U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 078 50025 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

PUBLIC COPY

SELF-REPRESENTED

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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established October 12, 2000, and claims to be an Argentinean Restaurant. The petitioner claims to have a subsidiary relationship with Angela Maria Orsini, located in Buenos Aires, Argentina. It claims three employees and $100,000.00 in gross annual income. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager for a period of three years, at a yearly salary of $24,000.00.

The director determined that the evidence of record was insufficient to establish that (1) the beneficiary had been or would be employed primarily in a managerial or executive capacity; (2) the U.S. entity has been doing business for the year preceding the filing of the petition; and (3) a qualifying relationship exists between the U.S. and foreign entities;

On appeal, counsel disagrees with the director's decision and states that the evidence is sufficient to demonstrate that the beneficiary has been and will be employed primarily in a managerial or executive capacity; that the U.S. entity has been doing business; and that a parent-subsidiary relationship exists between the U.S. and foreign entities.

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.

(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) states that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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.

The first issue to be addressed 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.

On appeal, the petitioner asserts, "A negligent and unprofessional performance of my representatives was the principal cause of the failure of the petition." Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In the instant matter, the petitioner has failed to submit an affidavit in support of its claim, evidence confirming that counsel has been notified of the incompentency claim, or evidence demonstrating that a complaint, based upon the allegations, has been filed with the appropriate disciplinary authorities. To the extent that the petitioner has failed to produce evidence sufficient to substantiate its ineffective assistance of counsel claim, the AAO will review the record applying standard statutory and regulatory eligibility requirements and burdens of proof.

The petitioner stated in the petition that the beneficiary would continue to serve the U.S. entity as a general manager in charge of all aspects of the administration of the company. In a letter of support dated December 14, 2001, the petitioner described the beneficiary's duties to include the administration and management of the finance and marketing aspects of the U.S. Company, and the hiring and training of personnel.

In response to the director's request for additional evidence, the petitioner stated that the beneficiary has been in charge of hiring and supervising employees, buying goods, signing contracts, paying taxes, and obtaining business licenses.

The director determined that the evidence was insufficient to establish that the beneficiary's duties had been or would be primarily managerial or executive in nature. The director also noted the inconsistencies contained in the U.S. entities tax records pertaining to salaries and wages paid by the company in 2001.

On appeal, the self-petitioner asserts that he is responsible for finances, allocation of company resources, personnel, purchasing, and marketing. The self-petitioner contends that his wife performs the non-qualifying duties of the entity. The self-petitioner also contends that he has the authority to hire and fire personnel, exercises wide discretionary decision making authority, and answers to no one in making executive and managerial decisions.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed primarily in a managerial or executive capacity. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include the administration and management of the finance and marketing aspects of the U.S. Company. The petitioner did not, however, define what the administration and management of the U.S. entity's finance and marketing departments would entail. 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). 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).

Furthermore, 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 or executive, 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 marketing, sales, and distribution, 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 manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

As noted above, the petitioner has failed to overcome the director's objections with regard to the multiple inconsistencies found in the amount of salaries and wages paid to the U.S. entity employees during 2001. 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). The petitioner notes that due to an economic down-turn, its restaurant has had to reduce the number of employees, cut back in salaries paid, and hire the beneficiary's wife to perform non-qualifying duties. In part, evidence that a petitioner employs subordinate staff members is typically reviewed to establish whether a beneficiary has been or will be employed as a supervisor in a managerial executive capacity. In the instant matter, the beneficiary's wife appears to be the only employee subordinate to the beneficiary. As the beneficiary's wife's exact duties and level of responsibility have not been articulated by the petitioner, it cannot be determined whether she relieves the beneficiary from performing day-to-day

operations of the petitioner such that the beneficiary is primarily engaged in managerial or executive tasks. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The evidence of record fails to establish that the beneficiary has and will be able to spend the majority of his time performing managerial or executive duties.

The second issue to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it has been doing business for one year preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(14)(ii)(B) .

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

> *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In the instant case, the petition was filed January 8, 2002; therefore the evidence must show that the petitioner had been doing business for the period covering January 2001 through January 2002. The petitioner submitted a copy of a business license issued by the state of California to the petitioner, doing business as The Court Jester. The petitioner submitted invoices and bills of sale issued by "The Court Jester." However, the petitioner also submitted copies of company Articles of Incorporation, By-Laws, stock certificates, corporate income tax returns, and financial statements in the name of [redacted] On the other hand, the petitioner submitted copies of company bank statements and business license in the names of "The [redacted] and "The Court Jester." Again, 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, supra.* Furthermore, 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, id.* In the instant case, the petitioner has failed to submit evidence to establish that [redacted] has been doing business; that is the regular, systematic, and continuous provision of goods and/or services. In addition, there is no evidence to demonstrate the relation between The Court Jester and any foreign entity. The petitioner has not submitted sufficient evidence to establish that it has been doing business for the previous year. Therefore, the director's decision with respect to this issue will be affirmed.

The final issue to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish 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.

In the initial petition, the petitioner claimed that it is a wholly-owned subsidiary of the sole proprietorship, [redacted] located in Argentina. However, as noted by the director, the petitioner's tax returns demonstrate that the beneficiary himself owns 100 percent of the petitioning corporation. On appeal, the petitioner submits a letter from an accountant, which states that the information on the tax return was a "typographical error."

The petitioner's evidence is not persuasive. In the instant case, the petitioner is obligated to clarify the inconsistent and conflicting evidence by independent and objective evidence. The accountant's statement on appeal raises serious questions regarding the truth of the facts asserted. Cf. *Matter of Bueno,* 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma,* 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Merely asserting that the reported corporate income tax return contained inaccurate information does not qualify as independent and objective evidence. 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). Furthermore, evidence that is created by the petitioner after 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. The petitioner has failed to overcome the objections raised by the director. For this additional reason, the appeal will be dismissed.

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.