214.2(l)(3)(iv). For example, the foreign entity’s organizational chart depicts [REDACTED] as accounts and administration director, and the beneficiary as his subordinate in the position of administrative manager. In a letter of support, dated October 17, 2003, the petitioner stated in part: “[The beneficiary] has worked closely with [REDACTED] who trained him in management of Japanese restaurants....[The beneficiary’s] job has been focused on managing the Japanese restaurant operations [The beneficiary] is also responsible for all accounting matters and he reports directly to our director in charge of accounting, who has trained him in financial and accounting matters of our restaurant operation. In a letter of support from the foreign entity, dated September 9, 2003, the beneficiary’s duties are described in part as: “[The beneficiary’s] leadership skills enable him to oversee and supervise his employees; he... works closely with [REDACTED] who is one of our directors.” In response to the director’s request for evidence, the petitioner submitted a copy of the U.S. entity’s organizational chart. Counsel asserts that all ten of the subordinate managers (two for each designated U.S. restaurant) depicted in the organizational chart would report directly to the beneficiary as general manager. Although counsel claims that [REDACTED] has trained the beneficiary and that the beneficiary works closely with [REDACTED] at the foreign entity, the U.S. entity’s organizational chart shows [REDACTED] as manager of its Knoxville restaurant in the United States. Furthermore, the organizational chart demonstrates that the beneficiary would be supervising, not taking direction from [REDACTED] in the United States. 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. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Although counsel asserts on appeal that the beneficiary is managing a subordinate staff in that he performs his duties through the management of the foreign entity’s four divisions, 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. 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. The foreign entity’s organizational chart shows that the beneficiary takes direction from the accounts and administration director. However, there is no evidence submitted to show that the beneficiary manages or directs any subordinates. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do

not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although specifically requested by the director, the petitioner failed to submit evidence demonstrating the number of subordinate managers/supervisors or other employees who report directly to the beneficiary. The petitioner also failed to provide the director with subordinate job descriptions, job titles, duties, and evidence of their educational backgrounds. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). It appears from the record that the beneficiary has been primarily performing the day-to-day marketing and administrative functions of the foreign entity, rather than serving in a managerial or executive capacity. Further, there has been no evidence submitted to demonstrate that the beneficiary manages the organization, department, subdivision, function, or component of the organization. In this matter, there is insufficient evidence in the record to show that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. For this additional reason, the petition may not be approved.

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.