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U. S. Citizenship and Immigration Services
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U.S. Citizenship
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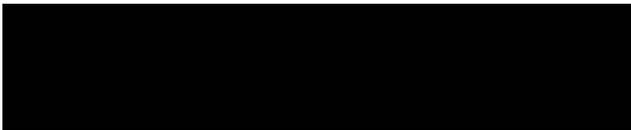
File: EAC 08 127 51707 Office: VERMONT SERVICE CENTER Date: **MAY 29 2009**

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:



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 dismiss the appeal.

The petitioner, a Texas corporation, filed this nonimmigrant petition seeking to employ the beneficiary in the position of head chef 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 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 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 matter 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 Part 5, No. 10 of the Form I-129, the petitioner describes itself as a seafood specialty restaurant where the beneficiary would be employed as head chef. In support of the petition, the petitioner provided a letter dated March 26, 2008 from counsel, who stated that the beneficiary's job duties with the U.S. petitioner will be similar to those with the foreign entity. The proposed position was described as follows:

[The beneficiary] is currently in charge and supervises the preparation of the fish salads, the cleaning up and cooking of the shrimp, the preparation of the fish fillets for soups, the cooking of the octopus, squid fillets, etc. Supervises the preparation of the ranchera and pico de gallo salsas and chips. He is responsible for supervising the setting up and maintaining the salad and dressing bar

[The beneficiary]'s duties at [the petitioner] will consist of the same managerial job duties that he has had at [the foreign entity]. He will continue to supervise the employees, the preparation and cooking of the different foods.

. . . Due to the volume of employees and patrons the restaurant is going to have, [the petitioner] needs a Head Chef in a managerial position, to run the kitchen, supervise and manage the 57 employees and make sure the patrons are satisfied

The petitioner also provided an organizational chart showing five employees—the president, a general manager as his direct subordinate, and three head chefs as direct subordinates of the general manager.

On April 7, 2008, the director issued a request for additional evidence (RFE), instructing the petitioner to provide further documentation establishing that the petitioning entity will require the services of a bona fide manager or executive and that it will have the capability of relieving the beneficiary from performing non-qualifying tasks. The petitioner was also asked to provide a more detailed organizational chart showing the beneficiary's subordinates and depicting the beneficiary in a managerial or executive role. Lastly, the petitioner was instructed to provide an hourly breakdown of the job duties of the beneficiary's subordinates, establishing that the beneficiary will oversee the work of managerial or professional employees.

In response, counsel submitted a letter dated May 30, 2008 in which he explained that the petitioner's restaurant would be comprised of 57 employees and that the beneficiary would be supervising a kitchen manager, a floor manager, and a kitchen operations employee, all three of whom would run the restaurant and thereby relieve the beneficiary from having to perform primarily non-qualifying tasks. Counsel further explained that the restaurant would operate for a total of 14 hours, which would be divided into two shifts. Counsel stated that each shift would be staffed with a kitchen manager, a floor manager, and a kitchen operations employee. With regard to the position of head chef, counsel stated that the beneficiary would be responsible for ensuring that the restaurant runs efficiently. However, none of the beneficiary's specific job duties were provided.

Additionally, the petitioner provided an organizational chart showing a fully staffed restaurant with the three head chefs towards the top of the restaurant's hierarchy, supervising the kitchen and floor managers as well as the kitchen operations employee. Combined, the three managers would supervise the remainder of the restaurant staff.

On June 10, 2008, the director denied the petition concluding that the petitioner failed to establish that the United States operation would support an executive or managerial position within one year. While the AAO will uphold the director's ultimate basis for denial, the underlying analysis is somewhat questionable. Specifically, the director found that the nature of the petitioner's restaurant does not appear to require workers with professional-level expertise. While this may be the case, the beneficiary's subordinates were described as managerial or supervisory employees with subordinates of their own. There is no statute or regulation requiring the beneficiary's subordinates to be both professional and managerial, so long as they are one or the other. The AAO further finds that the director's comment regarding the beneficiary's position within the organizational hierarchy to be unfounded. Contrary to the director's findings, the petitioner has provided an organizational chart that depicts the beneficiary to be at one of the top levels within the hierarchy. There is no

requirement that the beneficiary must be at the highest level in order to meet the definition of manager or executive.

Despite the shortfalls in the director's analysis, there are other deficiencies in the record that preclude the AAO from issuing a finding that is favorable to the petitioner. Specifically, the AAO finds that the record lacks a detailed description of the beneficiary's proposed job duties as required by 8 C.F.R. § 214.2(l)(3)(ii). The job description as provided by the petitioner is very general, indicating only that the beneficiary would oversee three managerial positions while failing to state the beneficiary's specific daily job duties. It is noted that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient, as neither addresses the critical question of what the beneficiary would actually be doing 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel argues that the beneficiary's subordinates are all supervisory and restates each of the beneficiary's subordinate's job descriptions. However, merely discussing the job duties of the beneficiary's subordinates and establishing that they are supervisory is not sufficient to inform U.S. Citizenship and Immigration Services (USCIS) of the job duties the beneficiary would perform.

Furthermore, while a beneficiary's position title is generally not a valid indicator as to the nature of job duties to be performed, the AAO notes that the beneficiary's position title in the present matter is somewhat of an exception, as the beneficiary is coming to the United States to be employed as a head chef in a restaurant. It is therefore reasonable for the AAO to conclude that at least some of the beneficiary's job duties would involve food preparation. That being said, the petitioner must be mindful that 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. *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. 593, 604 (Comm. 1988). As the petitioner is claiming that the beneficiary's position as head chef is primarily managerial or executive, the petitioner has the burden of establishing that the primary portion of the beneficiary's time would not be spent producing the products to be consumed by patrons of the petitioner's restaurant. Here, the petitioner maintains the claim that the kitchen manager, the floor manager, and the kitchen operations employees would supervise the non-professional kitchen staff. While this may be true, the fact that the beneficiary would not act as a first-line supervisor of non-professional employees does not establish that the primary portion of the beneficiary's actual daily tasks would be within a qualifying capacity. In fact, due to the lack of a detailed job description, the AAO is entirely unclear as to what, aside from food preparation, the beneficiary's daily tasks would involve. Merely claiming that the beneficiary would supervise other supervisory restaurant staffers does not explain what actual job duties the beneficiary would perform. Without this crucial information, the AAO cannot conclude that the beneficiary would be employed in a managerial or executive capacity.

Additionally, while not addressed in the director's decision, the record indicates that the petitioner has not met the requirements specified in 8 C.F.R. § 214.2(l)(3)(i), which 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." "Affiliate" is defined in pertinent part as "one of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner claims that the beneficiary's foreign employer and the U.S. entity are both majority owned by [REDACTED]. In support of the foreign entity's ownership, the petitioner has provided a copy of the minutes of a shareholders meeting that was held on March 12, 2004, establishing that [REDACTED] and [REDACTED] together own 60 out of a possible 100 shares of the petitioner's Series A stock. As [REDACTED] shares appear to be jointly owned with another individual, it is unclear how much of the foreign entity's stock is actually owned by [REDACTED] and whether that ownership constitutes a majority. 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)).

With regard to the U.S. entity's ownership, the petitioner provided its articles of incorporation, filed on April 13, 1978, in which Article Four clearly stated that the petitioner is authorized to issue up to 500,000 shares of stock. This document was accompanied by a single stock certificate, dated April 21, 1978, which purportedly issued 1,000 shares to [REDACTED]. However, these documents are problematic for a number of reasons. First, the petitioner provided no further documentation to establish whether any additional stock was issued, aside from the original 1,000 shares. It is therefore impossible for the AAO to determine whether [REDACTED] is, in fact, the petitioner's sole owner as seemingly indicated. Second, the petitioner stated at Part 5, No. 11 that it was established in 2008. The articles of incorporation and stock certificate that have been submitted in this proceeding suggest that the entity was actually established in 1978, which is 30 years prior to the date claimed in the Form I-129. The petition is therefore inconsistent with both supporting

documents. 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).

Thus, due to the lack of sufficient documentation and the inconsistency described above, the AAO cannot conclude that the beneficiary's foreign and U.S. employers have a qualifying relationship.

Second, the record is not persuasive in establishing that the petitioner has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of its petition, the petitioner submitted a copy of a document titled "Commercial Lease" which indicates that the petitioner's lease for space at [REDACTED] will commence 60 days from the issuance of a certificate of occupancy by the City of El Paso. It is noted that the lease contains no date to show when this agreement was entered into; nor any tenant or landlord signatures to show that the two parties agreed to the terms contained in the document. As such, the lease does not appear to be a valid document and cannot serve as evidence that the petitioner secured physical premises to house the new office.

Third, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner failed to specifically describe the beneficiary's job duties abroad as "head chef." Rather, the petitioner merely indicated, via counsel's letter dated March 26, 2008, that the beneficiary was employed for seven years as head chef of the restaurant abroad. Although counsel also stated that the beneficiary's proposed employment would encompass similar duties to those the beneficiary performed during his employment abroad, as discussed above, the description of job duties lack sufficient information and failed to establish the beneficiary's actual daily tasks. Therefore, due to the lack of necessary information the AAO cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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 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.