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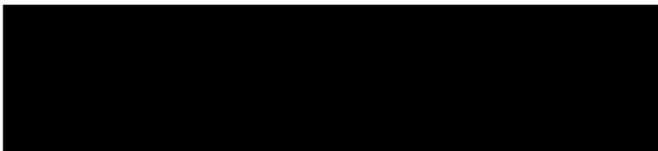
D-7

FILE: WAC 05 083 50821 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 filed this nonimmigrant petition seeking to extend the employment of its assistant operations manager 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 Territory of Guam, claims to be the affiliate of Subway Investments Corporation, located in Saipan, Commonwealth of Northern Mariana Islands. The petitioner claims to operate retail sandwich stores, namely Subway restaurant chains.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) a qualifying relationship existed between the petitioner and the foreign entity.

Counsel for the petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner seeks to disprove the director's conclusions, and submits a brief and additional evidence in support of his contentions.

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(1)(3) provides 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.

The first 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.

On the L Supplement to the Form I-129, the petitioner stated that the beneficiary would be managing eight Subway restaurants in the United States and would oversee eight supervisors and eight assistant supervisors. Additionally, in an undated statement entitled "Operations Manager" submitted with the petition, the beneficiary's position was described as follows:

Manages all operations of business, engaged in [S]ubway restaurant chain and related services. Primarily directs, supervises, and controls the work of all subordinate supervisory, managerial, and professional employees. Exercises discretion in day to day operations of Guam branch office. Has the power to hire and fire employees or to recommend those as well as other personnel actions for all employees of the business.

On March 16, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit a list of all employees under the beneficiary's supervision as well as a more detailed description of the beneficiary's duties, including the percentage of time devoted to each duty.

The petitioner submitted a response dated June 3, 2005. The petitioner provided an organizational chart for the entire business organization, which demonstrated that the beneficiary, as an assistant operations manager for the petitioner, will continue to oversee the employees of two Subway stores.¹ Specifically, store 22053 is shown to employ six employees: five sandwich artists and one certified sandwich artist; whereas store 7400 is shown to employ three sandwich artists and one re-certified sandwich artist. Although the position of "store team leader/supervisor" was also described, no employees were identified as being employed in this position. The organizational chart further indicated that the beneficiary was overseen by an operations manager, a

¹ It is noted for the record that the petitioner initially claims on the Form I-129 that the beneficiary will be employed as an operations manager, responsible for managing eight Subway restaurants and overseeing the work of eight supervisors and eight assistant supervisors. In response to the director's request for evidence, however, the petitioner indicates that the beneficiary will continue to be employed as an assistant operations manager, responsible for managing two Subway restaurants and overseeing the work of eight sandwich artists, one certified sandwich artist, and one re-certified sandwich artist. On appeal, the petitioner indicates that the beneficiary has since been promoted to an operations manager position, responsible for managing three Subway stores and overseeing the work of one store team leader, one assistant store team leader, nine sandwich artists, three certified sandwich artists, and three re-certified sandwich artists. This promotion occurred on August 31, 2005, more than six months after the petition extension was filed and five days after it was denied terminating the beneficiary's employment authorization pursuant to 8 C.F.R. §274a.12(b)(20).

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. 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). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested nonimmigrant visa classification.

director of operations, a managing director, a vice-president, and a president. With regard to additional details regarding her duties and her position, the petitioner provided the following list:

- Conduct in store training to Subway store Supervisors and Subway Sandwich Artists; (15%)
- To conduct interview and screening of Subway applicants; (5%)
- Responsible in training employees to comply with Subway standard procedure; (15%)
- To ensure all the assistant trainers to follow [sic] the Subway training agenda and training checklist to train employees; (5%)
- To do evaluation reports of the employees periodically; (5%)
- To ensure stores are being operated to Subway standards and quality services are provided to all customers; (15%)
- To ensure all Sandwich Artist[s] are following Subway prescribed formula and procedures in preparing the sandwiches, wraps, and salads; (15%)
- To motivate Sandwich Artist[s] in Subway operation; (10%)
- To prepare work schedules and sales reports; (5%)
- To issue warnings to substandard employees for violating company policy; (2%)
- To handle customer complaints; (1%)
- To assist employees to achieve corporate goals with recommended employee incentive program. (7%)

On August 25, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization, and that some of the identified duties of the beneficiary were not traditionally managerial or executive in nature. Finally, the director noted that the description of duties was not specific enough to warrant approval. On appeal, counsel for the petitioner attempts to refute the director's basis for the denial by providing documentation in the form of a "verification of employment" letter, in which the petitioner's vice-president affirms that the beneficiary is employed in a 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(1)(3)(ii). 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).

The description of duties provided in the initial statement simply adopt many of the key phrases used in the regulatory definitions of managerial and executive capacity. General statements such as "exercises discretion in day to day operations" and directs, supervises, and controls the work of all subordinate . . . employees" do

little to clarify the exact nature of the beneficiary's 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. With the initial evidence, the petitioner failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner, however, attempted to answer this question by providing a more detailed overview of the beneficiary's duties and the percentage of time she devoted to each duty in the response to the request for evidence. However, many of the duties identified, including "[c]onduct in store training to Subway store Supervisors and Subway Sandwich Artists" and "motivate Sandwich Artist in Subway operation" do not fall directly under traditional managerial duties as defined in the statute. By actively engaging in training and other first-hand tasks, it appears that the beneficiary may be performing services necessary to the provision of the petitioner's services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, upon review of the organizational chart and the current structure of the petitioner, it appears that the beneficiary is in charge of two Subway restaurants. Each restaurant employs sandwich artists, and each one has a certified sandwich artist and a re-certified sandwich artist, respectively. Despite identifying the position of "store team leaders/supervisors," no employees are listed as filling those positions. As a result, therefore, based on the nature of the petitioner's business operations, and the fact that the organizational chart shows five managerial employees above the beneficiary in the organizational hierarchy, it appears that the beneficiary is merely a first-line supervisor. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See id.* at 604. Since the employees under the beneficiary's supervision are sandwich artists, who essentially are food preparers as identified in their position descriptions, these employees are not professional in nature.

Despite the "verification of employment" letter submitted by counsel on appeal, the vice-president's assertion that the beneficiary is employed in a managerial capacity is simply insufficient to establish that she satisfies the regulatory requirements in this matter. 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)). In the instant matter, it is unclear how the beneficiary can engage primarily in managerial or executive tasks, particularly when her subordinate employees are food handlers and no other person has been designated as a store leader or supervisor. In addition, no one has been designated to conduct inventory; handle administrative or accounting tasks, or manage payroll for these two stores. The petitioner claims that the beneficiary oversees a subordinate staff of managerial, supervisory and/or professional employees, and is thus qualified for an extension of the petition. The ultimate fact, however, is that the employment situation

presented before the AAO is not credible based on the conflicting evidence in the record regarding the beneficiary's actual position and duties as well as those of her subordinates. Moreover, the attempts by the petitioner to change the position and promote the beneficiary on appeal, after the filing of the petition, are unacceptable. On appeal, 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).

Based on the evidence presented, the beneficiary is not employed in a predominantly managerial or executive position. For this reason, the petition may not be approved.

The second issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.
- (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, or
- (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner makes conflicting claims regarding the nature of the relationship between the entities. The petitioner claims that the Guam office is an affiliate of the beneficiary's foreign employer, with both entities being 65% owned by [REDACTED]. Additionally, however, franchise agreements between the petitioner's president and D [REDACTED] is submitted to show that the U.S. entity operates Subway franchises, an arrangement prohibited under the agreement given the claimed ownership by [REDACTED].

At the time of adjudication, there was no evidence in the record regarding the ownership of the foreign entity in this matter. The record did contain documentary evidence showing that the petitioner was owned 65% by [REDACTED], as claimed. The issue then is whether a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

Upon review, the director denied the petition based on the fact that the basis for the qualifying relationship appeared to be a franchise agreement. Although this reasoning was incorrect and will be withdrawn, the director's conclusion was correct given the lack of evidence regarding the ownership of the beneficiary's foreign employer. On appeal, counsel for the first time submits ownership documentation for the foreign entity, which corroborates the claim that the foreign entity is 65% owned by [REDACTED] and thus, on its face, appears to establish a qualifying relationship. However, this evidence may not be considered. The petitioner was put on notice of required evidence and 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Furthermore, an additional problem arises from the nature of the Guam operation.

The petitioner indicates that the beneficiary manages or oversees two Subway restaurants in Guam, and the record contains two franchise agreements between [REDACTED] (owner of "Subway") and the petitioner and foreign employer's president, [REDACTED]. There is no evidence in the record to show that the beneficiary is working for the petitioning entity in Guam; rather, it appears that she renders her services primarily to Mr. [REDACTED]. The record, therefore, contains no evidence to demonstrate that the beneficiary has entered Guam, a U.S. territory, to render her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof as required by 8 C.F.R. § 214.2(l)(1)(ii). The contractual agreement, executed by Johnnie Fong in his individual capacity cannot be transferred to the petitioner unless he is and at all times remains the owner of the controlling stock of the company. The evidence presented, however, indicates that Transpacific International owns the majority of the petitioner, not Mr. [REDACTED]. Although it is possible Mr. [REDACTED] indirectly owns the majority of the petitioner, no evidence of this indirect ownership has been presented. Moreover, the record also lacks evidence that the petitioner has assumed all of Mr. [REDACTED] obligations under the franchise agreements, as required for any assignment. Thus, even if the petitioner had adequately established its qualifying relationship with the beneficiary's foreign employer, the beneficiary does not appear to be rendering her services to this entity. Even if she is, it would be in violation of the franchise agreement. For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.