

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **MAY 13 2013** Office: VERMONT SERVICE CENTER

FILE: [Redacted]

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:

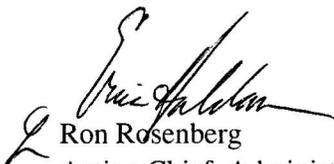
[Redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, ("the director") denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

This nonimmigrant petition was filed seeking to classify the beneficiary 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 was organized under the laws of the State of Georgia in November 2009. On the Form I-129 (Petition for a Nonimmigrant Worker), the petitioner noted that it employed two individuals and had earned a negative gross annual income of \$9,652 when the petition was filed. The Form I-129 lists the petitioner's type of business as "Indian restaurant." The Form I-129 Supplement L indicates that the petitioner is a joint venture and that the beneficiary of this petition owns 100 percent of the foreign entity (where he worked abroad) and 51 percent of the petitioner.¹ According to the Form I-129, the petitioner seeks to employ the beneficiary in L-1A classification as its operations manager for two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in either a managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive position.

I. The Law

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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:

¹ The record in this matter does not establish the foreign entity and the petitioner have been established as a joint venture. The record shows the foreign entity purchased a 51 percent interest in the petitioner on August 3, 2012. Accordingly, the petitioner is a subsidiary of the foreign entity.

- (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 regulation at 8 C.F.R. § 214.2(l)(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 (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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive position.

In the petitioner's letter appended to the petition, the petitioner stated that it was established in November 2009 and that it operates a restaurant in Georgia. The petitioner indicated that it is seeking an operations manager to direct, coordinate, and supervise the activities of the restaurant operation including: "marketing, advertising, menu designing, and customer relations." The petitioner also noted that the operations manager is required to "have knowledge and experience in preparing and cooking all types of Indian cuisine" and "to have experience in planning and managing of [*sic*] restaurant and have knowledge related in food products, seasonings and spices."

The petitioner also included its business plan which states on page 5, section 2.2: "[w]ith the support of both shareholders, [the petitioner has] decided to file an L-1B petition on behalf of [the beneficiary] so that he may serve as Executive Chef for [the petitioner]." At section 2.3 of the business plan, also on page 5, the business plan includes the following language: "[t]he shareholders of [the petitioner] have decided to file an L-1B petition for [the beneficiary] to serve as Operations Manager for [the petitioner]. The business plan also included the petitioner's organizational chart depicting the beneficiary in the role of operations manager under the supervision of the petitioner's president. The operations manager is shown as supervising a shift manager who in turn supervised three customer service positions. The operations manager is also shown as supervising an executive chef who in turn supervised three kitchen staff positions. The organizational chart also showed the beneficiary supervising an account manager. The chart did not identify any employees subordinate to the beneficiary, by name. The petitioner also provided two Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to two individuals in 2011. Neither employee appeared by name on the petitioner's organizational chart.

The director issued a request for evidence (RFE) instructing the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties in the United States; (2) information regarding the petitioner's employees, including a description of their duties; and (3) evidence that the beneficiary will be relieved from performing non-qualifying duties.

In response the petitioner stated that the beneficiary "will perform his duties in a managerial capacity" and the he "will be performing the day-to-day functions of managing the organization."

The petitioner indicated that the beneficiary will perform duties for the petitioner as he performed duties for the foreign entity. The petitioner identified the job duties for the foreign entity and provided a list of the same general duties as the beneficiary's duties for the petitioner. The petitioner also allocated the amount of time the beneficiary would devote to the duties as follows:

- Plan, develop and establish all business and strategic policies and objective for the company and supervise their implementation. Directs and coordinates activities among departments; 40%
- Oversees the financial operations of the organization, production and sales, planning and directing activities such as sales promotions and coordinating with other department heads as required; 20%
- Acts on behalf of the Board of Director in formulating and administering policies; 10%
- Implement the hiring policies of the company, recruit employees for the U.S. office, manage the accounts payable and receivable, manage the staff, prepare work schedules and assign specific duties as needed; 5%
- Directs and coordinates activities of departments or divisions for which responsibility is delegated to further attainment of goals and objectives; 5%
- Reviews analyses of activities, costs, operations, and forecast data to determine departments or divisions progress toward stated goals and objectives; 5%
- Supervise department managers and directors and other administrative department to review achievements and discuss required changes in goals or objectives resulting from current status and conditions[.] 5%

The petitioner provided its organizational chart depicting the same proposed positions without identifying any current employees except for the beneficiary and the president of the company to whom the beneficiary reports. The petitioner also provided brief job descriptions for the positions and the experience and preferred educational credentials for each position. The petitioner also included a photocopy of advertisements placed online dated October 7 and 8, 2012 for immediate openings for the positions of executive chef, sales manager, dining room supervisor, cashier, and service staff. The petitioner further included a copy of the business plan previously provided. The petitioner noted that the mundane operations of the petitioner "can be defined as the creation of the products for which the Petitioner provides" which includes cooking and service the cuisine to the customers. The petitioner stated that the petitioner had only two employees because of its declining business and that the beneficiary had been hired to expand and grow the business and then hire more employees.

Upon review, the director considered the totality of the evidence and determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner submits a brief. The brief recites the statutory and regulatory criteria, repeats the majority of the director's decision, lists the previously submitted evidence, and repeats the previously overbroad description of the beneficiary's proposed duties. Counsel asserts that "the director's decision fails to support how the beneficiary's duties are not executive or managerial in nature." Counsel asserts that the description of the beneficiary duties clearly falls

under managerial and executive capacity and again repeats the description of duties. Counsel contends that the petitioner's description of the beneficiary's duties shows that the beneficiary would assume essential functions of the business. Counsel avers that the director's decision contains several errors of fact and law. However, counsel does not identify the claimed errors.

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of the Act.

Preliminarily, we observe that counsel's assertion that the director failed to establish how the beneficiary's duties are not executive and managerial is a misguided attempt to switch the burden of proof. In visa petition proceedings, the burden is on the petitioner to establish eligibility. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. In this matter, the director clearly discussed the deficiencies in the record and properly analyzed the evidence regarding the issue of the beneficiary's employment in the claimed managerial or executive capacity. Counsel's assertion to the contrary is unsupported. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, we find that the record includes inconsistent unresolved information regarding the intent of the petitioner as to the intended role of the beneficiary for the petitioner. The petitioner stated on the Form I-129 that it intended to employ the beneficiary as an L-1A executive or manager; however, the petitioner's own business plan identified the beneficiary's role in part as an executive chef. 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). In this matter, the petitioner has not provided clarification of the beneficiary's actual intended role at the restaurant and for the petitioner.

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(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.* In this matter, the petitioner claims that the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act. Counsel, however, references the beneficiary's duties as falling under both the managerial and executive capacity. Section 101(a)(44)(A) of the Act and section 101(a)(44)(B)

of the Act. The petitioner may not claim to employ a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must establish that the beneficiary meets all four criteria of one of the statutory definitions. On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either primarily managerial or executive duties.

As the director stated, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will 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 fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

In this matter, the petitioner does not have a subordinate level of managerial employees or any employees for the beneficiary to direct. Although the petitioner has provided an organizational chart it has not identified any employees other than the beneficiary and the president, and it claimed only two employees on the Form I-129. Additionally, the advertisements placed in the classifieds on October 7 and 8, 2012, three weeks after the petition was filed, further confirm that the petitioner did not have employees when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978). The petitioner does not include evidence that it continued to employ the individuals who had been issued IRS Forms W-2 in 2011. Further, if the petitioner continued to employ these two individuals, the petitioner does not identify their positions. Finally, the petitioner has not explained how the service of any employee obviates the need for the beneficiary to primarily conduct the petitioner's business. The AAO acknowledges the petitioner's desire to install the beneficiary as its operations manager to assist the petitioner in its expansion; however, the petitioner does not provide documentary evidence of such expansion. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The record is insufficient in establishing the first criterion set out in the definition of executive capacity at 8 U.S.C. § 1101(a)(44)(B). Accordingly, the petitioner has not established the beneficiary will perform in primarily an executive capacity.

Turning to the definition of "managerial capacity," the statutory definition allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

To determine whether the beneficiary in this matter will primarily perform the duties of a personnel manager, we turn first to the petitioner's description of duties. The petitioner indicated generally that the beneficiary would spend five percent of his time supervising department managers and directors and other administrative departments. The petitioner's organizational chart does not identify department managers but rather a shift manager and an executive chef. The petitioner, however, has not provided evidence that either of these positions were filled when the petition was filed. The petitioner also references the beneficiary's management of staff, preparing work schedules, and assigning specific duties. However, again the petitioner has not provided evidence that it employs staff for the beneficiary to manage. Moreover, preparing work schedules and assigning duties are generally duties performed by first-line supervisors. Again, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

In addition, the petitioner's brief descriptions of the duties of the beneficiary's potential subordinates do not demonstrate that these individuals perform duties that are professional or managerial duties. The descriptions of duties for these positions are so general that it is not possible to conclude that the performance of any of the positions requires a bachelor's degree. Moreover, a review of the educational requirements listed on the position descriptions, does not reveal that the petitioner requires a bachelor's degree for any of the positions. Finally, the petitioner's allocation of the beneficiary's time suggests that the beneficiary would not be primarily supervising staff. Accordingly, the record does not include sufficient probative evidence to establish that the beneficiary primarily performs the duty of a personnel manager.

We now turn to an analysis of the record as it relates to a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term

"essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not articulated the essential function the beneficiary allegedly manages. Moreover, the petitioner does not include probative evidence that it employs individuals who would relieve the beneficiary from primarily performing the requisite day-to-day tasks necessary for the petitioner to operate.

The record does not include a substantive description identifying the beneficiary's proposed daily job duties. 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. Although afforded a second opportunity to provide the deficient information, the petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine in response to the RFE. Specifics are clearly an important indication of whether a beneficiary's duties are 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). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava, Id.*

In the instant matter, the petitioner indicated the beneficiary would spend 40 percent of his time, planning, developing, and establishing all business and strategic policies and objectives for the company and supervise their implementation as well as directing and coordinating the activities among the departments. As observed above, however, the petitioner has not provided evidence that the beneficiary has anyone to direct or supervise. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The petitioner allocates 20 percent of the beneficiary's time to overseeing the financial operations of the organization, the production, and the sales as well as planning and directing sales promotions and coordinating with other department heads. Again, however, the petitioner has not provided probative evidence that it employs anyone to perform the duties relating to sales, promotions, accounts payable and receivable, or the other operational tasks of preparing and serving the petitioner's cuisine.

The petitioner's advertisements to fill positions subsequent to the filing of the petitioner, emphasizes that, as of the date of filing, the petitioner had no employees who could relieve the beneficiary from performing the day-to-day operational tasks rather than managing an essential function for the petitioner.

Beyond the required description of the job duties, United States Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Upon review of the totality of the record, the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reason. 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.