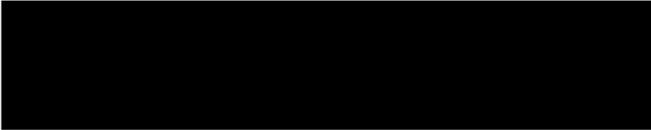


**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



D7

File: WAC 06 008 52438 Office: CALIFORNIA SERVICE CENTER Date: **JUN 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. Wiemann, Chief
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 visa petition seeking to employ the beneficiary as a regional distribution 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 limited liability company organized under the laws of the State of Texas and is allegedly a beer importer and distributor.

The director denied the petition concluding that the petitioner did not establish that it and the foreign employer have a qualifying relationship.

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 to the petitioner asserts that the director erred and that the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. In support, counsel 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 primary issue in the present matter is whether the petitioner has established that it has a qualifying

relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i).

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." An "affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (Comm. 1988); *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.

In this matter, the petitioner, a Texas limited liability company, asserts that it is an "affiliate" of the beneficiary's foreign employer, Cerveceria Cuauhtemoc Moctezuma, S.A. de C.V. ("CCM"). The petitioner asserts that both of these entities are owned and controlled by FEMSA Cerveza, S.A. de C.V. ("FEMSA Cerveza") which, in turn, is owned and controlled by Fomento Economico Mexicano, S.A. de C.V. ("FEMSA"). In support of this assertion, the petitioner submitted a copy of FEMSA's 2004 annual report which identifies FEMSA Cerveza and CCM as subsidiaries, although FEMSA's ownership interest in CCM is not specifically described. The petitioner also submitted a copy of the petitioner's 2000 certificate of organization evidencing its formation as a limited liability company under the laws of the State of Texas and a copy of the petitioner's "Amended and Restated Regulations" dated December 31, 2004. Section 3.1 of the Amended and Restated Regulations identifies FEMSA Cerveza as the sole "initial member" of the petitioner.

On October 21, 2005, the director requested additional evidence. The director requested, *inter alia*, further evidence establishing that the petitioner has a qualifying relationship with the beneficiary's foreign employer. In response, the petitioner referred the director to the evidence submitted with the initial petition, e.g., the annual report and the petitioner's Amended and Restated Regulations.

On December 5, 2005, the director denied the petition. The director concluded that the petitioner did not establish that it and the beneficiary's foreign employer have a qualifying relationship. The director based his denial on the annual report's failure to list the petitioner as a subsidiary or affiliate of FEMSA and the apparent license relationship between the petitioner and Heineken USA, Inc.

On appeal, counsel asserts that the record establishes the requisite qualifying relationship. Counsel argues that the petitioner's relationship with Heineken USA, Inc. is immaterial and does not alter the petitioner's qualifying relationship with the beneficiary's foreign employer. Counsel further argues that Section 3.1 of the petitioner's Amended and Restated Regulations and the 2004 annual report sufficiently establish that the two entities have a qualifying relationship as affiliates. Finally, counsel provided a "secretary's certificate" purporting to confirm that the petitioner's sole owner is FEMSA Cerveza.

Upon review, the petitioner's assertions are not persuasive in establishing that it has a qualifying relationship with the beneficiary's foreign employer.

As explained above, the petitioner is a limited liability company organized under the laws of the State of Texas in 2000. As counsel correctly observes, limited liability companies do not generally issue share certificates like corporations. However, in this matter, the petitioner has failed to provide sufficient evidence establishing the ownership and control of the United States entity under the laws of the state of organization. Texas limited liability companies formed in 2000 are regulated by the Texas Limited Liability Company Act. Tex. Rev. Civ. Stat. Ann. Art. 1528n.¹ This law provides guidance on how to interpret the articles of organization and adopted regulations of a Texas limited liability company as these relate to ownership interests, and how a Texas limited liability company can evidence ownership of interests by members.

Sections 3.02 and 4.01 permit a person to become a member of a limited liability company upon formation and to be identified as an "initial member" in the articles of organization. Tex. Rev. Civ. Stat. Ann. Art. 1528n, §§ 3.02 and 4.01. Section 4.01 also permits members to be added after formation of the limited liability company. *Id.* Furthermore, section 2.22 requires Texas limited liability companies to maintain records including, but not limited to, a list identifying each member by name, address, and percentage of ownership; a written statement of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the date on which each member became a member; and copies of the regulations of the limited liability company, if any. Tex. Rev. Civ. Stat. Ann. Art. 1528n, § 2.22.

In this matter, the only evidence submitted by the petitioner in its attempt to establish its ownership and control was a copy of its Amended and Restated Regulations dated December 31, 2004 which identify FEMSA Cerveza as the sole "initial" member. The record is devoid of any evidence establishing the identity of the current members of the petitioner even though Texas law mandates the creation and maintenance of such documentation. *See id.* Moreover, the "secretary's certificate" submitted on appeal also fails to establish the petitioner's ownership and control. Not only does this certificate fail to comply with Texas law, it purports to attest to the ownership and control of a Texas corporation and not of a Texas limited liability company. The petitioner makes no attempt to explain this fundamental inconsistency in the record. 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). Finally, the annual report fails to specifically described FEMSA Cerveza's ownership interest in CCM thus casting doubt on the petitioner's claim that it is an affiliate of CCM.

¹While the Texas Limited Liability Company Act was substantially amended in 2005, and was made effective in 2006, these revisions do not generally affect limited liability companies formed in 2000, such as the petitioner. The petitioner, therefore, is still regulated by the Act as it appeared in 2000. Tex. Bus. Org. Code Ann. Chapter 101.

Accordingly, as the petitioner has failed to provide any evidence of its current ownership and control, the petition may not be approved.²

Beyond the decision of the director, as the petitioner has also failed to establish that the foreign entity is currently "doing business" as defined by the regulations, the petitioner has failed to establish that it has a qualifying relationship with the beneficiary's foreign employer for this additional reason.

On October 21, 2005, the director requested additional evidence regarding the current business operations of the beneficiary's foreign employer. Specifically, the director requested photographs of the foreign employer's business premises, merchandise, products, and employees. The director also requested addresses, directions, and telephone numbers for each of the foreign employer's facilities.

In response, however, the petitioner stated the following on page 3 of the letter dated November 21, 2005:

As its annual report thoroughly details, FEMSA is a multi-billion-dollar company that does business globally. The USCIS's request for photographs of FEMSA's operations therefore is superfluous.

In view of the petitioner's refusal to comply with the director's request for evidence, the petition must also be denied because the petitioner's failure to provide this evidence precluded a material line of inquiry into the current business operations of the foreign employer. As explained in 8 C.F.R. § 103.2(b)(8), a petitioner's refusal to provide the requested evidence amounts to a request for a decision on the record. However, 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). The director's request for photographic evidence confirming the existence and current operations of the beneficiary's foreign employer, Cerveceria Cuauhtemoc Moctezuma, S.A. de C.V., is entirely appropriate in this case. *See* 8 C.F.R. § 214.2(l)(3)(viii). FEMSA's 2004 annual report, which happens to list the beneficiary's employer as a subsidiary of FEMSA Cerveza, does not establish that this subsidiary is currently engaged in the regular, systematic, and continuous provision of a good or service. As this is an essential element of establishing the existence of a qualifying relationship, and the petitioner has failed to carry its burden of proof, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be employed in the United States in a managerial or executive capacity.

²It is noted that the director also concluded in his decision that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer because (1) the 2004 annual report for FEMSA fails to list the petitioner as a subsidiary or affiliate; and (2) the petitioner has a license agreement with Heineken USA, Inc. Upon review, the AAO will withdraw these determinations even though it will dismiss the appeal for the reasons set forth above. The petitioner's absence from the annual report is of no consequence since the report identifies both FEMSA Cerveza and CCM as subsidiaries and implies that there may be additional subsidiaries which are unnamed in the report; however, as explained above, the annual report does not reveal the magnitude of FEMSA's, or FEMSA Cerveza's, ownership interest in CCM. Moreover, upon review of the license agreement, the petitioner's relationship with Heineken USA, Inc. does not appear to affect the petitioner's ownership and control. It is therefore irrelevant to these proceedings.

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.

While the petitioner is claiming that the beneficiary will be employed in a managerial capacity, it does not clearly state that it is not alternatively seeking to classify the beneficiary as an executive. Therefore, the AAO will consider the petition as one seeking to classify the beneficiary as a manager or, in the alternative, as an executive and will consider both classifications.

The petitioner described the beneficiary's proposed job duties in letters dated October 6, 2005 and November 21, 2005. As these job descriptions are clearly delineated in the record, the descriptions will not be reproduced here. Generally, the beneficiary is described in both the letters and in an attached organizational chart as having no supervisory responsibilities over other employees as he will be the petitioner's only employee in California. Rather, the beneficiary is described as "managing local markets, safeguarding equity of [the foreign entity's] brands, and implementing the annual marketing plan for the region." More

specifically, the beneficiary is described as developing and managing the annual marketing plan; providing market information; managing spending; guiding and directing the marketing budget; making sales calls; communicating with wholesalers; training; engaging in market research; and supporting and complimenting advertising and promotional activities.

Upon review, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. A majority of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. Marketing and sales duties are not managerial in nature when the tasks inherent to these duties are performed by the beneficiary. As the record is devoid of any evidence that subordinate employees will relieve the beneficiary, the petitioner's only employee in California, of the need to perform these non-qualifying tasks, it must be concluded that he will perform these tasks. 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 Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or that he will manage an essential function of the organization. As explained above, the beneficiary has been ascribed no supervisory or managerial authority over other employees. He will be the petitioner's only employee in California. Therefore, he is clearly not supervising other supervisory, managerial, or professional employees.

Moreover, the record does not establish that the beneficiary will manage an essential function of 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function because, as explained above, it appears that the beneficiary will perform the tasks related to the function rather than manage the function.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than

