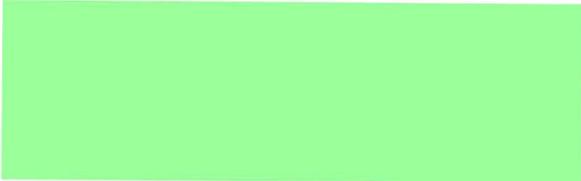


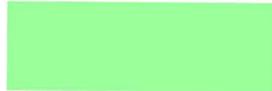


U.S. Citizenship
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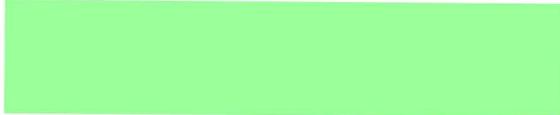
(b)(6)



DATE: **JUN 25 2014** OFFICE: VERMONT 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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

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 appeal will be dismissed.

The petitioner is a Florida corporation that was established in November 2012. The petitioner states that it will engage in the operation of an Italian café and bistro and claims to be a subsidiary of the beneficiary's employer abroad. It seeks to employ the beneficiary in the position of general manager of its new office. The petitioner has now filed this nonimmigrant visa petition seeking to employ the beneficiary for an initial period of one year in the nonimmigrant visa category of an L-1A 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 beneficiary will be employed in the United States in a managerial or an executive capacity within one year of approval of the petition.

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.

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.

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.

II. Facts and Procedural History

The record shows that the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 30, 2012. Included among the petitioner's supporting evidence was a statement, dated November 28, 2012, in which the petitioner provided an overview of the beneficiary's professional experience and educational credentials and gave a general description of the beneficiary's proposed U.S. employment.¹ The petitioner also provided its articles of incorporation, operating agreement, business plan listing the petitioner's itemized start-up and monthly operating costs, and an unsigned copy of a business lease with no specific date of commencement.

On January 22, 2013, the director issued a request for evidence (RFE) informing the petitioner that the record lacked sufficient evidence to warrant approval of the nonimmigrant visa petition filed on the beneficiary's behalf. Among the issues addressed in the RFE was that of the beneficiary's proposed employment with the petitioning entity. In an effort to determine whether the beneficiary would be employed in a qualifying managerial or executive capacity, the director instructed the petitioner to list the beneficiary's prospective subordinates, their educational credentials, and their respective position descriptions. The director also instructed the petitioner to provide a copy of its organizational chart with the projected hierarchy and the beneficiary's prospective position therein. Lastly, the petitioner was informed that if it were to submit any foreign language documents, they were to be accompanied by certified English language translations establishing the translator's competence to accurately translate.

The petitioner's response included an organizational chart depicting the petitioner's projected organizational hierarchy. The beneficiary was depicted at the top of the hierarchy as the company president followed by two vice presidents, a treasurer, and an executive chef as the beneficiary's direct subordinates. The chart showed

¹ As the director included the petitioner's job description in her decision, the AAO need not restate the same in the current discussion.

three waiters, a busboy, a bar coffee tender, and a cashier as directly subordinate to the treasurer and a dishwasher and an unidentified number of line cooks as the kitchen staff positions directly subordinate to the executive chef. The petitioner also provided a résumé for the head chef as well as a foreign language résumé for [REDACTED]. No further information was provided with regard to the job duties or educational credentials of the beneficiary's remaining projected subordinates.

In addition, the petitioner provided the following: (1) evidence of an undated outdoor dining café application; (2) architectural and engineering plans for restaurant tenant improvement, dated December 14, 2012; (3) an invoice, dated March 7, 2013, showing the petitioner's purchase of technology services and equipment from [REDACTED]; (4) an invoice with a credit card purchase receipt, dated March 5, 2013, showing payment made in the amount of \$2000 on an invoice totaling \$4,409.60;² (5) purchase receipts, dated January 2, 2013 and February 12, 2013, respectively, showing the petitioner's purchase of café equipment in the amounts of \$7,000 and \$9,951.28, respectively; (6) an invoice, dated March 18, 2013, billing the petitioner for work to be done inside the café; and (7) the petitioner's lease, effective December 18, 2013.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity within one year of commencing operations. Therefore, on August 5, 2013, the director issued a decision denying the petition. The director pointed out the discrepancy between the beneficiary's position title of president, as identified in the organizational chart, and the position of general manager, which the petitioner indicated at Part 5, No. 1 of the Form I-129, as the beneficiary's proposed job title. The director further pointed out the petitioner's failure to provide job descriptions for the beneficiary's projected subordinates and determined that it would be unlikely for the petitioner to employ two vice-presidents and a treasurer given the scope and nature of the petitioner's new business.

On appeal, the petitioner asserts that the beneficiary would not be employed as a first line supervisor, but rather would be employed in a managerial capacity, having control over the organization and the organization's supervisory and professional employees such as the petitioner's Italian chef, treasurer, and assistant manager. In addition to the initial statement, the petitioner indicated its intent to submit further evidence or information by checking Box B of the Form I-290B, Notice of Appeal or Motion. However, there is no evidence that the petitioner supplemented the record in any way since the filing of the appeal. As such, the record will be considered complete as currently constituted.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity within one year of commencing operations.

² Neither the merchant nor buyer was identified on the photocopied documents.

III. Analysis

The primary issue to be addressed in this decision is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary in a managerial or an executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

In the matter at hand, while the record indicates that the petitioner acquired sufficient physical premises approximately three weeks after filing the petition and established the size of the financial investment in the United States, it has provided inconsistent information about the beneficiary's position title and has submitted an organizational chart that contains questionable information when considered in light of the scope and nature of the petitioner's business. Consequently, we find that the petitioner has not established how the beneficiary would be relieved from performing non-managerial duties within one year.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the present matter, the petitioner has provided a deficient job descriptions that is comprised of non-qualifying tasks as well as broad job responsibilities that generally paraphrase aspects of the statutory definitions. For instance, the petitioner indicated that the beneficiary would perform marketing job duties, take inventory, make menu changes, and directly participate in the training of employees. Based on the evidence provided, it is unclear which, if any, of the petitioner's prospective employees would take over the performance of these non-qualifying tasks after the petitioner's first year of operation. Although the director provided the petitioner with an opportunity to submit information pertaining to the job duties of the beneficiary's subordinates by issuing an RFE, the petitioner failed to adequately address the director's request and, instead, provided two résumés, one of which was in a foreign language and was not accompanied by a certified English language translation and whose relevance was not explained. *See* 8 C.F.R. § 103.2(b)(3). That being said, even if both résumés had been in English,

neither addresses the issue of the job duties of the prospective employees. Furthermore, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In light of the petitioner's failure to provide job descriptions for the beneficiary's projected subordinates, the petitioner is unsuccessful in establishing its ability to relieve the beneficiary from having to primarily perform non-qualifying tasks after its first year of operation.

In addition, while the petitioner indicated that the beneficiary would formulate policies regarding marketing, sales, and finances, it is unclear who would be performing the underlying tasks of sales and marketing; nor did the petitioner specifically state what actual daily tasks represent the beneficiary's prospective role in formulating the petitioner's policies with regard to its finances. 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).

Further, the beneficiary's position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

According to the petitioner's business plan, the company will operate with one chef, one assistant chef, four waiters, the beneficiary, and one other shareholder. This staffing structure does not disclose which of these individuals would be responsible for keeping inventory or carrying out the petitioner's marketing and sales tasks. In fact, based on this anticipated hiring structure, it is unclear who, if not the beneficiary or her partner and shareholder, would greet and seat the restaurant customers. The hiring structure does not have provisions in place to explain who would assume these non-qualifying tasks beyond the restaurant's first year of operation.

Moreover, the petitioner's organizational chart, which was submitted in response to the RFE, indicated that the petitioner would employ two vice presidents, a treasurer, multiple line cooks, a dishwasher, a busboy, a bar coffee tender, and a cashier, none of whom were included in the staffing structure that was mapped out in the petitioner's business plan, which was provided initially in support of the petition. This staffing structure is significantly different from the one in the petitioner's original business plan, as described above. 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). As the petitioner did not explain how or why these two entirely distinct personnel plans pertain to the same entity, the petitioner has failed to consistently describe its intended organizational structure.

While it appears that the petitioner will hire staff to perform the routine functions of a restaurant, such as cooking the food and delivering it to the restaurant clientele by means of a wait staff, the record does not establish that the beneficiary would be relieved from primarily performing other operational functions within one year. Despite the preliminary stage of the petitioner's organizational development, the petitioner nevertheless maintains the burden of having to meet the statutory requirements. Based on the combination of vague and non-qualifying job duties in the beneficiary's job description, the lack of job descriptions for the beneficiary's subordinate staff, and the discrepancies in the petitioner's proposed staffing structure, we cannot conclude that beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations.

The petitioner must first show that the beneficiary performs the high-level responsibilities that are specified in the definitions of managerial or executive capacity. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend his or her time primarily performing day-to-day operational 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 or 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").

Based on the evidentiary deficiencies addressed above, we will uphold the director's determination that the petitioner failed to establish it would employ the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the new office petition. Accordingly, the appeal will be dismissed.

IV. Beyond the director's decision

Finally, while the director limited his decision to a discussion that focused on the beneficiary's proposed employment with the petitioning entity, we find that the record points to additional deficiencies that preclude an approval of this petition. Namely, the record indicates that the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer as claimed or that the beneficiary was employed abroad in a qualifying managerial or executive capacity. *See* 8 C.F.R. §§ 214.2(l)(3)(i) and (iv), respectively.

First, we will turn to the issue of a qualifying relationship between the petitioner and the beneficiary's employer abroad.

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 indicates that it is a subsidiary of [REDACTED] a restaurant that is presumably located in Italy, but whose origin was not expressly stated. Although the petitioner provided a page from the restaurant's

website along with several commercial ads describing the restaurant's offerings, the petitioner did not provide any evidence establishing the ownership of the foreign enterprise, other than to claim on the Form I-129 Supplement L, Section 1, No. 10, that the foreign entity is 100% owned by the beneficiary and [REDACTED]. The same petition supplement page indicates that the two individuals who, together, own 100% of the foreign entity also, together, own 56% of the U.S. entity. Despite the claimed parent-subsidary relationship the petitioner claims to have with the foreign entity, the petitioner provided an operating agreement in support of the Form I-129, listing the petitioner's four owners – the beneficiary and Mr. [REDACTED] each owning 28%, and [REDACTED] and [REDACTED] each owning 22%. The list of owners does not include the foreign entity that is claimed to be the petitioner's parent. Given that the definition of subsidiary necessarily requires that the petitioner be directly or indirectly owned, in whole or in part, by another entity the fact that the petitioner in this case is owned directly by four individuals indicates that it cannot be deemed a subsidiary of the foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K).

Further, the petitioner's claim that the beneficiary and Mr. [REDACTED] together, own 100% of the foreign entity does not constitute evidence. The petitioner provided no documentation to establish the ownership breakdown of the foreign entity. In other words, it is unclear whether each owner owns an identical portion of the foreign entity or whether one person owns a majority – more than 50% – such that together the two individuals ownership comprises 100% of the foreign entity. 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)). The petitioner failed to provide evidence corroborating its claim and establishing who actually owns the foreign entity. Moreover, even if the petitioner were to provide evidence to show that the foreign entity is either equally owned by the beneficiary and Mr. [REDACTED] or that one individual owns the majority and thus controls the entity, neither would be sufficient to determine that a qualifying affiliate relationship exists between the petitioner and the beneficiary's employer abroad.

Based on the evidence provided in this matter, we cannot conclude that the ownership scheme of the petitioner and the foreign entity is so similar as to fall within any of the prongs that define the term "affiliate," which states that the petitioner and the foreign entity must either be one of two subsidiaries that are owned and controlled by the same parent or individual, or alternatively, that they be two legal entities that are owned and controlled by the same group of individuals, each of whom owns and controls approximately the same share or proportion of each entity. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(L)(1) and (2). In this case, the operating agreement indicates that four individuals own the U.S. entity, while it appears that no more than two individuals own the foreign entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, it cannot be concluded that the same legal entity or the same individuals control both entities. Based on the lack of evidence to support the petitioner's claim, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

The second additional ground for denial is the petitioner's failure to establish that the beneficiary's employment abroad was in a qualifying managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

In the present matter, the petitioner provided no information about the beneficiary's job duties when the petitioner was originally submitted, stating only that the beneficiary's duties abroad as owner and general manager of a restaurant included marketing, inventory, menu changes, controlling and calculating food costs, managing staff, and hiring and training employees.³ Although the petitioner responded to the RFE, the information provided imparted little additional knowledge about the managerial or executive job duties the beneficiary performed abroad. Moreover, the petitioner did not establish that the performance of marketing duties or managing inventory and making menu changes are duties performed within a qualifying managerial capacity. Nor did the petitioner provide sufficient evidence to establish that the beneficiary's allocated the primary portion of her time to managing a subordinate staff of supervisory or professional personnel. Given the lack of evidence submitted, we cannot conclude that the beneficiary was employed abroad in a qualifying managerial or executive capacity as claimed.

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 *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). Accordingly, even though the above two issues were not addressed in the director's original decision, we find that the petitioner failed to meet the regulatory requirements discussed 8 C.F.R. §§ 214.2(1)(3)(iii) and (14)(ii), respectively, and on the basis of the above discussed adverse findings, the instant petition cannot be approved.

V. 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, that burden has not been met.

ORDER: The appeal is dismissed.

³ See Form I-129 Supplement L, Section 1, No. 6.