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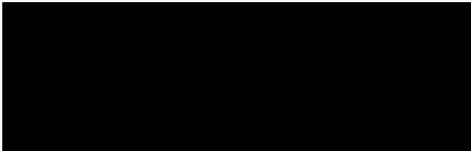
File: WAC 03 243 50220 Office: CALIFORNIA SERVICE CENTER Date: SEP 21 2005

IN RE: Petitioner:
Beneficiary:



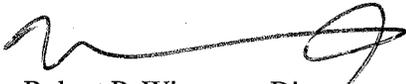
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN 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 filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that operates a restaurant. The petitioner claims that it is the subsidiary of [REDACTED] located in Dangriga, Belize. The petitioner seeks to employ the beneficiary as its executive director for a two-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner has a qualifying relationship with the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director did not consider all of the evidence submitted in support of the claimed qualifying relationship between the petitioner and the foreign entity. Counsel further claims that the director placed undue emphasis on the size of the petitioner's company and the number of employees to be supervised by the beneficiary in determining that he would not be employed in a managerial or executive capacity. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 July 15, 2003 letter submitted in support of the petition, the petitioner described the beneficiary's proposed duties as follows:

His executive duties will include setting corporate policy, directing management, making executive discretionary decisions, having control over business and employees through managerial staff, hiring and firing employees, and having regular contact with our parent company on policy and operation of the business both in Belize and the United States. Some of his specific duties are signing contracts [sic], checks, tax returns, and legal documents on behalf of the corporation and business; implementing the business restructuring plan; determining terms of employment, including salary raise and benefit, of individual employees. [The beneficiary] will also be entrusted with the duty of making plans to achieve the goal of the parent company in making a diversified business investment in the United States.

The petitioner submitted a separate statement describing its organizational structure. The petitioner indicated that it employs: (1) [REDACTED] as president of the company and manager of the restaurant, who will assist the beneficiary in performing executive duties, supervise and manage daily business operation, and supervise employees; (2) six kitchen staff, including a head chef, three cooks and two cook's assistants, who will prepare food, dishes, banquet and other orders placed by customers, review the restaurant menu, and observe health and sanitary guidelines in the kitchen; and (3) three dining room staff, including two waiters and a head waitress, who also serves as secretary of the company.

On September 5, 2003, the director requested additional evidence to establish that the beneficiary will be employed in a managerial or executive capacity in the United States. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties, including the percentage of time spent in each of the listed duties; (2) copies of California Forms DE-6, Employer's Quarterly Wage Report, for the last two quarters; and, (3) an organizational chart describing the petitioner's managerial hierarchy and staffing levels, including the names of all executives, managers, and supervisors and the number of employees within each department. The director instructed the petitioner to list all employees under the beneficiary's supervision by name and job title and include a brief description of their job duties, educational level, annual salaries and immigration status.

In a response dated November 24, 2003, the petitioner provided the following description of the beneficiary's duties:

Supervise two cooks and three Kitchen Helps. Based on the suggestions from cooks, to select and price menus. Decides the alteration of menu. Decides promotion strategy and supervises its performance. Makes sure supplies could be ordered and received in time.

Estimates food consumption, places orders with suppliers, and schedules the delivery of fresh food and beverages. Receives and checks the contents of deliveries, evaluating the quality of meats, poultry, fish, fruits, vegetables, and baked goods. Meets with sales representatives from restaurant suppliers to place orders replenishing stocks of tableware, linens, paper,

cleaning supplies, cooking utensils, and furniture and fixtures. Arranges for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control.

He will devote 35% of his time in above-mentioned job duties.

Hires and fires employees. Interviews new employees. He will also schedule the work hours of employees, making sure there are enough workers present to cover peak dining periods. If employees are unable to work, he is liable to find temporary workers to fill in for them. Arrange for newspaper advertising. Our secretary, [REDACTED] will report any emergency to the beneficiary when president is not available.

Investigates and resolves customers' complaints about food quality or service. To maintain company and government sanitation standards, directs the cleaning of the kitchen and dining areas and washing of tableware, kitchen utensils, and equipment. Beneficiary also monitors the actions of employees and patrons on a continual basis to ensure that health and safety standards and local liquor regulations are obeyed.

He will devote 35% of his time in above-mentioned duties.

To set corporate policy, direct management, exercise discretionary decisions making, exercise control over business and employees. He devotes and has regular contact with the overseas parent company on policy and operation of the business both in the United States and overseas. Supervise and manage other daily business operation. President, [REDACTED] will supervises [sic] beneficiary.

He will devote 30% of his time in above-mentioned job duties.

The petitioner submitted an organizational chart that indicates the beneficiary will report to the president and supervise two cooks and three "kitchen help" staff. The petitioner's California Form DE-6 for the third quarter of 2003 confirmed the employment of the employees who will report to the beneficiary.

On December 8, 2003, the director denied the petition concluding that the beneficiary will not be employed in a managerial or executive capacity. The director noted that although the petitioner indicated that the beneficiary would perform duties such as "exercise control over the business and employees through managerial staff," the organizational chart depicts the beneficiary as a first-line supervisor of non-professional employees.

On appeal, counsel for the petitioner re-states the initial job description provided by the petitioner and asserts that the director erroneously concluded that the petitioner does not have a reasonable need for an executive. Counsel cites *National Hand Tool Corp. v. Pasquarell* 889 F.2d 1472 (5th Cir. 1989), *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570 (N.D. Ga. 1988) and an unpublished AAO decision to stand for the proposition that

the statute was not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise.

Counsel's assertions are not persuasive. 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'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.* Furthermore, 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 prove 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).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner's initially provided a job description that generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as "setting corporate policy," "directing management," and "making executive discretionary decisions." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In response to the director's request for a more detailed job description, the petitioner indicated that the beneficiary places orders with suppliers, schedules and inspects food deliveries, arranges for equipment maintenance, arranges waste removal and pest control services, supervises cooks and kitchen helpers, schedules kitchen and dining room staff, resolves customer complaints, and oversees restaurant cleaning and dishwashing activities. These duties, which will require 70 percent of the beneficiary's time, depict an employee engaged in routine, day-to-day purchasing and other routine activities necessary to operate the restaurant, including first-line supervision of kitchen staff. 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).

The petitioner also indicated that the beneficiary would devote 30 of his time to setting corporate policy, directing management, exercising discretionary decision-making and exercising control over the business. Again, this description merely paraphrases the statutory definition of executive capacity and is insufficient to establish that the beneficiary's actual duties are executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Further, the petitioner initially indicated that the president of the company would "assist" the beneficiary in these duties, implying that the beneficiary's position was senior to that of the president. In response to the request for evidence, the petitioner depicted the president as the senior employee in the organization, which suggests that he, rather than the beneficiary, would perform any executive-level duties at the restaurant.

The director concluded that the beneficiary would be a first-line supervisor of non-professional personnel, regardless of his job title of "executive director." A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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: "The 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 the subordinate employee. The possession of a bachelor's degree 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 a bachelor's degree is required to perform the duties of a cook or a kitchen helper. The AAO therefore concurs with the director's determination that the beneficiary will not supervise professional personnel.

Counsel does not specifically refute the director's determination that the beneficiary will be a first-line supervisor of non-professional employees. Instead, counsel re-states the initial description of the beneficiary's duties, which does not include the operational and first-line supervisory duties discussed above. Counsel contends that the director inappropriately based his decision on the size of the petitioning company and the number of staff to be supervised by the beneficiary. Counsel's arguments are not persuasive, as the director did not cite either of these factors as a basis for denial in his decision.

Based on the foregoing discussion, the petitioner has not established that the beneficiary's duties will be primarily managerial or executive in nature. The evidence of record indicates that the preponderance of the beneficiary's time will be allocated to non-qualifying operational and first-line supervisory duties. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. company has a qualifying relationship with the foreign entity.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(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 (I)(1)(ii) of this section;

* * *

- (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.

On the L Classification supplement to Form I-129, the petitioner indicated that it is a subsidiary of the foreign entity. The petitioner stated that the foreign company is 100 percent owned by the beneficiary, and that the petitioner is owned by the foreign entity (51%) [REDACTED] (25%), and [REDACTED] (24%).

In support of the petition, the petitioner provided: (1) its articles of incorporation, indicating that the company is authorized to issue 1,000,000 shares of common stock; (2) minutes of the first organizational meeting of the board of directors dated July 10, 2001; (3) issuance of shares under section 25102(C) which indicates that 10,000 shares were issued to [REDACTED] and [REDACTED] each shareholder receiving 5000 shares, on July 10, 2001; (4) minutes of a meeting of the board of directors dated March 28, 2003, which states that the board of directors resolved to issue 10,000 new shares to the foreign entity for cash consideration; (5) written consent of the petitioner's shareholders to issue 10,000 shares of common stock to the foreign entity, dated March 28, 2003; (6) resolutions adopted by unanimous consent of the board of directors dated July 10, 2003, indicating that [REDACTED] agreed to transfer 200 shares to the foreign entity; (7) written consent of the shareholders dated July 10, 2003, approving the transfer of 200 of her shares of the company to the foreign entity; (8) stock certificate number one for issuance of 5,000 shares of the petitioner's stock to [REDACTED] on July 10, 2001; (9) stock certificate number three for issuance of 10,000 shares of stock to the foreign entity on

March 28, 2003; (10) stock certificate number four for issuance of 200 shares of stock to the foreign entity on July 10, 2003; (11) stock certificate number five for issuance of 4,800 shares of stock to [REDACTED] on July 10, 2003; (12) memorandum of transfer of shares dated July 10, 2003, indicating that [REDACTED] would transfer 200 shares of stock to the foreign entity for the sum of one dollar; and (13) a cashier's check payable to the petitioning company in the amount of \$50,000, the amount purportedly paid by the foreign entity for the petitioner's stock.

The director denied the petition on December 8, 2003, in part determining that there was an inconsistency in the petitioner's evidence of ownership. Specifically, the director stated that one of the documents submitted, the minutes of meeting dated July 10, 2003, shows that the foreign entity only owns 50 percent of the petitioner's stock, as opposed to 51 percent as claimed by the petitioner. The director concluded that there was insufficient evidence to establish that the U.S. entity is a subsidiary of the foreign entity.

On appeal, counsel references the documents submitted with the petition and asserts that the petitioner submitted sufficient evidence to establish that the foreign entity owns 51 percent of the U.S. company.

Counsel's assertions are persuasive. The director noted that the minutes of a July 10, 2003 meeting of the board of directors showed that the foreign entity only owns 50 percent of the U.S. company. It appears that the director is referring to the July 10, 2003 written consent of shareholders. However, since the purpose of this shareholder resolution was to authorize the transfer of additional shares to the foreign entity, the resulting change in stock ownership would not have been reflected in this document. As this perceived inconsistency was the director's sole basis for concluding that the petitioner had not established a qualifying relationship with the foreign entity, the director's finding with respect to this issue only will be withdrawn. The AAO notes that there was no evidence of ineligibility in the petitioner's documentation, and a request for evidence would have been appropriate if the director had concerns regarding the claimed qualifying relationship. *See* 8 C.F.R. § 103.2(b)(8).

Beyond the decision of the director, the record does not contain sufficient evidence that the beneficiary has been employed in a managerial or executive capacity with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(iv). The foreign entity, a sole proprietorship operated by the beneficiary, is a grocery store. Although the organizational chart for the foreign entity shows that the beneficiary supervises a general manager and an assistant general manager who oversees the staff in the store, the description of the beneficiary's duties shows that he performed many non-qualifying operational and first-line supervisory duties. For example, the petitioner states that the beneficiary allocated 50 percent of his time to resolving customer complaints, examining returned goods, installing and removing cash register receipt tape, auditing cash receipts, supervising employees who clean the store, and preparing records and documentation to meet government requirements. The beneficiary was also responsible for supervising, scheduling and training all employees in the store, ordering merchandise, goods and equipment, and inspecting merchandise displays. Many of the beneficiary's daily tasks were routine operational duties that overlapped with those of the other employees in the store and did not fall directly under traditional managerial duties as defined in the statute. 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). In the instant matter, the petitioner has failed to show that these non-

qualifying duties did not constitute the majority of the beneficiary's time. For this additional reason, the petition will 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. 2d 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.