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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

D7

[redacted]

File: SRC 05 235 51872 Office: TEXAS SERVICE CENTER Date: SEP 18 2007

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)

IN BEHALF OF PETITIONER:

[redacted]

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 appeal will be dismissed.

The petitioner seeks to extend the temporary employment of the beneficiary as its general manager 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 in the state of Florida, claims to operate a restaurant under the name of "Big Pete's Pizzeria." It also claims to be the subsidiary of [redacted] located in Penang, Malaysia. The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the director erred by concluding that the beneficiary was not employed in a qualifying capacity. Specifically, counsel for the petitioner asserts that, despite its small size, the petitioning entity does in fact employ the beneficiary in a primarily managerial capacity. Counsel further asserts that the beneficiary's duties also comply with regulatory definition of executive capacity.

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) 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 primary issue in this 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.

The nonimmigrant petition was filed on August 25, 2005. The petitioner indicated on Form I-129 that it has three employees. In a letter dated August 18, 2005, former counsel for the petitioner explained that the petitioner employed three full-time employees and one part-time employee in addition to the beneficiary. Specifically, they were identified as follows:

Waitress
Chef
Waiter/Clean-Up/Delivery Person
Clean-Up/Kitchen Help (Part-Time)

With regard to the beneficiary's duties, counsel stated:

> [The beneficiary] manages these employees and primarily oversees the quality control, financial, supply monitoring aspects of the store. He checks on and creates new menu additions, conducts business to business communication (between suppliers/store signage/accountants/lawyers) and generally manages the location day-to-day. [The beneficiary] also helps with the cooking and ingredient selection. He also negotiates vending contracts with large institutions. . . .

Finally, the petitioner submitted its Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return for 2004, demonstrating that the beneficiary was the petitioner's only employee during this period.

On November 23, 2005, the director requested additional evidence with regard to the beneficiary's managerial and/or executive capacity. Specifically, the director requested an organizational chart for the U.S. and the foreign entity including all employee names and position titles. The director also requested the petitioner's quarterly tax returns for 2004 and 2005 as well as its payroll register. Finally, the director requested a statement explaining how the beneficiary would not engage in the day-to-day tasks of the business, as well as evidence that he is managing a staff of managerial or professional employees.

In a response dated February 2, 2006, the petitioner, through counsel, submitted a response to the director's request. With regard to the beneficiary's duties, counsel stated that the beneficiary was employed in a primarily managerial capacity, and that his duties required him to supervise a subordinate staff. Counsel alternatively claimed that the beneficiary was acting as a function manager. Specifically, counsel claimed:

> Our office wishes to clarify that the Beneficiary will not be engaged in the day to day operations of the business, and that he will primarily be engaged in managerial duties as well as managing an essential function of the restaurant. These managerial duties include the supervision, training, hiring firing of the other managers in the establishment, namely the vice president: Nagarajan, the kitchen manager: [redacted] and the sales manager: [redacted] The beneficiary will also be in charge of staff meetings, meetings with the company accountant to review accounts & balances, the review of new marketing plans and sales strategies in conjunction with [redacted] creation of new business tactics and stratagems, scouting for new locations for an expansion of the business, and general direction and development of the enterprise.

In addition, counsel stated:

> Beneficiary also oversees the quality control, staff meetings, financials, advertising & promotional overview and supply monitoring aspects of the store. He checks on menu additions, conducts business to business communication (between suppliers/store signage/accountants/lawyers) and generally manages the location day-to-day. These activities comprise 75% of his time. These are specialized duties which can only be carried out by a qualified functional manager.

The petitioner also submitted an organizational chart. The chart listed five employees under the beneficiary: Nagarajan, Vice President; [redacted] Kitchen Manager; [redacted] Sales Manager; [redacted] Cook; and [redacted] Cashier. In addition, a list of their work schedules was provided, which provided that each employee worked either from 10-4 pm or 11-4 pm Monday through Friday. The petitioner also submitted its Florida Forms UCT-6, Employer's Quarterly Report, for the first 3 quarters of 2005, which indicated wages paid to the beneficiary and all other employees except for the vice president. All four of the beneficiary's subordinates earned a monthly salary of $600 for the first nine months of 2005, based on the quarterly reports.

On June 22, 2006 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that although the petitioner claimed that the beneficiary oversaw the employees listed on the organizational chart, there was no evidence to suggest that these employees were in turn managerial employees.

On appeal, newly-appointed counsel for the petitioner argues that the director's focus on the small size of the petitioner's staff in concluding that the beneficiary was not overseeing a subordinate staff of managers was erroneous. In addition, counsel claims for the first time that the beneficiary is also an executive, thereby qualifying under the regulatory definition of executive capacity. The petitioner submits a new organizational chart and copies of IRS Form W-2 for 2005 in support of the appeal.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the current structure of the petitioner's enterprise, it appears that the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive.

While the beneficiary is the intended general manager of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment. 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). In this case, the petitioner fails to sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. While the AAO notes that in response to the request for evidence the petitioner claimed that 75% of the beneficiary's time is spent performing his duties as a general manager, many of the identified duties, such as "check[ing] on menu additions," "negotiate[ing] vending contracts with large institutions," and "help[ing] with the cooking and ingredient selection," are not traditionally considered managerial or executive duties. For this reason, the AAO cannot determine, despite the petitioner's whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Since this description of the beneficiary's duties, which includes both managerial and administrative or operational tasks, fails to quantify the exact amount of time the beneficiary spends on them, the AAO cannot determine what an average day or week consists of for the beneficiary. In addition, the fact that the record contains numerous discrepancies regarding the beneficiary's alleged subordinate employees makes it difficult to determine whether the beneficiary is relieved from performing non-qualifying duties associated with operating a restaurant.

The initial letter of support, dated August 18, 2005, stated that the petitioner employed the following persons: [redacted] Waitress; [redacted] Chef; [redacted] Waiter/Clean-Up/Delivery Person; and [redacted] Clean-Up/Kitchen Help (Part-Time). In response to the request for evidence, however, the petitioner provided a completely different list of employees, which was corroborated by payroll records.[1] In addition, the quarterly reports and Form W-2 on record indicate that all employees earned , Furthermore, the petitioner initially claimed on Form I-129 that it employed three persons, in contrast to its letter of support. The petitioner has not explained or acknowledged these inconsistencies. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a

[1] It is further noted for the record that the petitioner's quarterly reports for the first three quarters of 2005 indicate that all of the beneficiary's subordinates consistently earned $1,800 per quarter. However, the W-2 forms for these employees for 2005 indicate that these employees earned a total of $12,000 for the year. Assuming the W-2 forms are correct, it stands to reason that each of these employees must have earned $6,600 in the fourth quarter of 2005. This unexplained inconsistency raises questions with regard to the validity of the petitioner's claims, particularly since the petitioner omitted the quarterly report for the fourth quarter of 2005. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Despite this unexplained inconsistency, the record contains sufficient evidence to show that the petitioner employs the following persons: [redacted], Kitchen Manager; [redacted] Sales Manager; [redacted] Cook; and [redacted] According to the employee schedule, each person works five days a week for five or six hours per day, from 10 or 11 a.m. until 4 p.m. According to the payroll records, each employee earns $1,800 per quarter, or $600 per month. It is noted that the sales manager and kitchen manager earn the same wages as the cook and the cashier. 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.

The petitioner did not provide the level of education required to perform the duties of its subordinate employees; thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that any of 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. Although the organizational chart indicates that the kitchen manager oversees the cook, and the sales manager oversees the cashier, there is insufficient evidence in the record to support this contention. No position descriptions for the cook and cashier are provided, and the fact that all employees earn the same compensation suggests that all employees are working on the same level. Without further evidence to support a structured hierarchy, it cannot be determined whether these employees are supervisors or managers. 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)). 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.

More importantly, although not addressed by the director, is the fact that the employment structure set forth by the petitioner is not credible. It has been noted in the record that there are only five employees working at the restaurant, each of whom allegedly end work at 4:00 p.m. each day, and that the beneficiary maintains a full-time position. Although the initial letter of support identified a waitress and delivery person, the updated organizational chart does not mention any such persons working for the petitioner. Most importantly, however, is the petitioner's menu and advertisement submitted in support of the petition, which indicates that its restaurant is open from 11:00 a.m. until 11:00 p.m. Monday through Friday. This advertisement also indicates that it offers delivery services. Considering the petitioner's claim that one cook and one cashier are employed, along with three other alleged managerial employees, it is difficult to believe that the pizza restaurant, with its extensive menu including sandwiches, pastas, wings, and salads, can operate with one cook who ends work at 4:00 p.m. each day.

Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what

proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The record indicates that the beneficiary earns the largest amount of money, namely, $7500 per quarter. According to the petitioner, he is employed full-time. Since the record claims that no employee works past 4:00 p.m. and the restaurant is open until 11:00 p.m. each day, it stands to reason that the beneficiary is performing many of the required tasks, such as cooking, waiting tables, and delivering food, for which no employees are delegated. Given the lack of specific details regarding the manner in which the petitioner can function with these part-time employees, the record does not demonstrate that the beneficiary will function primarily as a manager or executive. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. If the beneficiary is performing the sales function, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not primarily employed in a managerial or executive capacity. *See* §§ 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).

On appeal, counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As discussed above, the numerous inconsistencies regarding job duties, work schedules, and operating hours of the petitioner have not been resolved.

In the present matter, 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 the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Finally, counsel on appeal asserts for the first time that the beneficiary is an executive as well as a manager. On appeal, however, 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). For this reason, the AAO will not analyze the beneficiary's duties for compliance with the regulatory definition of executive capacity.

The petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the petitioner and the foreign employer. Although the petitioner claims that the foreign entity owns 51% of the petitioner and thus maintains a parent-subsidiary relationship, the petitioner has failed to submit sufficient evidence to support this claim.

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 submits a non-traditional and unnumbered share certificate claiming that the foreign entity owns 51% of the petitioner. No additional documentation, such as the stock ledger, meeting minutes, or share certificates representing any other outstanding shares in the company was submitted. As general evidence of a petitioner's claimed qualifying relationship, however, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The AAO further notes that upon review of the documentation contained in the record, there are numerous unexplained inconsistencies. For example, the petitioner's By Laws repeatedly refer to Kansas state law, yet the petitioner is a corporation formed in and governed by the laws of the State of Florida. In addition, Line 2 of Schedule L on the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2004, indicates a figure of $0 for capital stock, despite the claim that 25,500 of the authorized 50,000 shares were issued, at $1.00 per share, to the foreign entity on July 31, 2004. 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. at 591-92.

In addition, while not directly addressed by the director, the minimal documentation of the foreign entity's business operations raises the issue of whether the foreign entity is a qualifying organization doing business abroad. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office abroad. Although the director specifically requested evidence of the foreign entity's business dealings in the request for evidence, the petitioner failed and/or refused to submit such evidence. 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). For these additional reasons, 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).

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.