U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 29 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

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, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(1)(C). The petitioner, a Florida limited liability company, operates a restaurant/food service business and claims to be an affiliate of It seeks to employ the beneficiary as its president and CEO at an annual salary of $42,000.

The director denied the petition, concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the foreign entity; and (2) that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the discrepancies and alleged accounting errors in the record which led the director to deny the petition are attributable to the petitioner's accountant and do not change the fact that the petitioner has a qualifying relationship with the foreign entity. Counsel submits a brief and additional evidence in support of the appeal, but does not address the director's adverse finding regarding the beneficiary's foreign employment capacity.

I. The Law

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) 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.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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.

Defining the term managerial capacity, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

II. Qualifying Relationship

The first issue to be addressed is whether the petitioner established that it has a qualifying relationship with the foreign entity.

A. Facts

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on March 13, 2012. In its accompanying supporting letter, the petitioner stated that it has a qualifying relationship with which employed the beneficiary in Venezuela from February 2008 until June 2010. Specifically, the petitioner indicated that both companies are owned by the same individuals in the same proportions as follows:

The petitioner's supporting documents included: (1) its Articles of Organization identifying the beneficiary as the manager of the company; (2) Membership Certificate no. 1 issued to indicating she owns a 50% interest in the LLC; (3) Membership Certificate no. 2 issued indicating that owns a 41.7% interest in the company; and (4) Membership Certificate no. 3 indicating that owns an 8.3% interest in the company.

The petitioner also submitted copies of annual reports and officer lists filed with the Florida Department of Corporations which identify the beneficiary as the current sole manager, president and registered agent of the company. None of these documents identify any members of the company.

In addition, the petitioner submitted a copy of its 2011 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, which indicates that the company has one owner. The accompanying Schedule K-1 indicates that is the sole member. The petitioner reported the same information in its 2011 Florida Partnership Information Return (F-1065).

With respect to the ownership of the foreign entity, the petitioner provided a copy of its corporate charter filed with the Second Registrar of Commerce of in February 1998. According to this document the authorized capital of the company is Bs. 30,000,000.00 divided into 30,000 shares. The charter indicates that owns 15,000 of the authorized shares, owns 12,500 shares, and has 2,500 shares.

According to the notes accompanying the foreign entity's financial statement for 2011, "the Company carried out an increase of capital in the fiscal year 2011." Specifically the document indicates that "the capital of the society was increased to Bs. 4,970,000.00, the Social Capital of the Company being represented in 1,000 Shares with a nominal value of Bs. 5,000.00 each." The accompanying financial statement indicates that the social capital increased from Bs. 30,000 to Bs. 5,000,000.

On May 14, 2012, the director issued a request for evidence (RFE). The director observed that the information reported in the petitioner's IRS Form 1065 for 2011 conflicted with the petitioner's claims that the company has three owners. The director therefore requested additional evidence to establish the identity of the company's owners, the date on which they acquired ownership, information regarding the purchase price of membership interests, and documentation of the owners' capital investments. The director further instructed the petitioner to provide copies of any operating agreements, meeting minutes or other documentation that specifies who the owners are and who has control of the company.

In response to the RFE, the petitioner reiterated that it is owned by the same three individuals as the foreign entity, and stated: "We have corrected form 1065 for 2011 and 2010 showing the number of partners in the K-1 Schedules accordingly with the Membership Certificates. We apologize for the original error but it was a misunderstanding with the accountant who prepared those forms."

The petitioner submitted a copy of its IRS Form 1065 for 2011 dated March 27, 2012 by the petitioner's accountant and signed by the petitioner on June 28, 2012. The new Form 1065 included three Schedules K-1 issued to The same information was reported on the 2010 Form 1065 and accompanying Schedules K-1.

The director denied the petition on March 7, 2013, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. The director acknowledged the petitioner's submission of the amended tax returns, but noted that the petitioner failed to mention if and when it filed the revised forms with the Internal Revenue Service. Further, the director emphasized, that despite being instructed to submit additional evidence of ownership, including operating agreements, meeting minutes and other relevant corporate documents, and evidence of the members' investment in the LLC, the petitioner submitted only the amended tax returns.

On appeal, counsel asserts that the petitioner provided copies of its membership certificates confirming the qualifying relationship with the foreign entity and asserts that "the account's error does not constitute a

change to the corporate relationship." Counsel asserts that the petitioner's accountant, was informed of the petitioner's correct ownership structure in 2010 when the beneficiary hired him to prepare the company's income tax returns. Counsel maintains that "the accountant incorrectly assumed that he could complete schedule K-1 (Form 1065) with [the beneficiary's] information, as a sole partner and failed to include the correct partners." Counsel further indicates that the beneficiary advised the accountant to correct these errors, but "failed to timely file the amendment with the IRS for the years 2011 and 2011."

Counsel further explains that the foreign entity provided a $213,000 investment in the U.S. entity which enabled it to purchase its restaurants in the United States.

In support of the appeal, the petitioner submits a letter from states that the beneficiary informed him that the company is a subsidiary of a Venezuelan company with owners that live abroad. He asserts: "Since the partners of did not have social security numbers, I incorrectly assumed that I could complete the schedule K-1 (Form 1065) with information, as a sole partner and failed to include the correct partners." states that he "erroneously completed schedule K-1" for the 2010 and 2011 tax years and was made aware of this error on June 28, 2012. He indicates that he provided with copies of the revised forms but did not inform him that the amendment needed to be filed with the IRS. Finally, he states that the amendment for the 2011 Form 1065 was ultimately filed and received by the IRS on March 28, 2013.

The petitioner submits copies of the 2011 and 2012 Forms 1065 bearing receipt stamps from the Internal Revenue Service. The petitioner also provides an affidavit from who states that the shareholders of the foreign entity approved a $213,000 investment in the petitioning company. states that Venezuelan currency restrictions prevented the foreign entity's shareholders from individually transferring money to the petitioner. Instead, the foreign entity provided checks to and to the beneficiary. The first check was dated June 2010 in the amount of $128,000 for the purpose of purchasing the petitioner's first restaurant. indicates that the foreign entity provided a second check to the beneficiary in the amount of $85,000 for the purchase of the petitioner's second restaurant in February 2011. The petitioner provides copies of both referenced checks.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it has a qualifying relationship with 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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In this case, the petitioner's initial evidence of ownership was limited to copies of its membership certificates indicating that it is owned by the same three individuals who are claimed to own the foreign entity. As the petitioner also submitted a copy of its Form 1065 for 2011 showing as the sole owner of the petitioning company, the director reasonably requested that the petitioner provide additional evidence to document capital contributions from the petitioner's claimed owners, as well as copies of the petitioner's operating agreement, meeting minutes and other relevant documentation of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the identification of a member of an LLC into the means by which this membership interest was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for the membership interest. Additional supporting evidence would include an operating agreement, minutes of relevant membership or management meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner's response to the director's request consisted of amended Forms 1065 with no evidence that the tax returns had been filed with the IRS. The petitioner did not comply with the director's request for a copy of the company's operating agreement, minutes of membership meetings, evidence of capital contributions from the members or other documentary evidence of ownership. 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

petitioner simply attributed the inconsistent information found on the petitioner's tax returns to a "misunderstanding with the accountant" and provided no further explanation.

Further, the amended tax returns contain slightly different information than what is indicated on the company's membership certificates. Specifically, the amended Schedule K-1s indicate that and own 8.7% and 41.3% of the company, respectively, rather than 8.3% and 41.7%.

On appeal, the petitioner offers evidence that the petitioner eventually filed its amended tax returns for 2011 and a letter from , who states that he "assumed" he could list as the sole owner of the petitioning company despite claiming that he was aware that the company has three foreign owners. Given that the Schedule K allows the filer to identify its members as foreign or domestic, the accountant's claim that he believed he could not indicate the actual ownership of the company because its members are foreign and do not have social security numbers is not entirely credible. Further, the tax returns submitted at the time of filing list as the preparer and contact person.

On appeal, the petitioner also attempts to address acquisition of ownership interests by the petitioner's foreign members, evidence that was previously requested in the RFE and not provided. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Nevertheless, the copies of checks submitted on appeal, at most, may show that the foreign entity contributed funds towards the purchase of the petitioner's restaurants; the petitioner has not explained how the contributions demonstrate ownership of the petitioning company by the same individuals in the same percentages.

The petitioner has not offered a copy of its operating agreement or any other company document addressing the ownership and control of the company or the initial contribution made by its members in exchange for ownership of the company. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Finally, while not addressed in the director's decision, the petitioner has provided dated evidence of the ownership of the foreign entity. While the company's formation documents from 1998 support the petitioner's claims regarding the ownership of the foreign entity by three individuals in the asserted percentages, the petitioner has not provided any more recent evidence of the company's ownership to confirm that there have been no changes in ownership since the date of formation. As noted above, the notes to the foreign entity's financial statement indicate that the company carried out an increase in its social capital in

2011 which reasonably would have resulted in the issuance of additional shares. The petitioner did not provide any corporate documentation related to this transaction and the resulting ownership.

Based on the discrepancies and omissions in the record, the petitioner has not established that the petitioner and the foreign entity have a qualifying relationship. Accordingly, the appeal will be dismissed.

III. Foreign Employment in a Managerial or Executive Capacity

The remaining issue addressed by the director is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

In a letter submitted in support of the petition, the petitioner stated that the beneficiary was employed as the foreign entity's "Operational Manager" from 2007 until 2010. The petitioner described the position as managerial in nature and stated that the beneficiary performed the following duties:

> He implemented technical strategies that ensured the optimization of production, maximizing the sales, improving profitability, growth and good competitive position; he defined, implemented, tracked and reported the achievement of the goals, policies and initiatives aimed for better operations of the company; he evaluated contracts, proposals, directs negotiations and prepares bids and contracts; he planed [*sic*] and directed installation, maintenance of facilities and equipment; he organized and assigned staff. He was directly responsibility for the planning, direction, coordination and control of all operational management aspects concerning the production of the company; [the foreign entity] has sufficient of number of subordinates supervisors and employees which relieve the beneficiary of having to take care of the day to day operations.

The petitioner provided an organizational chart for the foreign entity; however, the chart did not identify the beneficiary or depict his former position.

In the RFE issued on May 14, 2012, the director instructed the petitioner to provide, *inter alia*, the following: a detailed description of the position including all specific daily duties; the percentage of time spent on each duty; an organizational chart depicting the number of employees who reported to the beneficiary; and brief descriptions of job titles, duties, and education level for all of the beneficiary's subordinates.

In response, the petitioner stated that the beneficiary allocated 55% of his time to "General and Executive Functions" including preparing operational expense payments, coordinating personnel security, attending executive meetings to discuss finished products, assisting in meetings with governmental authorities, and preparing and presenting technical and administrative documents of company accounts to the president. The petitioner indicated that the beneficiary allocated another 30% of his time "to all aspects related with suppliers of raw materials, equipments and parts for the production line of bread," including: developing

business relationships with equipment and parts suppliers, monitoring production equipment maintenance, and assisting the president and administrative manager with pricing. The petitioner stated that the beneficiary spent his remaining time on human resource issues (10%) and assisting the president with the purchase of new products (5%).

The petitioner submitted a revised organizational chart for the foreign entity identifying the beneficiary's position as operations manager, reporting to the company's president. The chart indicates that the beneficiary supervised a purchasing and operations supervisor and a maintenance chief, and shows a warehouse manager reporting to the purchasing and operations supervisor. The chart indicates that four employees, two master bakers and two master pastry chefs, reported to the warehouse manager. The petitioner did not provide the requested information regarding the duties and educational levels of the beneficiary's subordinate employees.

The director denied the petition, in part, based on a determination that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. The director determined that the petitioner's description of the beneficiary's duties was vague, nonspecific and failed to adequately describe the nature of the beneficiary's duties within the context of the foreign entity's business operations. In addition, the director acknowledged the organizational chart submitted in response to the RFE, but found the evidence insufficient to establish that the beneficiary was engaged in supervising subordinate managers, supervisors or professionals.

On appeal, neither counsel nor the petitioner addresses the director's adverse finding with respect to the beneficiary's foreign employment. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

As noted by the director, the petitioner failed to provide a detailed description of the beneficiary's duties and the percentage of time he would spend on specific tasks sufficient to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

Further, the petitioner provided inconsistent information regarding the organizational structure of the foreign entity. The organizational chart provided at the time of filing indicates that the president of the company directly supervises an accountant, an administrator, a general supervisor and a maintenance manager. The next tier of employees included a personnel and purchasing supervisor, payroll employee and administrative

assistant reporting to the administrator and bakery and pastry specialists reporting to the general supervisor. The lowest tier included cashiers, bakery, coffee shop and delicatessen employees. As noted, the beneficiary's position of operations manager was not identified.

The chart submitted in response to the RFE indicated that the president supervised an accountant, an administrative manager and an operations manager. The chart shows a general coordinator supervising a sales supervisor, an administrator and a systems assistant, as well as bakery, tavern, and deli employees and cashiers reporting to the sales supervisor. The chart indicated that the beneficiary supervised, directly or indirectly, three positions that were not identified on the previous chart. The petitioner provided no explanation for the significant differences between the two charts and failed to provide any of the requested information regarding the beneficiary's claimed subordinate employees. 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).

Overall, the record is lacking information regarding the beneficiary's actual duties, the amount of time he allocated to qualifying duties, the nature of his supervisory responsibilities and the organizational structure of the foreign entity during the beneficiary's period of employment with the company. Accordingly, the petitioner did not establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity and the appeal will be dismissed.

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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). Here, that burden has not been met.

ORDER: The appeal is dismissed.