

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

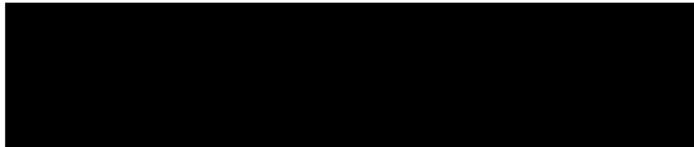
U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

b7

PUBLIC COPY



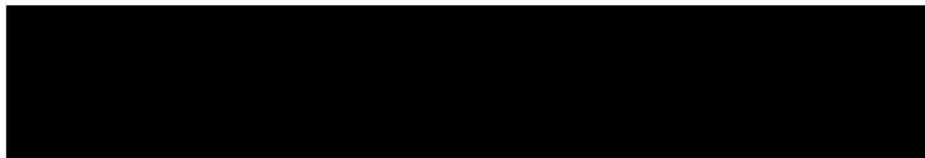
File: SRC 05 048 52352 Office: TEXAS SERVICE CENTER Date: JUL 05 2007

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. Wienmann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 extend the employment of its food manager 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 Georgia that is operating as a Mexican restaurant. The petitioner claims that it is the affiliate of Farmacias de Similares, S.A. de C.V., located in Mexico. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal and motion to reconsider. 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 beneficiary has been and would continue to be employed as an executive and a manager by the petitioner. In support of this assertion, the petitioner submits a brief and additional evidence.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in the present matter is whether the beneficiary would be employed by the United States entity in a primarily 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 letter dated December 8, 2004 accompanying the initial petition, the petitioner states the following with respect to the beneficiary's job duties:

We continue to have the need for a [f]ood [m]anager to ensure that the day-to-day U.S. operations run efficiently, economically, and safely. In this position, [the beneficiary] will continue to hire, fire, pay and supervise all operations personnel. She will continue to manage the training of U.S. personnel to prepare authentic and exotic Mexican dishes and delicacies. She will also continue to manage the hiring and training of U.S. personnel, who will in turn be responsible for the cooking, cleaning, and sales of our products. She will be responsible for inventory build-up and maintenance and will also handle customer service activities. Furthermore, [the beneficiary] will be responsible for overseeing the sanitation of the restaurant to ensure compliance with the Health Department. She will also oversee the preparation of dishes, pricing and taste quality.

On December 21, 2004, the director requested further evidence that the beneficiary is performing in a managerial or executive capacity in the U.S. company. Specifically, the director noted that the employees whom the beneficiary supervises do not appear to be professionals and requested a description of their job duties and educational backgrounds.

In a letter dated January 25, 2005, the petitioner described the beneficiary's employment with the U.S. entity as follows:

[The beneficiary's] temporary employment with [the U.S. entity] will continue to be under the job title of Manager – Food Operations and Vice President. [The beneficiary] owns 50% of the restaurant. In this managerial position, she manages the company and the restaurant's 4 employees. . . . She manages an essential function within the organization – the cooking, inventory, sales and marketing. She contacts media to place advertising in newspapers, radio,

and flyers. She has the authority to hire and fire other employees, as well as authorize vacation leave and bonuses. [The beneficiary] exercises direction over the day-to-day activities for sales, inventory, and operations. As the Vice President of the corporation, [the beneficiary] will continue to work with the President and establish the goals and policies of the restaurant, and exercise decision-making in all aspects of the corporation. She reports directly to the President of the corporation.

Regarding the beneficiary's subordinate employees, the petitioner stated:

[The beneficiary] currently supervises four individuals – 3 chefs and 1 cashier. The three chefs have the responsibilities of preparing the meat, sauces, and vegetables to the restaurant's proprietary recipes. The chefs are responsible for notifying [the beneficiary] of any inventory needs, suggestions, and vacation requests. The cashier is responsible for all accounts receivable due to sales. Two of the chefs have 9 years of schooling, one of the chefs completed 11 years of schooling, the fourth chef holds a bachelor's degree, and the cashier holds a bachelor's degree. All four individuals have been employed with [the U.S. entity] since July 2003.¹

On February 17, 2005, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director determined that the petitioner has not shown that the beneficiary would be supervising a staff of professional, managerial or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director further found that the beneficiary would have to engage in the day-to-day business activities of the company given the current structure of the company. The director also determined that the petitioner has failed to show that the beneficiary would be managing an essential function within the company.

On appeal, counsel for the petitioner contends that the beneficiary's position meets the statutory criteria for executive and managerial capacity. Specifically, counsel states that the beneficiary "manages sales, marketing, inventory, and production, all of which are essential functions within the organization." Counsel also claims that the chef positions are considered "professional" by the Department of Labor. Counsel restates the beneficiary's job duties and asserts that they meet each of the criteria in the definitions of managerial capacity and executive capacity. In addition, counsel indicates that the beneficiary now owns 100% of the U.S. entity and 50% of a new restaurant business called [REDACTED] also located in Atlanta, Georgia. Counsel submits a copy of a stock certificate dated March 18, 2005 indicating that the

¹ It is noted that elsewhere in the record, the petitioner stated that there are only three chefs. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

beneficiary owns "100% shares" of the common stock of the U.S. entity and documentation relating to the formation and ownership of the new restaurant.²

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the job descriptions it submitted, the petitioner claimed that the beneficiary "manages an essential function within the organization – the cooking, inventory, sales and marketing," as well as "handle[s] customer service" and "oversee[s] the sanitation of the restaurant." The evidence shows that the staff of the U.S. entity consists of the beneficiary, three chefs, and a cashier. However, the petitioner clearly indicates that the chefs are solely responsible for food preparation, and the cashier is "responsible for all accounts receivables due to sales," or in other words, receives payments from customers. As such, it would appear there is no one else on the petitioner's staff other than the beneficiary to actually perform the sales, marketing, customer service, sanitation, and inventory procurement and maintenance functions that the beneficiary purportedly manages and oversees. Thus, it appears the beneficiary is performing these functions herself and does not manage or oversee them as claimed by the petitioner. Regardless, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. at 591. Moreover, if the beneficiary actually performs the sales, marketing, customer service, sanitation, and inventory procurement and maintenance functions of the U.S. company, she is performing tasks necessary to provide the company's service or product, and these tasks would not be considered managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the

² The AAO does not find the existence of the new restaurant to have any relevance to the beneficiary's eligibility for L-1A status under the current petition. That restaurant or business was not named as the petitioner in this matter, nor is it a foreign entity having a qualifying relationship with the petitioner in this matter. Moreover, aside from establishing that entity's existence, counsel has provided no evidence to show how the beneficiary's role within that entity might qualify her for L-1A status under the present petition. Furthermore, the petitioner had made no mention of this business previously. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel also appears to claim that the beneficiary qualifies as a "functional manager" since she "manages sales, marketing, inventory, and production, all of which are essential functions within the organization." 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). However, if it is claimed 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. As previously noted, there is insufficient evidence that this beneficiary will manage an essential function of the company rather than directly perform the duties related to functions that may be considered essential to the company. Again, 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. at 604.

Additionally, 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, as required by the statute. *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. 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 the subordinate employee. The petitioner claimed that the cashier and one of the chefs hold bachelor's degrees. However, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that the employee is employed in a professional capacity, as that term is defined above. Counsel claims that the chefs' positions are "professional" positions; however, the petitioner has not, in fact, established that an advanced degree is actually necessary to prepare the restaurant's food, or to carry out the cashier's job. Thus, the evidence does not show that any of the beneficiary's subordinate employees can be considered a "professional." Similarly, there is no evidence that any of the beneficiary's subordinates supervise any other employees or otherwise function in a managerial or supervisory capacity. Because the

beneficiary is primarily supervising employees who are not professional, managerial or supervisory, the beneficiary cannot be deemed to be primarily acting in a managerial capacity. For this additional reason, the petition may not be approved.

Finally, the AAO finds counsel's claim on appeal that the beneficiary's position with the U.S. entity meet the requirements for executive capacity to be without merit. In describing the beneficiary's "executive capacity," counsel merely paraphrases the components of the statutory definition of that term. 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); *Ayvr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Accordingly, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(1)(3).

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

On the Form I-129, the petitioner indicated that the U.S. entity and the foreign entity are affiliates since the same individual, the beneficiary, owns 100% of the foreign entity and 50% of the U.S. entity.³ However, the petitioner did not submit any documentation to support its claim regarding the ownership and control of the

³ The AAO acknowledges that counsel claims on appeal that the beneficiary now owns 100% of the company. Counsel submits a copy of the company's stock certificate number 3, which states that "Rosa Navarrete" owns "100% shares of the common stock" of the U.S. company. However, the stock certificate is dated March 18, 2005, after the petition was filed, and is therefore irrelevant in determining the petitioner's eligibility for the classification sought. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Moreover, even if this evidence was contemporaneous with the petitioner's filing, as discussed *infra*, it is not valid under Georgia law.

foreign entity. With respect to the U.S. entity, the petitioner submitted (1) a copy of stock certificate number 2, undated, indicating that the beneficiary owns "50% shares of the common stock" of the U.S. entity; (2) a copy of a stock investment letter dated March 18, 2003 in connection with the purchase of "50% shares" of the U.S. entity by the beneficiary; and (3) a copy of a consent of shareholders to the transfer of "50% shares" (however, the quality of the copy is such that the date and name of the transferee are illegible). First, various defects in the documents submitted, such as the lack of a date on the share certificate and the references in each document to the beneficiary's ownership of "50% shares" of the company, without indicating the exact number of shares owned or the number of shares of the company issued and outstanding, cause the AAO to question the validity of these documents. Under Georgia law, a share certificate must state upon its face the number and class of shares which such certificate represents. Ga. Code Ann. § 14-2-625(b)(3) (2006). Since the share certificate submitted does not comply with local law and is ambiguous as to what it represents, it does not adequately prove that the beneficiary owns or controls the petitioner. Second, as general evidence of a petitioner's claimed qualifying relationship, these documents are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N at 362. The petitioner has not submitted any of these additional documents. Without full disclosure of all relevant documents, Citizenship and Immigration Services is unable to determine the elements of ownership and control. In light of the above deficiencies in the evidence, the AAO finds the petitioner has failed to establish that there exists a qualifying relationship between the U.S. and foreign entities. For this additional reason, the petition will be denied.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.