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U.S. Citizenship
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Services

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File: EAC 08 076 51081 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of "general manager/president" to open a new office in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a limited liability company formed under the laws of the State of Florida, describes its business as "restaurant and related services."

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

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, the petitioner asserts that it has established that the beneficiary will primarily perform qualifying duties within one year.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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, 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 in this proceeding is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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.

In support of its petition, the petitioner submitted a document titled "business plan" in which the petitioner claims the United States operation has acquired an existing restaurant "with the intention to offer to the general public pizzas, pastas and roisserie [sic] chicken." The petitioner also claims that it "will organize the import/export unit to be able to start properly in the second year." Finally, the petitioner claims that "by the end of the second year [it] will have at [sic] minimum of 2 locations with a duplicated [sic] of monthly income." The petitioner submitted evidence of its acquisition of a restaurant business and its assumption of a restaurant lease on December 11, 2007.

The petitioner also projects its monthly expenses and income in the "business plan." The petitioner projects monthly sales of approximately \$48,000.00 and monthly income of \$7,140.00. The projections include, in addition to the beneficiary, the hiring of four workers who will be paid \$1,600.00 per month each. It appears that these workers will staff the Peruvian restaurant operation. It is noted that the record is devoid of evidence corroborating any of the projections in the "business plan."

The petitioner also submitted a proposed organizational chart for the United States operation. The chart describes the proposed operation as a complex, multi-tiered organization, which will involve at least 20 workers, including five "managers." However, the petitioner does not explain when these workers will be hired or what, exactly, these workers will do on a day-to-day basis.

Finally, the petitioner described the beneficiary's proposed duties in the United States in a letter dated January 4, 2008. As this letter is in the record, the job description will not be repeated here verbatim. Generally, the petitioner claims the beneficiary will set up the United States operation, develop policies and procedures, liaise with the parent company, clients, and vendors, and hire and train staff.

On January 30, 2008, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's proposed duties in the United States as well as position descriptions for all proposed employees.

In response, the petitioner submitted a proposed job description for the beneficiary. The petitioner describes the beneficiary's proposed duties as follows:

1. Be responsible for developing and implementing marketing objectives, strategies, and programs designed to increase and improve the company's business services as well as customer satisfaction; supervise the implementation of marketing programs, assuring their timely, effective, and efficient execution in the marketplace; directing the company's strategies, ensuring quality performance in the workplace, promotions, and other services in USA. Solve complicated issues within different departments of Petition and parent company abroad. He would spend 30% of his time.
2. Be responsible for directing staffing, training, and performing evaluations to develop and control new targets of [the] company as he is knowledgeable in these duties. [The beneficiary] will also coordinate services by establishing territories and goals as well as control system for managers and other medium level executives in Florida and in Peru. He will maintain the weekly conference meetings with Petitioner's employees and key personnel in Lima-Peru to evaluate goals and objectives reach and make necessary adjustments. He would spend 20% of his time.
3. To review market analyses to determine client/customer need, volume potential, price schedules [examples omitted], special prices, and discount rates. Offer our clients the state-of-the-art services (clients mean final consumers and/or food distributors) with excellent quality and timely [sic]. As such he will create, develop and implement company's policies and procedures accordingly [sic] with regulations to keep the high standard in order to satisfy client's expectations; be responsible for the development of campaigns to accommodate the goals of [the petitioning organization] and further consolidate its position in the marketplace. He would spend 20% of his time.
4. He will contribute [to the] company's knowledge and experience in the variety of business activities such [as] research, management, providing the appropriate employment opportunities within the company's zone of influence, traveling to business meetings, making direct distribution negotiations and contribute to strengthening the economic conditions in this area. He would spend 10% of his time in this responsibility.
5. Upon further expansion in [the] company, [the beneficiary] will hire and train personally the Marketing Department, Administration, Productions, and other key personnel in USA, in order to achieve above standard performance in the areas of promotion, products development, marketing and public relations in the United States entity, and in Peru; and he will coordinate with the parent company new strategies and inform the targets reached. He would spend 20% of his time in these duties.

The petitioner also claims that in "the coming months" it will hire "additional professional employees to facilitate the technical work, financial, and strategic planning to reach company's goals." The petitioner claims it will hire a part-time accountant (who will be an independent contractor), a business counselor, a marketing and sales manager, a production manager, an administrative manager, a market analyst, five technicians, and a finance analyst. Some of these positions will allegedly require a bachelor's degree, and the total projected annual salaries for these workers range from \$225,200.00 to \$260,200.00, which does not include the beneficiary's projected salary of \$42,000.00 per year. However, the petitioner does not reconcile these hiring plans with the more limited description of a five-employee restaurant operation in the "business plan" submitted with the initial petition. The petitioner also does not explain why, exactly, the United States operation, as described in the petition, will require the services of these proposed workers. Finally, the petitioner does not explain how it will support these workers.

On March 31, 2008, the director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval.

Upon review, counsel's assertions are not persuasive.

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(l)(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.

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 therefor. Most importantly, the business plan must be credible.

Id.

For several reasons, the petitioner in this matter has failed to establish that the United States operation 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. More specifically, the petitioner has failed to establish that the beneficiary will primarily perform qualifying duties after the petitioner's first year in operation; has failed to establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the operation of the business by a subordinate staff within the petitioner's first year in operation; and has failed to sufficiently and credibly describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the job description for the beneficiary fails to credibly establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after the petitioner's first year in operation. For example, the petitioner states that the beneficiary will develop and implement objectives, strategies, programs, policies, and procedures pertaining to marketing and administering the operation. The petitioner also claims that the beneficiary will direct and train the staff. However, the petitioner fails to specifically describe these policies, programs, procedures, strategies, and objectives, or to explain what, exactly, the beneficiary will do to "manage" the operation other than to act as a first-line supervisor of a five-employee Peruvian pizza, pasta, and rotisserie chicken restaurant. While the petitioner claims that it will also establish an import/export business and expand its operations to include other restaurant locations, these expansion plans appear purely speculative. The record is devoid of evidence credibly establishing that the purported expansion plans will likely come to fruition within the first year in operation. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform primarily managerial or executive duties after the first year in operation. Specifics are clearly an important indication of whether a beneficiary's duties will be primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to "primarily" perform the non-qualifying tasks inherent to his duties and to the operation of the single-location restaurant in general. While the petitioner claims that it will hire additional employees during its first year in business, the petitioner's claims are both incredible and contradictory. In the initial "business plan," the petitioner claims that it will hire four workers to assist in the staffing of the Peruvian restaurant. The petitioner also budgets approximately \$9,900.00 monthly for salaries, which is based on monthly sales projections of \$48,000.00. However, the petitioner also submits an organizational chart in which it claims it will establish a complex, multi-tiered organization, which will involve at least 20 workers, including five "managers." Furthermore, in response to the Request for Evidence, the petitioner projects filling a variety of positions, some requiring bachelor's degrees, which will cost the petitioner at least \$22,000.00 per month in salaries. In describing these proposed workers, the petitioner fails to include any employees who will prepare and serve the food offered at its single-location Peruvian restaurant. The petitioner also fails to explain how it will be able to hire and support all of these workers or, even if it could, what these workers will do to support the single-location restaurant operation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Overall, the petitioner has failed to establish that it will truly be able to hire the workers described in the organizational chart and in the response to the Request for Evidence. To the contrary, it appears that, in his operation of the single-location restaurant operation, any workers hired will not relieve the beneficiary of the need to primarily perform the non-qualifying administrative, operational, or first-line supervisory tasks inherent to his duties. Simply alleging that the petitioner will hire twenty or more employees who will perform non-qualifying tasks does not establish that the United States operation will truly grow and mature into an active business organization which will reasonably require the services of a beneficiary who will primarily perform managerial or executive duties. Rather, the petitioner must clearly define the scope and nature of a United States operation and establish that it has, and will continue to have, the financial ability and business strategy to support the establishment and growth of the business. However, as the record in this matter is devoid of any such evidence, the petitioner has failed to establish that the beneficiary will more likely than not perform "primarily" qualifying duties after the petitioner's first year in operation. An employee who "primarily" performs the tasks necessary to produce a product or to 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; *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* § 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Given the size and nature of the restaurant operation, it is more likely than not that the beneficiary and his proposed subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469

F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional, restaurant employees.¹

Accordingly, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity within one year, and the petition may not be approved for that reason.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(I). As explained above, the petitioner describes the United States operation as a single-location, Peruvian restaurant. The petitioner also claims it will open additional restaurants and establish an import/export component to its business. However, the petitioner's business plan and associated financial projections are entirely unsupported by evidence. The record does not specifically describe the operation's marketing strategy, and the petitioner fails to address its competitors or potential customers. It is unclear what, exactly, the petitioner will import or export and in what quantities, where the products will be stored, how the products will be transported, and to whom the petitioner will market the products in the United States. The record does not contain any independent analysis, contracts, or list of business contacts. Absent a detailed, credible description of the petitioner's proposed United States business operation specifically addressing the petitioner's proposed products, marketing plan, and customers, it is impossible to conclude that the proposed 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.

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

¹In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of any of the positions.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business."

In this matter, the petitioner claims in the Form I-129 and in the January 4, 2008 letter to be 100% owned and controlled by the foreign employer, Negociaciones e Inversiones Dupont, S.A. However, the record is devoid of organizational documents or other evidence corroborating this claim. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, in a letter dated March 10, 2008 submitted in response to the Request for Evidence, it is claimed that the "[b]eneficiary is also the principal shareholder of US entity and he will have entire control of the [petitioner]." The petitioner fails to reconcile this conflicting claim with its claims in the Form I-129 and supporting documents to be owned and controlled by the foreign employer. Once again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Accordingly, as the petitioner has failed to clearly establish its ownership and control, it has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.