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File: WAC 04 027 51599 Office: CALIFORNIA SERVICE CENTER Date: **APR 24 2006**

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 petition seeking to extend the employment of its CEO and managing director 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 Peruvian specialty restaurant. The petitioner claims that it is the affiliate of [REDACTED], located in Mollendo, Peru. 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 for an additional two years.

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

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 erred in determining that the beneficiary was not acting as a manager or executive. Counsel argues that by virtue of his position as the petitioner's CEO his duties are at the managerial and executive level, particularly since the duties of the beneficiary involve significant authority over the generalized policy of the organization and since substantially all of his duties are managerial or executive.

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.

The issue in the present matter is whether the beneficiary will 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 October 27, 2003, the petitioner stated that currently, the beneficiary was actively pursuing other locations and continued to be in the process of marketing and promoting the first restaurant location it had recently opened for the petitioner. With regard to his duties, the petitioner described them as follows:

[The beneficiary] will give instruction and direction to managers as regards to operations and development methods and strategies. [The beneficiary] has full authority to hire and fire all employees of the business, [sic] he will when required oversee training programs as performed by the general manager.

On March 17, 2004, the director requested additional evidence. Specifically, the director requested an organizational chart for the U.S. and foreign entities, the petitioner's quarterly tax returns and payroll summaries, a statement of the petitioner's staffing level, the titles, duties, and educational levels of all the petitioner's employees, and finally, a more detailed description of the beneficiary's duties.

In a response dated June 8, 2004, the petitioner submitted quarterly wage reports for the last quarter of 2002, all of 2003, and the first quarter of 2004. Each report indicated that the beneficiary received wages, and each report included a different combination of employees in addition to the beneficiary. During the quarter ending December 31, 2003, during which the extension request was filed, the documentation indicated that the petitioner employed the beneficiary, a store manager, and two other employees in unidentified positions.

Additionally, the petitioner provided an organizational chart for the U.S. entity which indicated that the beneficiary oversaw five employees, namely:

 Accountant/Bookkeeper

[REDACTED], Store Manager  
[REDACTED], Chef  
[REDACTED], Chef  
[REDACTED], Restaurant Worker

Finally, the petitioner provided the following updated description of the beneficiary's duties:

Assign daily tasks to Store Manager. Ensure that all tasks are completed in a timely fashion by the management team and staff. (5% of time)

Weekly management meeting; Create and discuss restaurant policy, financial status and sales projections, promotional plans, customer satisfaction level, and other operational concerns. (15% of time)

Review weekly sales audits as prepared by accountant. (10% of time)

Review summary of company purchases with manager via tradebills, purchase orders, and inventories. (5% of time)

Review the cost analysis on weekly purchases as prepared by Store Manager. (10% of time) Order changes and expenditures as needed.

Establishing rapport with executives of suppliers and conduct warehouse visitation and sales meetings. Negotiating and Entering contracts with suppliers. (25% of time)

Discuss and Monitor quality control of products and facility with the restaurant manager. (5% of time)

Research other states for possible [petitioner]'s locations, currently looking at Miami, Los Angeles, and Tennessee. (10% of time)

Supervise payments of taxes and other financial obligations. (5% of time)

Supervise monthly audits of deposits and payments made. (10% of time)

On June 24, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director noted that the evidence provided in support of the extension did not support a finding that the petitioner's business required the services of a manager or executive and concluded that, based on the record, the beneficiary was not operating in a capacity that was *primarily* managerial or executive.

On appeal, counsel for the petitioner restates the relevant portions of the definitions of both managerial and executive capacity, and claims that the beneficiary performs the stated duties of both capacities. Counsel

challenges the director's conclusion that the beneficiary's duties were described in only broad and general terms, and claims that the description of duties provided was thorough, accurate, and adequately described the nature of the beneficiary's position in the United States. Counsel further states that as of the filing of the appeal, the petitioner now employs seven employees and that the U.S. business is prospering.

Upon review, 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.* The petitioner, however, does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Instead, counsel merely claims that the beneficiary's duties are managerial *or* executive, which appears to be requesting consideration of both classifications in the event that the beneficiary's duties fail to meet the requirements of one of the definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The definitions of executive and managerial capacity have two main 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).

The description of the beneficiary's duties provided in the petitioner's initial letter of support was extremely generalized and at times seemed to paraphrase the regulatory definitions. For example, descriptions such as "full authority to hire and fire all employees" and "oversee training programs" do little to clarify what the beneficiary does on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *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).

In response to the request for evidence, the petitioner submitted a more detailed description of the beneficiary's duties, which included a breakdown of the percentage of time devoted to each stated duty. Specifically, counsel indicates that 25% of the beneficiary's time is spent negotiating contracts and building a rapport with clients. Other major duties include the weekly management meeting (15%), review of weekly sales audits (10%), review of cost analysis (10%), researching potential markets in other states for expansion (10%), and supervising monthly audits of deposits and payment (10%). Taken together, these duties compile 80% of the beneficiary's time.

On appeal, it is noted that counsel submits a newly-updated description of the beneficiary's duties, which includes new percentage breakdowns of the time the beneficiary allegedly devotes to each of these

newly-identified tasks. This evidence, however, will not be considered. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Although the AAO notes that the petitioner's business has been expanding since the filing of the extension request, the relevant evidence for purposes of this discussion is the nature of the beneficiary's position at the time of filing, and not during the present time frame.

Therefore, while the petitioner's more specific description of duties provided in response to the request for evidence is helpful to clarify the nature of an average workday for the beneficiary, it presents additional problems, because traditionally, negotiating contracts and reviewing financial figures do not fall directly under traditional managerial or executive duties as defined in the statute. Rather, these duties are essential to the viability of the petitioner's business. 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).

Furthermore, the nature of the petitioner's staffing levels and hierarchical structure is unclear based on the evidence provided. In response to the request for evidence, the petitioner submitted an organizational chart indicating that the beneficiary oversees an accountant, a store manager, two chefs, and a restaurant worker. The quarterly tax return submitted for the period in which the extension request was filed, however, does not list the same employees as being on the petitioner's payroll at that time. The quarterly return for the quarter ending December 31, 2003 indicates that the petitioner employed the beneficiary, the store manager identified in the organizational chart, and two other employees whose position titles, education, and duties are not known. The AAO notes that after review of all quarterly tax returns, the current staff of subordinates, excluding the store manager, does not appear to have worked for the petitioner until at least April of 2004, which is five months after the petition's filing date. 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).

Therefore, the record reflects that at the time of filing, the petitioner employed the beneficiary, the store manager, [REDACTED] and two other general employees: [REDACTED] and [REDACTED]. No information regarding the position titles, duties, or educational levels was provided for these two employees. In addition, no information regarding the duties of Mr. [REDACTED] was provided other than his position title. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the beneficiary's subordinates, and further did not provide the requested details regarding their

positions. Any 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). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the small number of subordinates, whose positions and duties are not readily identified, it appears that the beneficiary is not primarily engaged in managerial or executive tasks. Specifically, there are a multitude of non-qualifying duties associated with the maintenance and expansion of the petitioner's restaurant, none of which have been clearly delegated to a staff of subordinates. Absent evidence to the contrary, therefore, it must be concluded the beneficiary is heavily engaged in these non-qualifying duties. As noted by counsel on appeal, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

In this matter, the petitioner indicates that it took seven months to obtain necessary permits and begin operating the business, but that the petitioner's business is now successfully expanding and slowly exiting its growth phase. While counsel for the petitioner alleges on appeal that the petitioner had since hired additional employees for a total of seven, including the beneficiary, this allegation is irrelevant. 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).

The record, therefore, is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future and further expand the business. However, as noted above, 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. *Id.* Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. Counsel continually alleges that the petitioner is still in a start-up phase and therefore should be treated accordingly. If the business is not sufficiently operational after one year, however, the petitioner is ineligible by regulation for an extension. In the instant matter, the

petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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

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.

Beyond the decision of the director, the petitioner has provided insufficient evidence to establish that a qualifying relationship exists between the petitioner and the foreign entity. 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 (BIA 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 claims that an individual, namely, Rosario Katherine Chirinos Laguna, owns 100% of both the petitioner and the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. The director requested evidence establishing the ownership of the foreign entity in the request for evidence in the form of an annual report. The petitioner responded by stating that because the foreign entity is a sole proprietorship, it was not required to file such a report, and therefore omitted any documentary evidence establishing the ownership structure of the foreign entity. Without clear evidence of the ownership structure of that entity, the AAO cannot determine that the petitioner and foreign entity are affiliates. For this additional reason, the petition may 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).

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**ORDER:** The appeal is dismissed.