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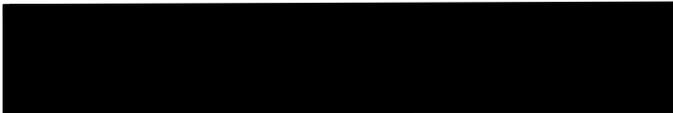
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FILE: SRC 05 108 50289 Office: TEXAS SERVICE CENTER Date: NOV 06 2006

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 is a Texas corporation and claims to be engaged in the restaurant business. The U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary's services as the vice president of operations of its new office in the United States for a one-year period.

The director denied the petition on May 17, 2005 concluding that there is insufficient evidence to demonstrate that a sufficient financial investment had been made in order to establish the new office. The director also noted that since the petitioner has not established that sufficient funds have been invested into the U.S. office, the petitioner has thus not established that the intended U.S. operation will support an executive or managerial position within one year of operation.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the foreign company is wholly-owned by three brothers who agreed to contribute a total of \$200,000 to the U.S. operation. Counsel for the petitioner submits copies of bank statements and wire transfers indicating two wire transfers from one of the owners of the parent company in the total amount of \$60,000, deposited to the bank account of the U.S. entity. In addition, counsel for the petitioner states that the U.S. entity plans to open a restaurant within the year 2005 and will employ approximately 37 employees and thus the U.S. operation will support an executive and managerial position within the first year of operations. The petitioner submits a letter and additional evidence in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

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 in the United States, 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 to be discussed in this matter is whether the petitioner established that a sufficient financial investment has been made in the United States company, as required by 8 C.F.R. § 214.2(l)(3)(v)(2).

As outlined in 8 C.F.R. § 214.2(l)(3)(v), if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. §

214.2(l)(3)(v). The regulations specifically require the petitioner to disclose the new office's 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. *Id.*

In the instant matter, the petitioner has not provided sufficient evidence of the foreign entity's financial investment of the United States operation, as required by 8 C.F.R. § 214.2(l)(3)(C)(2). As evidence of a financial investment for the U.S. company, the petitioner submitted two wire transfer receipts dated March 3, 2005, from [REDACTED] transferring \$11,000 and \$49,000 to the petitioning company. On March 15, 2005, the director requested further documentation in order to proceed with the processing of the pending petition. Specifically, the director requested evidence of the funding or capitalization of the United States company, such as copies of wire transfers showing transfers of funds from the foreign organization, evidence of financial resources committed by the foreign company, copies of bank statements for checking and savings accounts, and/or profit and loss statements of other accountant's reports.

In the petitioner's response dated May 4, 2005, counsel for the petitioner stated "[the foreign entity] has transferred sixty-three thousand, nine hundred sixty five, (\$63,965 USD) from BBVA Bancomer to Sterling Bank in Houston, Texas for initial capitalization." The petitioner also re-submitted the same two wire transfers dated March 3, 2005 from [REDACTED] transferring \$11,000 and \$49,000 to the U.S. entity's bank account in the United States. In addition, petitioner submitted a bank statement dated March 7, 2005 from Sterling Bank, under the account name of the U.S. entity, indicating that two wire transfers for the amount of \$11,000 and \$49,000 were credited to the company's bank account.

The director denied the petition on the ground that the petitioner failed to submit sufficient evidence of a financial investment in the United States company, as required by 8 C.F.R. § 214.2(l)(3)(v)(2). Specifically, the director observed that the petitioner has not demonstrated that the financial investment had originated with the foreign entity.

On appeal, the petitioner submits an affidavit from [REDACTED] the Executive Vice President of the U.S. company, stating the following:

2. I am an equal partner with my two brothers, [REDACTED] in [the foreign parent company] in Mexico. We share executive level duties operating a chain of restaurants under the name [REDACTED]
3. [The foreign parent company] is a joint venture parent of [the U.S. company], a company incorporated in Texas.
4. [The foreign parent company] is a family owned business and we have always operated under an informal financial structure agreed to between my brothers and myself. We basically have three different executive level positions to take care of operations, finance and design/marketing.
5. [REDACTED] negotiated an exclusive marketing and sales agreement with Cervezas Cuauhtemoc Moctezuma, S.A. de C.V., the second largest beer distributor in Mexico.

[The foreign parent company] is the largest account for all of Mexico City for draft beer. We received payment of \$270,000 U.S. dollars to the three of us. We each received \$90,000 in our individual names and have allocated these funds for both our Mexican and US business operations.

6. As agreed with my brothers, I have \$90,000 U.S. dollars allocated for operations at an affiliated company, SEALN, S.A. de C.V.
7. As agreed with my brothers [REDACTED] has \$90,000 U.S. dollars allocated for new business operations. \$40,000 for operations in Mexico, and \$50,000 is allocated for [the U.S. company] in Texas. [REDACTED] has funds already transferred to his account in Sterling Bank and will be transferring it to the company account next month. [REDACTED] has an additional \$40,000 in a separate account in Mexico to be used to support [the U.S. company's] start-up operations.
8. As agreed with my brothers, [REDACTED] has \$90,000 U.S. dollars, of which \$60,000 was allocated and transferred to [the U.S. company] for start-up operations. [REDACTED] has an additional \$50,000
9. Sixty thousand dollars was transferred by [REDACTED] to [the petitioner's] operating account at Sterling Bank on behalf of [REDACTED] [the foreign parent company]. All three owners of the company approved this transfer to capitalize the start-up operations of our U.S. subsidiary. [REDACTED] will contribute a total of \$110,000 and [REDACTED] will contribute \$90,000. We have a total foreign currency funding of \$200,000 for [REDACTED] [the U.S. entity].

Upon review, the petitioner has not provided sufficient evidence of a financial investment from the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner presented evidence of an informal investment agreement between the three owners of the foreign company for the first time on appeal. The petitioner did not discuss the above-mentioned financial agreement in the original petition. The director specifically requested additional information of the foreign company's investment of the U.S. entity, however, the petitioner again submitted documentation of two wire transfers from an individual for the total amount of \$60,000. The petitioner did not submit evidence of the financial agreement between the three owners of the foreign company to invest \$200,000.00 in the U.S. entity until the appeal.

The petitioner was put on notice of required evidence when the director requested additional information from the petitioner. The petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Moreover, on appeal, the petitioner submitted minimal evidence to establish that the above-mentioned financial agreement was indeed agreed upon by the three brothers. The petitioner submitted four checks paid to [REDACTED] for the total amount of \$3.48 million pesos, and copies of the personal

bank statements for December 2004 for each brother. 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)).

Furthermore, the petitioner does not explain why the initial petition did not indicate the financial agreement between the three brothers and the investment amount of \$200,000. As noted above, the petitioner submitted with the original petition and the response to the director's request for evidence two wire transfers to the U.S. entity for a total of \$60,000 and did not present any evidence of the claimed investment of \$200,000. 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).

In addition, as noted above, the funds from the wire transfer originated from [REDACTED] an owner and shareholder of the parent company. The funding did not originate from the foreign parent company. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In the instant matter, the wire transfers of the U.S. funding derived from a shareholder and owner of the foreign company rather than the actual foreign entity. Thus, the petitioner has not submitted sufficient evidence to establish that the foreign company invested in the U.S. entity. The petitioner has not submitted evidence on appeal to overcome the director's decision. Accordingly, the appeal will be dismissed.

In addition, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. 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(1)(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. The petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position.

The petitioner indicated in a support letter that the beneficiary will be responsible for the following duties:

In the capacity of Vice President of Operations, [the beneficiary] will design the interior of our restaurant locations and oversee construction to our specifications. He will be responsible for creating standard procedures for operation such as food preparation, service, etc. He will be responsible for hiring and firing restaurant employees and all

other aspects of human resources for our company. [The beneficiary] will be responsible for monitoring and adjusting inventory level at our restaurant locations. [The beneficiary] and the Vice President of Administration will be responsible for preliminary plans for a franchise model.

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). On review, the petitioner failed to provide a detailed description of the beneficiary's duties that demonstrates what the beneficiary will do on a day-to-day basis. The petitioner did not define the beneficiary's goals and policies, or clarify the role of the interior design and construction operations that the beneficiary will supervise. 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).

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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "design the interior of our restaurant locations and oversee construction to our specifications" and "monitoring and adjusting inventory level," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine 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).

In addition, the petitioner submitted a proposed organizational chart for the first restaurant the U.S. entity will open. The proposed organizational chart indicated that the U.S. company intends to hire 37 employees by the initial year of operation. The proposed positions are employees that will run the restaurant such as restaurant managers, waiters, hosts and kitchen staff. Thus, it appears from the record that the only individuals performing any marketing, finance operations, administrative and business development activities would be the beneficiary and his brothers, who have already been granted L-1A status. Furthermore, the petitioner had indicated that it intends to open one restaurant annually for the first several years of operation. Given the beneficiary's responsibility for interior design and supervision of construction activities, it is reasonable to assume that these non-managerial tasks will require a substantial portion of his time for the foreseeable future. An employee who "primarily" performs the tasks necessary to produce a product or 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. at 604.

Furthermore, the petitioner submitted a vague economic plan for the U.S. entity. 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 therefore. Most importantly, the business plan must be credible.

*Id.*

The petitioner submitted a vague business plan that included the projected client profile in the United States, and indicated that the petitioner's goal is to "make a chain of owned and franchised restaurants in Texas for a total of 10 restaurants within 5 years." The business plan included a brief outline of the projected dates to establish the 10 restaurants starting in February 2005 through January 2010.

The submitted plan fails to outline how the U.S. entity will reach the listed goals and plans and if it is financially feasible to do so. The plan is vague and not credible. In addition, the petitioner submitted information of potential sites for the restaurant location, however, the petitioner did not submit any evidence to document that it has obtained a lease to open a restaurant. 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)).

Further, a review of CIS records reveals that two other individuals were approved for an L-1A visa on behalf of the petitioner. The petitioner has not explained why the U.S. company will need three executives or managers in order to open the new office in the United States. 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.

Upon review of a totality of the evidence, the record is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity within one year. For this additional reason, the appeal will be dismissed.

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 and the appeal dismissed 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.