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U.S. Citizenship
and Immigration
Services

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FILE: SRC 02 167 51931 Office: TEXAS SERVICE CENTER Date: JUN 28 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 incorporated in 1989 and claims to be a Salvadorian restaurant. The petitioner claims that it maintains a subsidiary relationship with [REDACTED] located in San Salvador, El Salvador. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its operations manager for a period of two years. The director determined that the evidence was not sufficient to establish that: (1) there was a qualifying relationship between the foreign entity and the U.S. entity; and (2) the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted was sufficient to establish a qualifying relationship between the U.S. and foreign entities and that the beneficiary will be employed 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 (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.

* * *

The first issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the U.S. and foreign entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

- (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 operation 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.

The petitioner initially stated that 100 percent of the U.S. entity's stock was owned by the foreign company. In support of the petition, the petitioner submitted copies of its Articles of Incorporation, stock certificates, assignment of stock certification, corporate resolution approving assignment, waiver of notice of special organizational meeting of the directors and shareholders, and IRS Form 1120, U.S. Corporation Income Tax Return for the year ending March 31, 2001.

In response to the director's request for evidence, the petitioner submitted a copy of an amended U.S. Corporation Income Tax Return for the year ending March 31, 2001. The amendment demonstrated that ██████████ 50 percent and ██████████ owned 50 percent of the company's stock. The petitioner also submitted a copy of the Assignment of Stock notices that indicated a transfer of stock from ██████████ and ██████████ to the foreign entity, in total. The petitioner submitted copies of a Waiver of Notice of Special Organization Meeting, Corporate Resolution, and U.S. entity stock certificates one through eight.

The director determined that the evidence was insufficient to establish a qualifying relationship between the U.S. and foreign entities. The director noted inconsistencies in the number of authorized shares the U.S. organization had authority to issue and the number that had actually issued. The director also noted that the U.S. entity's IRS Form 1120, Corporate Income Tax Return and its amendment, IRS Form 1120X for the year ending March 31, 2001 contained information contrary to statements made and evidence submitted in support of the petition. The director noted that the original owners of stock certificates 2, 5, and 6 had not signed the back of the stock certificates, thus rendering them still valid. The director also noted that the petitioner had stated that ██████████ was 50 percent owner of the U.S. entity on March 31, 2001; but that the stock certificates submitted do not establish that fact. The director stated that the petitioner failed to address why stock certificates #6 and #7 were submitted into evidence when they were not valid. The director also stated that the petitioner had failed to submit evidence demonstrating the ownership of the foreign entity. The director's position remained the same in her response to the petitioner's Motion to Reopen/Reconsider.

On appeal, counsel argues that the qualifying relationship of the U.S. and foreign entities has been established through legal stock transfers. Counsel also argues that Florida corporate law does not require the actual issuance of stock certificates in order to prove ownership. Counsel further argues that the evidence submitted demonstrates a valid transfer of stock, although some original stock certificates were incomplete. Counsel asserts that stock certificates number 7 and 8 are valid as a result of a valid transfer agreement being signed and entered into.

The petitioner submitted copies of Share Purchase Agreements, dated April 12, 2001; Assignment of Stocks, dated April 12, 2001; and an undated Corporate Resolution. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

The petitioner has not submitted sufficient proof of stock purchase by the foreign entity. There have been no bank statements, canceled checks or any other business documents presented to substantiate the purchase of the U.S. entity's stock by the foreign entity. There are no certified meeting minutes that demonstrate the foreign entity's interest in purchasing shares of stock in the U.S. entity, nor has there been evidence presented to show an agreement by the directors and shareholders of the foreign entity to purchase such stock. Further, there has been no independent documentary evidence submitted to substantiate information contained in the U.S. entity's analysis of change in stockholder's equity. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner submitted copies of the U.S. entity's stock certificates, IRS Forms 1120 and 1120X, and the petition, which all contain inconsistent information that has not been adequately explained. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, evidence that is created by the petitioner after Citizenship and Immigration Services (CIS) points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event that is to be proven and existent at the time of the director's notice.

In view of the inconsistencies, and lack of evidence to substantiate the petitioner's claim, the record is insufficient to establish ownership and control of the U.S. company by the foreign entity. The record does not demonstrate that the foreign entity has actually utilized company funds to purchase shares of stock in the U.S. company nor does it demonstrate that the foreign entity controls the U.S. entity. Hence, it cannot be concluded that the petitioner has established that a qualifying relationship exists between the U.S. and foreign entities. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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 the petition, the petitioner stated that the beneficiary's responsibilities would continue to consist of "directing the daily business of the restaurant, including company finances, inventory control, employment matters, menu selection, pricing, and quality control."

In a letter of support dated April 22, 2002, the beneficiary stated:

While in the United States, my objective is to function at a managerial level handling all the activities of restaurant operations. Part of my responsibility is to handle the company finances and assist with policy formulation. The other part of my function is to review company costs, negotiate with food and supply vendors, ensure all county and city licenses are current, ensure health code compliance and confer with my counterpart, the company president, to review our overall efficiency, profitability, menu creations, and personnel productivity.

In a letter of support, dated May 2, 2002, the petitioner described the beneficiary's duties as:

The beneficiary will continue working as Operations Manager of the U.S. Corporation and will continue his managerial roles in both companies. The beneficiary will oversee the restaurant's daily operations and supervise two other managers and staff. In addition, the beneficiary will handle the company finances, and review reports with the other shift managers to determine company costs, revenue, inventory control and various employment matters that involve the restaurant staff. He will exercise full discretion to make changes in the menu pricing, food offerings, and changes in the operational staff.

The petitioner described the shifts at its restaurant as:

A.M. SHIFT

1. [REDACTED] Manager (full-time)
2. [REDACTED] Cook (part-time)
3. [REDACTED] Cook (part-time)
4. [REDACTED] Cook (part-time)
5. [REDACTED] Cook (per diem)
6. [REDACTED] Waitress (per diem)

7. [REDACTED] Waitress (per diem)
8. [REDACTED] Waitress

P.M. SHIFT

1. [REDACTED] Manager (full-time)
2. [REDACTED] Cook (part-time)
3. [REDACTED] Cook (part-time)
4. [REDACTED] Waitress (per diem)
5. [REDACTED] Cook (full-time)
6. [REDACTED] Waitress
7. [REDACTED] Waitress

In response to the director's request for evidence on the subject, the petitioner submitted a copy of the U.S. entity's organizational chart that depicted the beneficiary as general manager. The chart also showed that two shift managers, eight cooks, and six servers were under the beneficiary's direction. The petitioner submitted employee lists which demonstrated that the two shift managers were employed on a full-time basis; one server and one cook were employed on a full-time basis; five cooks were employed on a part-time basis; three servers and one cook received per diem; and two servers and one cook's employment was not classified. The petitioner also submitted copies of its IRS Form 941, Employer's Quarterly Federal Tax Returns for the quarters ending March 31, 2001, June 30, 2001, September 30, 2001, December 31, 2001, and March 31, 2002. Each listed eight to ten employees.

The petitioner stated that the beneficiary supervised the U.S. entity's entire operation that consisted of two managers, seven employees, and seven independent contractors who were employed on a per diem basis. The petitioner also stated that the restaurant was a family owned business and that the beneficiary was best suited to run the operation based upon his success in operating the trucking business abroad. The petitioner submitted copies of its IRS Form 1099 for [REDACTED] and [REDACTED] for the year 2001.

The director determined that the petitioner had failed to demonstrate that it was in need of an executive or manager or that the beneficiary's actual duties qualify as managerial or executive in nature. The director noted that the entity's cooks make less than the minimum wage that would be earned by a full-time employee. The director also noted that the petitioner had failed to submit evidence to show that the other employees were paid contractors. The director further noted that the evidence submitted by the petitioner failed to establish that the beneficiary was being paid by the foreign entity although the petitioner had stated that he was. The director also noted that, based upon the petitioner's statement and the lack of compensation recorded on its 2001 Income Tax Return, it appeared that the beneficiary was not compensated by the U.S. entity. The director stated that the record established that the petitioner did not have any qualifying employees and therefore, the beneficiary, although possessing the title of president, would be carrying out the day-to-day operations of the business and would not be supervising any employees. The director also stated that the evidence in the record was not persuasive in demonstrating that "the U.S. entity had grown to a point where it could remunerate the beneficiary, or where the beneficiary would function at a senior level, or with respect to a function." The director noted that the petitioner had failed to demonstrate that it was in need of a manager or executive. The director's decision in denying the petitioner's Motion to Reopen/Reconsider was based upon the same premises.

On appeal, counsel argues that the beneficiary performs as both an operations manager and vice-president, with the managerial role occupying most of his time. Counsel also argues that the beneficiary serves as a function manager and supervises two shift managers at the restaurant. Counsel cites to *Matter of Irish Dairy Board* to substantiate his argument. Counsel contends that the beneficiary manages the administrative aspects of the business; that he manages and oversees the kitchen staff; that he is responsible for the financial and transactional aspects of the business; and that he supervises two managerial employees who are the highest paid workers. Counsel cites to the Department of Labor's Occupational Outlook Handbook's discussion of Restaurant and Food Service Managers and the Dictionary of Occupational Titles (DOT) in support of his contention. Counsel argues that the wire transfers show ██████████ as the remitter of the funds from El Salvador.

Counsel's assertions are not persuasive. Neither the statements nor the evidence received is sufficient to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity. Counsel asserts that the beneficiary will serve as a functional manager and as a part-time executive. 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). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial in nature. A 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity. Although counsel contends that the beneficiary mostly functions as a manager and partially functions as an executive, this generalization is insufficient to establish how much of his time is spent performing managerial or executive duties.

The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as performing administrative duties and supervising non-qualifying personnel, 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).

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. 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.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the kitchen duties of the managers, who are among the beneficiary's subordinates.

Further, the petitioner has not shown that the Department of Labor's description of a restaurant manager in the DOT has any bearing on this proceeding. The petitioner has not shown that the Department of Labor reserves the title of restaurant manager to those working in a managerial capacity as defined at section 101(c)(44)(A) of the Act.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial or executive capacity even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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.

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. Counsel states that the beneficiary manages the administrative aspects of the business in that he deals with the financial and transactional aspects of the organization. However, there is no evidence to show that any of the listed employees perform duties involving the financial or administrative aspects of the business. Nor has there been evidence submitted to demonstrate that any of the company's employees qualify to perform such duties. Furthermore, 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*. The petitioner has not provided evidence that the beneficiary manages an essential function.

Likewise, it cannot be found that the beneficiary will be employed primarily in an executive capacity. Counsel contends that the beneficiary will function partially as an executive vice-president of the restaurant. However, the petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be primarily directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he will receive only general supervision or direction from higher-level individuals. Nor has there been evidence submitted to demonstrate what portion of the beneficiary's time will be spent performing executive duties. 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, there is no plausible explanation for why the beneficiary, as vice-president and operations manager, supervises Ana Chavez, the president of the organization.

Moreover, the petitioner has not shown that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. It appears that the majority of the beneficiary's time will be spent performing the day-to-day functions of the business as well as supervising non-professional subordinates.

Beyond the director's decision, there is insufficient documentation to establish that the foreign company is actively engaged in the regular, systematic, and continuous provision of goods or services. In the instant matter, the petitioner submitted copies of invoices from the foreign entity, which showed that the entity had performed business transactions for the month of April 2002. This is insufficient to show that the foreign entity has and will continue to do business. The term "doing business" is defined in the regulations as "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." 8 C.F.R. § 214.2(l)(1)(ii). Consequently, it cannot be concluded that the petitioner has submitted sufficient evidence to establish that the foreign entity is a qualifying organization as required by the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). 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.