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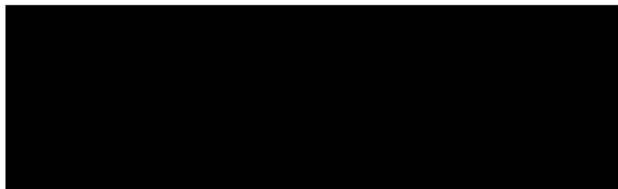
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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JUN 29 2009

File: EAC 08 209 50334 Office: VERMONT SERVICE CENTER Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting 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 withdraw the director's decision and remand the petition for further review and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as 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 Florida corporation, operates a restaurant. The petitioner states that it is a subsidiary of Ozzonno, S.A., located in Buenos Aires, Argentina. The petitioner seeks to employ the beneficiary in the position of general manager for a period of three years.

The director denied the petition on September 12, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director's decision refers to the petitioner as a "cattle importer established in 2004 that currently employs six individuals," and refers to the beneficiary's proposed position as "operations manager," and her proposed subordinates as "a controller, a veterinarian, an assistant supervisor, a ranch hand and a livestock yard attendant."

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 emphasizes that the director's decision contains several factual errors and suggests that the director confused the instant petition with an unrelated petition filed by a cattle importing company. Counsel notes that the petitioner operates a restaurant with 22 employees and seeks to employ the beneficiary as its general manager. Counsel asserts that the evidence of record establishes that the beneficiary will be employed in a primarily managerial capacity.

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.

The sole issue addressed by the director is whether the petitioner established that 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.

The petitioner filed the nonimmigrant petition July 25, 2008, indicating its intent to employ the beneficiary as the general manager of its company, which operates a restaurant with 21 employees. The petitioner noted that the beneficiary was previously granted L-1A classification and served as general manager of the petitioning company soon after its establishment, from July 2002 until July 2003.<sup>1</sup> In a letter dated July 17, 2008, the petitioner stated that the beneficiary will perform the following duties:

. . . to exercise wide discretion over the day-to-day operations of the company, including executing contracts with clients and providers, directing activities such as production, payroll and service, monitor work activities, and evaluate performance. Finally [the beneficiary] will continue to have full discretion over the hiring and firing of all employees, assign duties, responsibilities, and work stations to employees in accordance with work requirements. Her time will continue to be dedicated to managing and supervising the operations of [the petitioner].

The petitioner provided a copy of its payroll journal for the period ended on June 3, 2008, which indicated wages and salaries paid to 22 full-time employees.

The director issued a request for additional evidence on August 4, 2008, advising that the petitioner's initial evidence did not establish that the beneficiary would function at a senior level in an organizational hierarchy other than in position title, or that the beneficiary would supervise and control the work of a subordinate staff of supervisory, managerial or professional employees who could provide relief from performing the services of the company. The director instructed the petitioner to submit a list clearly delineating every position, and explaining how the beneficiary's subordinates are bona fide managers or professionals. The director also requested that the petitioner explain why it has offered the beneficiary an annual salary of \$30,000, noting that this "is a substantially smaller amount that what is normally meted out to a manager or executive who receives L-1A nonimmigrant classification from the USCIS."

In a letter dated August 19, 2008, the petitioner stated that the beneficiary will be employed in a managerial capacity, as she will function at a senior level in the organization and supervise and control the work of other supervisory and managerial employees. Specifically, the petitioner stated that the beneficiary will: (1) be in charge of managing the U.S. company and directing the negotiations of the company's future expansion; (2) supervise and direct the activities of other supervisory and managerial employees reporting to her; (3) have full discretion over the hiring and firing of all employees, and assign duties, responsibilities and work stations in accordance with work requirements; and (4) exercise wide discretion over the day-to-day operations of the company, including executing and approving contracts with clients and providers, directing activities such as sales, payroll and service, monitoring work activities, and evaluating performance.

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<sup>1</sup> The petitioner indicated on Form I-129 that a previous request to extend the new office petition was denied. (SRC-03-195-50485). The approved "new office" petition was valid from July 15, 2002 until July 14, 2003 (SRC-02-190-50326). The beneficiary was last admitted to the United States in F-1 status on March 27, 2008.

The petitioner indicated that the beneficiary would oversee a total of five managerial employees including a chief financial officer, two operations managers, a human resources manager, and a chef, and provided descriptions for each position. The petitioner also submitted an organizational chart showing that the chief financial officer will supervise an administrative assistant, the operations managers will supervise two bartenders, two cleaning people, two cashiers, three waiters and one dishwasher, and the chef will supervise two pizza cooks, two cooks, and one pastry chef.

Finally, the petitioner stated that the beneficiary's proffered annual salary is \$50,000 and that the \$30,000 salary was indicated in error on the Form I-129.

The director denied the petition on September 12, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. As noted above, the director referred to the petitioner as a "cattle importer established in 2004 that currently employs six individuals," and stated that the beneficiary's proposed position is "operations manager," supervising "a controller, a veterinarian, an assistant supervisor, a ranch hand and a livestock yard attendant."

On appeal, counsel for the petitioner emphasizes the obvious factual errors in the director's decision, noting that the director apparently confused the facts of the instant petition with those of an unrelated petition. Counsel asserts that the evidence of record establishes that the beneficiary will be employed in a primarily managerial or executive capacity and requests that the petition be approved.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the AAO agrees that the director makes no direct references to the petitioner's evidence and in fact appears to have issued the decision based on the facts of an entirely unrelated petition.

Furthermore, although the director issued a request for evidence, the director limited his inquiry to whether the beneficiary would supervise subordinate managers or professionals, and whether an annual salary of \$30,000 is sufficient for an L-1A manager or executive. The RFE reflected an incomplete application of the statute and regulations to the facts of this case, as the director restricted his analysis of the beneficiary's eligibility as a manager or executive to whether the beneficiary would supervise subordinate professionals or managers. Furthermore, the director's supposition that the beneficiary's salary was insufficient is not supported by the statute and regulations, which do not provide for the consideration of the proffered salary as a factor in determining the beneficiary's employment capacity.

However, notwithstanding the director's errors, the AAO finds the evidence of record insufficient to establish the petitioner's and beneficiary's eligibility for the requested classification. Accordingly, the director's decision will be withdrawn and the petition will be remanded to the director, who is instructed to request additional evidence consistent with the discussion below.

When examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the 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 to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The record does not contain a sufficiently detailed description of the beneficiary's proposed position as general manager of the U.S. company. Accordingly, the director is instructed to request that the petitioner provide a comprehensive, specific description of the duties to be performed by the beneficiary, including a breakdown of the percentage of time she will devote to those duties on a weekly basis. If the petitioner indicates that the beneficiary "oversees," "supervises," "directs" or "manages" an activity or function, the petitioner should clearly indicate who among its employees performs the routine duties associated with the particular activity or function.

The petitioner should also be instructed to provide a detailed organizational chart identifying the names and job titles of all employees working for the company as of the date the petition was filed. In addition, the petitioner should provide information regarding its hours of operation, and a sample work schedule for its employees, to establish that the company has sufficient lower-level staff to perform the routine duties associated with operating a full-service restaurant.

The record also contains inconsistent evidence regarding the petitioner's ownership that precludes a finding that the petitioner has a qualifying relationship with the foreign entity, as required by 8 C.F.R. 214.2(l)(3)(i). The petitioner indicates that it has two equal owners, Ozzonno S.A., an Argentine company, and Romina Garcia, a citizen of Argentina. The petitioner submitted a copy of its stock certificate #3 indicating that 50 of the company's 100 authorized shares were issued to Ozzonno S.A. on May 28, 2003.

However, the petitioner indicated on its 2006 IRS Form 1120, U.S. Corporation Income Tax Return at Schedule K, that the U.S. company is wholly-owned by Panamanian person or entity. This information directly contradicts the petitioner's claim that it is owned and controlled by the beneficiary's previous foreign employer, Ozzonno S.A. 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). The petitioner should be instructed to clarify this discrepancy and to submit additional documentary evidence in support of the claimed qualifying relationship, such as the company's stock transfer ledger, copies of all stock certificates issued to date, amended tax returns, and evidence that the foreign entity paid for its ownership interest in the U.S. company.

Finally, the evidence of record does not establish that the beneficiary 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, or that her prior year of employment abroad was in a position that was managerial or executive in nature. *See* 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner indicates that the beneficiary was employed by its alleged parent company in Argentina from April 1, 2001 until April 30, 2002, and by the petitioner from July 15, 2002 until July 14, 2003. The instant petition was filed on July 25, 2008, and the beneficiary was last admitted to the United States as an F-1

nonimmigrant student on March 27, 2008. While the petitioner suggests that the instant petition is a continuation of the beneficiary's previous employment as the U.S. company's general manager, the intervening five years cannot be overlooked. There is no evidence that the beneficiary has been employed by any qualifying entity in the United States or abroad since 2003.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

(Emphasis added).

It appears that the beneficiary has spent significant periods of time in the United States as an F-1 student since at least 2006. However, the beneficiary's time in the United States as an F-1 student would be considered interruptive of her continuous employment abroad. Absent evidence that the beneficiary worked for the foreign entity in Argentina for a full year during the three years preceding her most recent admission to the United States, USCIS cannot conclude that the beneficiary possesses one year of employment abroad within the requisite time period.

Finally, even assuming, *arguendo*, that the petitioner could establish that the beneficiary was employed by the foreign entity for one continuous year within the relevant time frame, the record as presently constituted contains insufficient evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

Therefore, the director is instructed to request additional evidence to establish that the beneficiary meets the requirements set forth at 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

It is emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, July 25, 2008.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for L-1A classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further

consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

**ORDER:** The decision of the director dated September 12, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.