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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: SRC 04 008 51367 Office: TEXAS SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner:
Beneficiary: [redacted]

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 BENEFICIARY:

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, 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 employ the beneficiary in the position of human resources manager and administrative officer to open a new office in the United States 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, a corporation organized under the laws of the State of Florida, describes its business in the United States as training and consultancy in gastronomy.[1]

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

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, the petitioner asserts that the petitioner will hire additional employees during its first year in operation and that these employees will provide consulting services to clients. The petitioner further argues that the beneficiary will manage the "service rendering" activities of the petitioner.

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.

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[1]According to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on October 1, 2004. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. *See* Fla. Stat. 607.1421 (2006). Therefore, if the appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

(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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The primary issue in this matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner described its proposed United States operation and the beneficiary's role in a letter dated September 30, 2003 as follows:

> [T]he management of [the foreign employer] decided the expanding of the business in the United States, opening a new subsidiary in Miami, Florida, having as a main object of activity – training and consultancy in gastronomy. The purpose of the US company is to expand the area of services that [the foreign employer] can offer to their clients. Consultancy in gastronomy consists in assistance, explanation and application of scientific and engineering principles found through research, development, production technology, quality control, packaging, processing, and utilization of food.
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> [The beneficiary] will develop the training strategy and the gastronomical consultancy methods.
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> [The beneficiary] will be in charge of making the contracts in this area, contract businesses involved in food industry with direct access to the customer, such as restaurants, pubs, coffee shops, bakeries to train their personnel and offer advice on gastronomical matters. Later this year, she plans to bring some employees from Argentina to help her extend the activity in Florida. In addition she will hire some workers in Miami to help do the work. Ultimately, [the beneficiary's] focus will be on the Human Resources Management and Training and Gastronomical Assistance, as her professional background shows. But she will bring experts from Argentina and hire American employees to manage the entire work.

The petitioner also submitted a proposed organizational chart showing the beneficiary eventually supervising a trainer/teacher who is described as "[t]he person in charge of dictating courses."

The petitioner did not submit a business plan, hiring timeline, or information regarding an investment in the United States operation, if any.

On December 5, 2003, the director requested additional evidence. The director requested, *inter alia*, evidence regarding the funding of the United States operation by the foreign employer and an explanation regarding the petitioner's need of managerial employees.

In response, the petitioner submitted a letter dated February 16, 2004, along with a list of the beneficiary's proposed responsibilities, which collectively indicate that over 75% of the beneficiary's time will be devoted to providing consultancy and other services to the petitioner's prospective clients. The petitioner asserts that the beneficiary will devote less than 25% of her time to managing the petitioner. Conversely, the general manager is described as devoting most of his time managing the petitioner.

The petitioner also submitted a document titled "Strategic and Tactical Business Plan" which vaguely outlines the proposed United States operation. The plan does not indicate who, other than the beneficiary, will provide the consulting services outlined in the list of responsibilities attached to the February 16, 2004 letter. The plan also fails to identify a single prospective client or competitor of the petitioner. While the plan repeatedly references "exhaustive studies" and "extensive research and investigation" regarding the restaurant

consultancy market, the petitioner failed to support its plan with any data from these studies. Finally, the petitioner attached a statement indicating that the beneficiary and the general manager will be paid a total of $57,156.00 and projected profit and loss statements for 2004, 2005, and 2006 which all show the petitioner paying no more than $57,156.00 in salaries in each of these years. Consequently, the plan indicates that the petitioner does not anticipate hiring any additional employees, which is inconsistent with the petitioner's assertion in the letter dated September 30, 2003 quoted above.

In response to the director's inquiry regarding the funding of the United States operation, the petitioner submitted a bank statement indicating that $9,500.00 had been wired to the beneficiary, individually, on August 22, 2003. The source of these funds was not disclosed. The petitioner also submitted a letter from the foreign entity indicating that it intends on investing $20,000.00 once "the corresponding permissions" are obtained by the petitioner. Therefore, as of the date of the filing of the petition, this investment had not been made. The business plan projects approximately $80,000.00 in operating expenses in the first year of operation.

On March 29, 2004, the director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

On appeal, the petitioner asserts that the petitioner will hire additional employees during its first year in operation and that these employees will provide consulting services to clients. The petitioner further argues that the beneficiary will manage the "service rendering" activities of the petitioner.

Upon review, the petitioner's assertions are not persuasive.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and

> pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

For several reasons, the petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. First, the record indicates that the beneficiary will spend 75% of her time providing consulting services to clients after the petitioner's first year in operation. 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. 593, 604 (Comm. 1988). Therefore, the petitioner's description of the beneficiary's prospective duties fails to establish that she will be primarily performing qualifying duties.

Furthermore, the record indicates that the petitioner does not plan on hiring any additional employees who will relieve the beneficiary of the need to perform these non-qualifying consulting services after the petitioner's first year in operation. While the petitioner asserts in the petition and on appeal that it will hire more employees, the petitioner offers no specific hiring plan and, importantly, the petitioner's projected profit and loss statements confirm that the petitioner has no plans to hire additional employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

Second, the petitioner has failed to sufficiently describe the scope or nature of the United States operation. As indicated above, the petitioner submitted a vague business plan which fails to identify a single prospective client or competitor. The only evidence in the record regarding potential customers was submitted by the petitioner on appeal. However, these letters of intent from potential customers were all dated after the director denied the petition. 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). Also,

while the business plan repeatedly references to "exhaustive studies" and "extensive research and investigation" regarding the restaurant consultancy market, the petitioner failed to support its plan with any data from these studies. Consequently, the petitioner's projection of $128,000.00 in revenue during its first year in operation was not supported by any data or specific information regarding pricing, customers, or competitors. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Third, the petitioner has failed to establish that a sufficient investment has been made in the United States operation. As indicated above, the petitioner submitted evidence that $9,500.00 had been wired to the beneficiary, individually, on August 22, 2003. As a threshold matter, this petitioner has not established that this is an investment in the United States operation. To the contrary, it appears to be a financial transaction involving the beneficiary personally and it has not been linked by any evidence to the petitioner's business activities. Regardless, in view of the petitioner's projected first year expenses of approximately $80,000.00, and its failure to establish that it will begin generating revenue immediately upon commencing operations, an investment of $9,500.00 would be insufficient under the circumstances. Furthermore, the foreign entity's statement that it would invest $20,000.00 in the United States operation after the visa is issued is without evidentiary value. As indicated 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. In any event, even an additional $20,000.00 investment would be insufficient given the expense projections when coupled with the petitioner's failure to establish that it will be able to begin generating revenue in the foreseeable future.

Accordingly, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

Title 8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner establish that the "beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation."

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.

A petitioner must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one *or* the other capacity. A petitioner may not claim that a beneficiary has been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given that the petitioner does not specify whether the beneficiary has been employed as an executive or a manager, the AAO will consider both classifications.

The record as a whole indicates that the foreign entity is in the business of operating a bar and restaurant in Argentina. The petitioner described the beneficiary's duties abroad as "human resources manager and administrative officer" in a letter dated September 30, 2003 as follows:

- design, plan, and implement human resources programs and policies including staffing, compensation, benefits
- manage employee relations and conflicts
- run training program
- design and implement health and safety programs

- supervise the services rendered to the customers
- analyze and supervise sales
- choose the suppliers and supervise the relations with them.

The petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary directly supervising the cashiers, a bartender, and a "human resources supervisor" who, in turn, is portrayed as supervising the wait staff. However, the petitioner did not explain how much time the beneficiary devoted to her various duties, such as supervising the cashiers and bartender, nor did the petitioner describe the job duties of the "human resources supervisors."

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.*

In this matter, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary acted in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner states that the beneficiary ran the "training program" as well as designed and implemented the "health and safety programs." However, the petitioner did not explain what, exactly, the beneficiary did in accomplishing these tasks. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary was actually performing managerial duties. 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). 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.

Likewise, the petitioner did not provide a breakdown of how much time the beneficiary devoted to the many duties ascribed to her. This is particularly important in this matter because many of the duties listed by the petitioner appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary designed, planned, and implemented "human resources programs and policies" and "choose the suppliers." However, such duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart fails to identify any employees who could have relieved the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that she performed these tasks. The subordinate employees are either not described or are clearly engaged in providing services directly to restaurant customers, and consequently not writing or implementing policies. As the petitioner has not established how much time the beneficiary devoted to non-qualifying tasks, it cannot be confirmed that she was "primarily" employed as a manager. 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the organizational chart, the beneficiary appears to have supervised a variety of restaurant workers. However, the petitioner has not established that any of these employees, including the "human resources supervisor," was primarily engaged in performing supervisory or managerial duties. Not only did the petitioner fail to provide any job description for the "human resources supervisor," it is more likely than not that all of the supervised employees were performing the tasks necessary to produce a product or to provide a service in the operation of the restaurant. In view of the above, the beneficiary would appear to have been primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not reveal the skill level or educational background of the subordinate employees, the petitioner has not established that the beneficiary managed professional employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted 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 the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, the beneficiary appears to have been primarily employed as a first-line supervisor and/or was performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary has been employed abroad in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this reason.

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 it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 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 appeal will be dismissed.

ORDER: The appeal is dismissed.