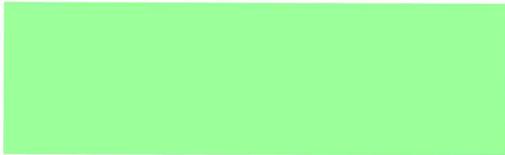


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U.S. Citizenship  
and Immigration  
Services



DATE: DEC 01 2014

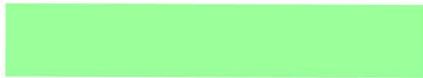
OFFICE: VERMONT SERVICE CENTER

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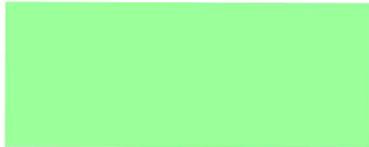
Petitioner:

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status as a 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 Texas limited liability company established in [REDACTED], operates a sushi restaurant. It is an affiliate of [REDACTED] the beneficiary's foreign employer in Mexico. The beneficiary was previously granted one year in L-1A status and the petitioner is now seeking an approval of an additional two years so the beneficiary may continue to serve as its General Manager.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the director erred by concluding that the beneficiary will act as a first-line supervisor of part-time employees. The petitioner contends that the evidence of record establishes that the beneficiary will supervise full-time subordinate supervisors and that he performs primarily managerial duties.

### 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 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, Petition for a Nonimmigrant Worker, 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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.

## II. Facts and Procedural History

The sole issue to be addressed is whether the petitioner established that the beneficiary would be employed in a qualifying managerial capacity under the extended petition.

The petitioner filed the Form I-129 on November 22, 2013. The petitioner operates a sushi restaurant with 20 employees and gross sales of \$819,629 in 2013. The petitioner stated on the Form I-129 that the beneficiary will be employed in the position of General Manager and be responsible for overseeing the entire operation of the restaurant, managing subordinate supervisors, implementing policies established by the petitioner's owners, exercising decision-making in all personnel matters and day-to-day operation of the restaurant, overseeing the company's financial position and budget through subordinate staff, developing marketing strategies, and ensuring compliance with regulations.

The petitioner provided an organizational chart for the restaurant which depicts the beneficiary as general manager, reporting to the company's owners. The chart also shows two operations managers and two kitchen supervisors reporting to the beneficiary who in turn supervise the restaurant staff including waiters, busboys, dishwashers, sushi chefs, griddle cooks, and appetizer cooks. In addition, the chart shows that the beneficiary supervises an administrative and finance manager who in turn supervises an accounts payable assistant.

The petitioner also provided a lease, photographs of its restaurant, a business plan, a list of suppliers and pay-invoices, balance sheets and income statements, IRS Form 1065 U.S. Return of Partnership Income for 2012, IRS Forms W-2 for all employees in 2012, IRS Form 940 (FUTA) for 2012, and Texas Workforce Commission Employer's Quarterly Reports for the last three quarters of 2012 and the first three quarters of 2013.

The director issued a request for additional evidence ("RFE"). The director requested, among other items, evidence to show that the petitioner can support an executive or managerial position. Specifically, the director requested information regarding a perceived discrepancy in an organizational chart and a clarification as to why the Vice President and General Manager of the company appear to be performing the same job duties.

In response, the petitioner explained that the organizational charts referenced by the director showed the foreign entity, not the United States entity, before and after the beneficiary's transfer to the United States. The petitioner provided a more detailed description of the beneficiary's duties and re-submitted the organizational chart for the United States entity, along with job descriptions for each position depicted on the chart. The petitioner also provided its 2013 IRS Form 1065, Return of Partnership Income, and copies of its 2013 IRS Forms W-3 and W-2 indicating that the company paid \$368,494 in salaries and wages during its first full year of operations.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director noted that the beneficiary would be functioning as a first-line supervisor of up to 21 part-time employees who provide the restaurant's services. The director also determined that the beneficiary does not qualify as a function manager.

On appeal, the petitioner states that the record supports a finding that the beneficiary would be managing other supervisory employees and that he has significant authority over the business beyond that typically held by a first-line supervisor. The petitioner provides an updated organizational chart clarifying that the beneficiary reports to the company's owners, and emphasizes that his duties do not overlap with other company employees. Finally, the petitioner stated that its prior counsel claimed in error that the beneficiary would serve as a function manager when in fact he would be managing supervisory employees rather than a specific function of the organization.

### III. Analysis

Upon review, the petitioner's assertions are persuasive. We find sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial capacity under the extended petition.

The director's determination appears to be based on erroneous conclusions of fact and misapplication of the statute and regulations pertaining to managerial employees. Further, although USCIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staffing levels or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 101(a)(15)(L) of the Act. Here, the director's decision reflects a pre-occupation with the non-professional nature of most restaurant work.

The statutory definition of "managerial capacity" 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 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).

Therefore, in order to qualify as a personnel manager, the beneficiary must oversee other supervisory, managerial, *or* professional employees, or primarily manage an essential function of the organization. The beneficiary's subordinate supervisory employees need not hold professional-level positions in order for him to qualify as a manager. *See* section 101(a)(44)(A) of the Act.

The petitioner has established that the beneficiary would supervise a multi-tiered management structure and exercise discretion over the day-to-day operations of the restaurant. Although the director found that the beneficiary would supervise "21 part-time employees," the submitted evidence demonstrates that many of the petitioner's employees, including the subordinate operations managers, kitchen supervisors, and administration and finance manager, work on a full-time basis and perform *bona fide* supervisory functions. Furthermore, the petitioner established that the company's staff will carry out the day-to-day restaurant operations and perform administrative and financial functions, such that the beneficiary would be relieved from primarily performing non-managerial duties associated with providing the restaurant's products and services and routine administrative matters. Finally, the evidence submitted establishes that the beneficiary will supervise and control the work of supervisory-level employees and have the authority to make personnel decisions for employees under her supervision. See generally sections 101(a)(44)(A) of the Act.

In visa petition proceedings, 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). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

Here, while the beneficiary may be required to perform some administrative or operational tasks, the petitioner has established by a preponderance of the evidence that the beneficiary will more likely than not allocate his time primarily to managerial tasks. Accordingly, the petitioner has established that the beneficiary will be employed in a qualifying managerial capacity.

#### IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has met that burden. Accordingly, the director's decision dated March 6, 2014 will be withdrawn and the appeal will be sustained.

**ORDER:** The appeal is sustained.