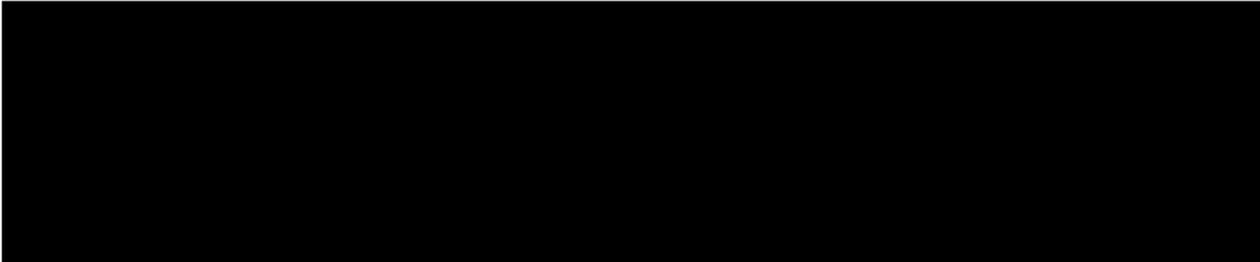


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



87

DATE: **SEP 11 2012**

Office: CALIFORNIA SERVICE CENTER

FILE:

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:

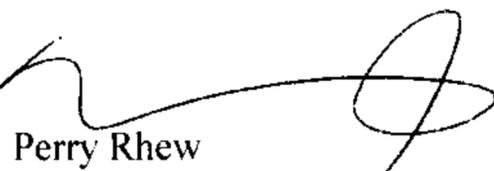


**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The petitioner has appealed the March 31, 2010 decision of the California Service Center Director denying the nonimmigrant visa petition. The Director concluded that the petitioner failed to establish it has a qualifying relationship with the beneficiary's foreign employer, and that the beneficiary will be employed in a primarily managerial or executive capacity. The AAO will dismiss the appeal.

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 Immigration and Nationality Act (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 first issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on December 22, 2009. The petitioner, a chain of four Mexican food restaurants, is an Arizona corporation formed in 1984. The petitioner indicated on Form I-129 that it is an affiliate of [REDACTED], based in Mexico City, Mexico. On the Form I-129, the petitioner stated that "[t]he [REDACTED] is the majority shareholder in Mexico & Arizona & has management control in both countries." In a letter dated November 25, 2009, accompanying Form I-129, the petitioner explained:

Both the Mexican and Arizona restaurants are managed and controlled by the family of the founding shareholder [REDACTED]. The beneficiary of this Petition, [REDACTED] . . . . The company continues to be controlled by the family members of Mr. [REDACTED].

In response to the director's request for evidence ("RFE") on December 29, 2009, the petitioner submitted a document describing the ownership of the foreign company as follows:<sup>1</sup>

<u>Shareholders</u>	<u>Number of Shares</u>	<u>% of Total Shares Owned</u>
[REDACTED]	7	0.23%
[REDACTED]	843	28.10%

<sup>1</sup> The director's denial notice misstated the ownership structure of the petitioner. It appears the director mistakenly referenced the ownership structure of [REDACTED] or [REDACTED] (which are identical in structure), instead of the foreign company, [REDACTED]. Nevertheless, the director's error was harmless and the reasoning for the decision remains sound.



(3.86%), (3.86%), (3.86%), (3.86%), (0.23%), (0.03%), and (0.03%).

The record clearly indicates that the petitioning company does not have a qualifying "affiliate" relationship with the foreign company. The evidence indicates that five individuals own the U.S. company, whereas ten individuals own the foreign company. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . ." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) (emphasis added).

Even though the U.S. and foreign companies have the same three individuals who own larger percentages of both companies, these three individuals do not constitute a "group" under the regulations. USCIS does not accept a combination of individual shareholders to constitute a "group," unless the individual members have been shown to be legally bound together as a unit within the company by evidence such as voting proxies or agreements to vote in concert. The petitioner submitted no such evidence. In addition, there is no parent entity with ownership and control of both companies that would qualify the two as affiliates.

Although counsel claims that the petitioning company and the foreign company are both majority owned and controlled by "the family," this familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family"). There is no merit to the petitioner's argument that the "there is no legal basis to treat shareholders related to each other differently than shareholders who are not related to each other."

In several letters submitted by the petitioner, founder and chief executive of the restaurants, claimed to be "the majority shareholder" of both the U.S. and foreign companies. Mr. also claimed that the initial investments forming the petitioner came primarily from his personal funds. However, the evidence in the record does not support these assertions. The evidence in the record reflects that Mr. ownership of the petitioner is 1.30%, and his ownership of the foreign company is 0.23%. The petitioner's stock ledger reflects that Mr. surrendered the majority of his stock certificates on December 26, 1996. Furthermore, even if the petitioner's initial investments came primarily from Mr. personal funds, this fact is immaterial to the question of whether the petitioner and the foreign company have a qualifying relationship at the time of filing the instant Form I-129. The relevant inquiry is Mr. control and ownership of the petitioner and the foreign company at the time the Form I-129 was filed, not at the time the petitioner and/or the foreign company were formed.<sup>2</sup>

Because the petitioner failed to establish that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer, the petition must be denied.

<sup>2</sup> The petitioner was established in 1984 and the foreign company was established in 1991. The instant Form I-129 was filed in 2009.

The second issue addressed by the director is whether the petitioner established that the beneficiary will be primarily employed in the U.S. in a qualifying managerial or executive capacity, as required by 8 C.F.R. §§ 214.2(l)(3)(iv) and 214.2(l)(3)(v)(B).

The petitioner seeks to employ the beneficiary as its Finance Manager, overseeing the financial management of all four of the petitioner's restaurants. The petitioner's organizational chart reflects that the beneficiary will be supervising an Operations Manager in Tucson and a Temporary Operations Manager in Phoenix. According to the organizational chart, each Operations Manager oversees a Manager and an Assistant Manager for each of its four restaurants, for a total of four Assistant Managers, four Managers, and two Operations Managers, all underneath the beneficiary. The beneficiary will report directly to the President and the CEO of the petitioner. The petitioner explained that the beneficiary's proposed position of Financial Manager does not currently exist in the United States. The petitioner further explained that it was creating this new position in the U.S. to mirror the current successful management structure of the foreign company. The petitioner explained the decision to hire the beneficiary was based upon the recent embezzlement of over \$200,000 by the petitioner's prior comptroller, the need to have someone trusted in management, and the need to better understand the source of the petitioner's "financial issues and impediments to continued growth," particularly in its Phoenix locations. Finally, the petitioner stated that the beneficiary's duties in the U.S. will be the same as they were in Mexico.

In the denial notice dated March 31, 2010, the director concluded that the beneficiary's proposed duties "are not duties that are typically considered managerial or executive as defined in the statute and regulation." The director stated that the duties were more indicative of an employee who is performing the tasks necessary to provide a service or to produce a product.

On appeal, the petitioner asserted that the beneficiary will be primarily engaged in managerial duties. The petitioner asserted that the beneficiary will be supervising the Operational Managers of its Tucson and Phoenix restaurants, and will report directly to the President and CEO of the foreign company. The petitioner explained that each restaurant has its own Managers and Assistant Managers whom supervise and manage the employees of each restaurant. The petitioner asserted that the beneficiary will not be replacing any of its current employees.

Upon review, the petitioner's assertions are persuasive. The AAO finds sufficient evidence to establish that the beneficiary will be employed in a primarily managerial capacity. While it does appear that the beneficiary would be engaged in some non-managerial duties, the petitioner has established by a preponderance of the evidence that the beneficiary's duties are primarily managerial. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The petitioner submitted sufficient evidence to establish that the beneficiary would be overseeing its financial operations. The petitioner established that the beneficiary would be supervising the two Operational Managers, whom currently supervise the managers and assistant managers of the petitioner's four restaurants. The petitioner has established that it has the capacity and organizational structure to support a bona fide managerial position.

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. With respect to the question of whether the beneficiary would be employed in a primarily managerial capacity, the petitioner has sustained its burden. Accordingly, the director's decision is withdrawn in part.

Nevertheless, since the petitioner failed to establish that it has a qualifying relationship with the foreign company, the appeal must be dismissed.

**ORDER:** The director's decision to deny is affirmed in part and withdrawn in part. The appeal is dismissed.