



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **NOV 21 2013** OFFICE: VERMONT SERVICE CENTER [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 Texas limited liability company established in October 2011, states that it is engaged in the restaurant business. It claims to be an affiliate of [REDACTED] located in Mexico. The petitioner seeks to employ the beneficiary as franchisee/general director for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director determined that the petitioner failed to establish that the beneficiary would supervise subordinate managers or professionals. The director also concluded that given the nature and size of the business, it appeared likely that the beneficiary would be performing primarily non-managerial or non-executive duties. Lastly, the director found that the petitioner had not established a qualifying relationship as required by the Act, since the record did not reflect that the petitioner exercised control over its claimed restaurant franchise business.

On appeal, counsel for the petitioner asserts that the director's decision was in error based his disregard or misinterpretation of certain facts on the record, and states that the beneficiary is an executive and manager consistent with the Act. The petitioner maintains that the beneficiary would in fact supervise subordinate managerial personnel, and further challenges the director's conclusion that the petitioner does not own and control its claimed restaurant business. In support of these contentions counsel submits a brief and additional evidence.

I. The Law

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 (1)(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.

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.

II. The Issues on Appeal

A. Employment in the United States in a managerial or executive capacity

As previously noted, the director denied the petition finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying executive or managerial capacity.

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 a letter of support dated December 6, 2012, counsel claimed that the petitioner required the beneficiary's services as its general director to oversee its restaurant franchise, [REDACTED] which was purchased in 2011. In a statement included with the support documents, the petitioner provided the following overview of the duties of the proffered position along with the amount of time the beneficiary would devote to the performance of each stated duty:

- Oversee the entire operation of the restaurant.
18 Hrs
- Responsible for the completion of all administrative tasks and reports.
4 Hrs
- Analyze P&L statements.
4 Hrs
- Performs all employee evaluations.
5 Hrs
- Performs all cash outs and bank deposits.
4 Hrs
- Monitors restaurant operating expenses.
6 Hrs
- Authorizes payroll.
2 Hrs
- Lead by example.

- Authorizes all payments.
5 Hrs
- Responsible for restaurant level marketing (door-hanging, community involvement and business to business marketing).
8 Hrs

The director found the initial evidence insufficient to establish eligibility, and consequently issued a Request for Evidence (RFE) on December 28, 2012. The director asked the petitioner to submit a comprehensive description of the beneficiary's duties which indicated the manner in which those duties would be managerial or executive in nature. The director requested, *inter alia*, evidence demonstrating that: (1) the beneficiary would function at a senior level within the petitioner's organization; and (2) the beneficiary would be managing a subordinate staff of professional, managerial and supervisory personnel who will relieve her from performing non-qualifying duties. In addition, the director asked for additional information pertaining to the petitioner's other employees, including descriptions of their positions, the number of hours devoted to each of their duties, and the educational requirements of the positions.

The petitioner, through counsel, responded to the director's request on January 24, 2013. Instead of providing a more comprehensive description of the duties of the proffered position, the petitioner submitted two documents in support of the beneficiary's claimed managerial responsibilities: (1) a letter from [REDACTED]; and (2) a copy of the Operations Manual for [REDACTED]

The letter from [REDACTED] dated January 21, 2013, claims to be an evaluation of the beneficiary's position as Franchisee/General Manager for the petitioner's franchise restaurant, as well as an evaluation of her foreign position. [REDACTED] bases his assessment of the beneficiary's duties upon the same list of duties set forth above, with one additional duty: the supervision of the general manager. [REDACTED] referenced the statutory definition of managerial capacity and asserted that the beneficiary's position meets the requirements.

The petitioner also submitted a copy of the franchise restaurant's Operations Manual, which counsel contends demonstrates the managerial capacity of the beneficiary's position. A review of the manual reveals that it includes step-by-step procedures for opening and closing, security, menu pricing, and maintenance/repairs, as well as customer service guidelines, suggestive selling, and cash handling procedures.

Finally, counsel submitted position overviews and the hours devoted to the duties of each position for the petitioner's employees. The AAO takes note of the duties of the General Manager, [REDACTED], the beneficiary's claimed subordinate. Specifically, the duties of the General Manager are stated as follows:

- Hires good people and keeps them motivated.
6 Hrs

- Oversees the entire operation of the restaurant.
10 Hrs
- Responsible for MIT training (managers in training).
4 Hrs
- Responsible for the safety and sanitation of the restaurant.
5 Hrs
- Supervises all staff.
8 Hrs
- Terminates marginal employees.
- Trains all new employees.
5 Hrs
- Orders all inventory and constantly monitors all levels to ensure the supply is adequate.
4 Hrs
- Provides excellent customer services and ensures customer satisfaction.
All shift
- Write Schedules.
2 Hrs
- Conducts daily and weekly inventories.
4 Hrs
- Prepares payroll.
2 Hrs

Finally, the AAO notes that the record contains an organizational chart as well as various tax documents, photographs, and corporate documentation. The petitioner's organizational chart indicates that the beneficiary will directly oversee [REDACTED] who in turn will oversee three individuals: (1) a floor manager; (2) an assistant general manager; and (3) a kitchen manager. These three individuals in turn will supervise numerous employees in their respective departments.

The director denied the petition, finding that the beneficiary would not be employed in a qualifying managerial or executive capacity. Specifically, the director first noted that the record contained no evidence of the employment of [REDACTED] in the position of general manager as claimed by the petitioner. Although the record contained various payroll and tax documents for its employees, the director noted that there was no evidence pertaining to [REDACTED] and therefore the director was unable to verify his employment. Moreover, the director noted that the only employees with a managerial title who earned wages, according to the documentation contained in the record at the time of filing, were the kitchen manager and the floor manager, both of whom earned very low wages.

Additionally, the director noted that the simple attachment of a managerial or executive title to a position does not serve to demonstrate that such a position in fact meets the regulatory requirements. Based on the petitioner's failure to demonstrate that the beneficiary had a subordinate staff of managerial, professional, or

supervisory employees to relieve her from performing the non-qualifying duties, the director denied the petition.

On appeal, counsel asserts that the director's denial was erroneous. Specifically, counsel contends that, contrary to the director's findings, the petitioner did in fact employ [REDACTED] as general manager at the time of filing, noting that the Wage and Tax Statements (Form W-2) including in the record were for 2011, and that [REDACTED] had not been hired until 2012.¹ Counsel submits documentation to support this contention, as well as additional documentation establishing that the other claimed subordinate managers earned full-time salaries in 2012. Counsel concludes that the beneficiary will be employed in a managerial capacity by virtue of his supervisory role over these subordinate managers and the managerial duties associated with his position.

Upon review, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The AAO will first address the description of the duties of the proffered position as set forth by both counsel and the petitioner. The bulleted lists provided in support of the petition identify generic duties and include no specific or descriptive details that would identify with specificity the manner in which the beneficiary's duties are primarily managerial. 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 petitioner has provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of her daily duties. In fact, portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's day-to-day activities within the context of the petitioner's restaurant business.

For example, duties such as "oversees the entire operation of the restaurant" and "responsible for completion of all administrative tasks and reports" provide little insight into what the beneficiary actually does on a day-to-day basis. The general lack of specificity surrounding these offered duties calls into question how much of the beneficiary's time is actually spent performing qualifying duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. *Id.*

¹ The record indicates in the Asset Purchase Agreement that the [REDACTED] franchise was purchased near the end of 2011.

While the director provided the petitioner with the opportunity to submit a comprehensive description of the beneficiary's duties, the petitioner opted to instead submit the opinion of [REDACTED] who based his analysis on the exact same set of job duties that the director had already reviewed and found to be deficient to establish eligibility. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Here, the expert opinion letter was non-responsive to the director's request that the petitioner provide a more detailed description of the beneficiary's actual day-to-day duties. Further the opinion appeared to be based entirely on the vague list of job duties that the petitioner submitted at the time of filing. 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).

The definitions of executive and managerial capacity have two 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). Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Here, various discrepancies in the record cast serious doubt on whether the petitioner is operating at the level offered, and indeed employing the four claimed managerial employees and multiple support employees to relieve the beneficiary from performing primarily non-qualifying duties. Although counsel on appeal submitted evidence to establish that these employees are in fact working for the petitioner, the nature of their duties as it relates to relieving the beneficiary from the performance of non-qualifying duties is unclear.

For instance, the petitioner claims that the beneficiary will spend 18 hours per week overseeing the entire operation of the restaurant. However, this is also a task to which the general manager will devote 10 hours per week. It is unclear why the beneficiary will be actively overseeing the restaurant when such a task is identified as being one delegated to his subordinate manager, and it is further unclear as to how the general manager will relieve the beneficiary from performing non-qualifying duties when in fact they perform the same or similar duties. 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).

Moreover, the beneficiary's tasks include "all administrative tasks and reports," as well as bank deposits and door-to-door marketing. A review of the petitioner's organizational chart reveals that there are no administrative personnel, such as administrative assistants, secretaries, bookkeepers or sales/marketing employees to perform these non-qualifying duties. Further, a review of the duties of the claimed subordinate managers reveals that none of these individuals are tasks with such duties. Finally, the remaining employees of the petitioner, according to the organizational chart, are drivers, cooks, waiters, and bartenders. It is unlikely based on their titles that they will be assigned administrative tasks such as those mentioned here.

It is noted that counsel refers to unpublished decisions in which the AAO determined that a beneficiary only needs to devote more than 50% of his or her time to managerial duties to be considered a manager. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In sum, the record includes a number of inconsistencies related to the petitioner's operation of the restaurant franchise and the beneficiary's role therein. As noted, many of the beneficiary's duties overlap with those of the general manager, who also performs some of the same duties as the assistant general manager. Overall, the petitioner indicates that its managerial employees allocate a total of 42 hours to week to overseeing the operation of the restaurant, but the evidence of record indicates that the restaurant is open for 91 hours per week. In addition, the AAO notes that the petitioner employs only two cooks who earned wages of only \$2,867.42 and \$1259.28, respectively, in 2012. It is reasonable to assume that a restaurant requires the presence of at least one cook at all times. According to the [REDACTED] Operations Standards Manual, which is submitted on appeal, a typical shift in a [REDACTED] franchise has a single manager-in-charge who is responsible for cooking all orders unless hourly sales warrant the addition of a cook in which case the "manager in charge then moves to driver routing and phones."

This information raises questions regarding the extent to which the subordinate "managers" actually perform supervisory or managerial duties. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Rather, it appears that all subordinate employees spend the majority of their time directly engaged in providing the restaurant's products and services.

Regardless, as discussed, the petitioner's description of the beneficiary's duties was insufficient to establish that she performs primarily managerial or executive duties. While counsel emphasizes on appeal that the

restaurant has adequate staff for cooking, serving and delivering orders to the restaurant's customers, such duties are not the only non-qualifying duties associated with operating the business. The beneficiary performs a number of administrative and marketing functions which do not fall within the statutory definition of managerial or executive capacity.

In conclusion, taking into account the totality of the circumstances, the petitioner has not established that the beneficiary is acting primarily in a managerial or executive capacity due to the vague nature of the beneficiary's duties, the various discrepancies related to the petitioner's claimed business operations, and the failure to show that the beneficiary is primarily engaged in the supervision of subordinate managers, supervisors or professionals. For this reason, the appeal will be dismissed.

B. Qualifying Relationship

As noted, the director denied the petition, in part, based on a finding that the petitioner had not established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(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[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

- (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.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The director concluded that the petitioner had not established that it had ownership and control over its claimed franchised restaurant business. However, the AAO notes that the nexus of analysis when determining ownership and control should be focused on whether common ownership and control exists between the foreign employer and the petitioner, and not on whether the petitioner owns and controls its franchised restaurant. However, the fact that the petitioner may operate a franchised business does not preclude it from establishing a qualifying relationship with the foreign entity.

In the present matter, the petitioner claims that both the foreign employer and the U.S. company are 51% owned by [REDACTED] and therefore, the two companies have an affiliate relationship. The record contains documentation to support this contention.

Although the appeal will be dismissed, the AAO will withdraw the director's finding that the petitioner has not established that it has a qualifying relationship with the foreign entity. The only explanation the director provided for a finding of ineligibility on this ground is the fact that [REDACTED] exercises control over the manner in which the franchise is to be operated. As discussed above, the relevant issue to review here is whether common ownership and control exists between the foreign employer and the petitioner. The record contains sufficient evidence to satisfy this criterion. Accordingly, the director's decision will be withdrawn as it relates to the qualifying relationship between the petitioner and the foreign affiliate.

III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). With respect to the issue of whether the petitioner has a qualifying relationship with the foreign affiliate, the petitioner has sustained its burden. Accordingly, the director's decision is withdrawn in part. With respect to the question of whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity, the petitioner has failed to meet its burden. The appeal will be dismissed for this reason.

ORDER: The appeal is dismissed.