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



U.S. Citizenship
and Immigration
Services

DATE: JAN 27 2014 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.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary 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 corporation established in 2012, operates a restaurant. It claims to be an affiliate of [REDACTED] the beneficiary's foreign employer in Indonesia. The petitioner is seeking an initial approval of one year so the beneficiary may serve as the "President Director" of its new office.

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 within one year.

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 asserts that the evidence of record establishes that the beneficiary will function in a qualifying managerial capacity. Counsel submits a brief and additional evidence in support of the appeal.

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 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)(3)(v) further provides 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 in the United States, 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.

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 it would employ the beneficiary in a qualifying managerial or executive capacity within one year.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on September 20, 2012. The petitioner established that it operates an Indian cuisine restaurant with an anticipated staffing level of 15 employees and anticipated gross sales of \$552,464 for its first full year in operation. The petitioner stated on the Form I-129 that the beneficiary will be employed in the position of "President Director" and be responsible for establishing the restaurant by implementing standards, managing assets, and achieving sales targets. The petitioner provided a description of the beneficiary's proposed managerial duties and indicated that she currently performs similar duties for the petitioner's foreign affiliate, which operates two Indian restaurants in Indonesia.

The petitioner provided a proposed organizational chart for the restaurant. The organizational chart showed the position of President/General Manager to be held by the beneficiary. Of the positions listed on the organizational chart, 14 subordinate employees were to be hired in the first year of operations according to the business plan and projected payroll. The chart indicates that the executive chef and restaurant manager will report to the beneficiary. The chart identifies two chefs and two cooks reporting to the executive chef and additional staff reporting to the restaurant manager, including a bartender/bar manager and four wait staff. Finally, the chart indicates that the kitchen staff will include three dishwashers/cleaning staff. The petitioner provided job descriptions for the proposed positions.

The petitioner also provided a lease, photographs of its restaurant, a certificate of occupancy, a business plan showing projected payroll and sales forecasts, and bank statements showing initial funding.

The director issued a request for additional evidence ("RFE"). The director requested, among other items, evidence to show that the entity would support an executive or managerial position within one year of commencing operations, including a comprehensive description of the beneficiary's duties, a breakdown of the number of hours devoted to the subordinates' job duties on a weekly basis, and evidence of their educational credentials.

In response, the petitioner submitted a lengthy description of the beneficiary's duties as well as detailed position descriptions for the beneficiary's proposed subordinates.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that because the beneficiary will not supervise professional positions requiring a bachelor's degree, the beneficiary could not qualify as manager based on her supervisory responsibilities. The director found that the position descriptions provided for the subordinate employees were of limited probative value as they were "penned by the counsel and president of the foreign entity, who also shares the same name as the beneficiary." Furthermore, the director found that the beneficiary's proposed duties were non-qualifying and she would most likely be assisting with the day-to-day non-supervisory operations of the business. The director emphasized the petitioner's anticipated size and staffing levels in denying the petition.

On appeal, counsel states that the director's reasoning was based on errors of law or fact. Specifically, counsel states that the record supports a finding that the beneficiary would be spending a majority of her time on managerial duties and that the beneficiary's subordinates would carry out the day-to-day functions of the restaurant. Furthermore, counsel asserts that the director applied an improper standard by requiring that supervisory employees hold at least a bachelor's degree. Counsel emphasizes that the petitioner does not need to establish that the beneficiary would supervise professionals if the record shows that she will oversee subordinate supervisors and perform primarily managerial duties or that she will be a function manager. Furthermore, counsel states that the job descriptions of the subordinates were probative as the company's president had the authority to submit those descriptions. Finally, counsel states that the petitioner will be of sufficient size to support a managerial position by the end of the first year of operations.

III. Analysis

Upon review, the petitioner's assertions are persuasive. The AAO finds sufficient evidence to establish that the beneficiary would be employed in a qualifying managerial capacity within one year.

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 proposed 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.

In order to qualify as a 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 her to qualify as a manager. *See* section 101(a)(44)(A) of the Act.

The evidence of record establishes that the beneficiary would supervise a multi-tiered management structure and exercise discretion over the day-to-day operations of the restaurant. Furthermore, the petitioner established that the company's proposed staff will carry out the day-to-day restaurant operations, and that the new office will reasonably grow to the point where the beneficiary would be relieved from performing primarily non-qualifying duties. 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* sections 101(a)(44)(A)(ii) and (iii) of the Act.

While the beneficiary will undoubtedly be required to perform some administrative or operational tasks, the petitioner has established by a preponderance of the evidence that the majority of the day-to-day non-managerial tasks required to produce the products and provide the services of the company would be carried out by the beneficiary's subordinates within one year. Accordingly, the petitioner has established that the beneficiary will be employed in a primarily 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 December 21, 2012 will be withdrawn and the appeal will be sustained.

ORDER: The appeal is sustained.