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U.S. Citizenship
and Immigration
Services

DATE: JAN 08 2015 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)

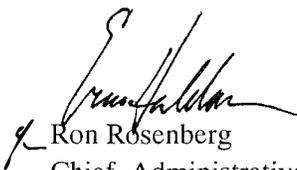
ON BEHALF OF PETITIONER:

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 (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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), 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, a Florida corporation¹ established in December [REDACTED] indicates on the Form I-129 that it will operate a pizzeria business. The petitioner claims to be an affiliate of "[REDACTED]" an entity located in Russia. The petitioner seeks to employ the beneficiary as the general manager of its new office.

The director denied the petition finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition.

The petitioner subsequently filed a motion to reopen the decision. The director reopened the matter and on review affirmed the prior denial decision. The petitioner subsequently filed an appeal. The director declined to treat the appeal as a second motion and forwarded the appeal to this office. On appeal, the petitioner asserts that the beneficiary will conduct managerial duties and manage professionals and non-professionals. The petitioner submits a brief and additional documentation.

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(1)(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 (I)(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.

¹ The petitioner is identified as [REDACTED] on the Form I-129; however, the record reflects that the company's registered name is [REDACTED]

- (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. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner has established that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition.

A. Facts

On the Form I-129, the petitioner stated that the beneficiary will be employed as the general manager of the company, which intends to open and operate a pizzeria. The petitioner provided evidence that it purchased a 51 percent interest in [REDACTED] a company established in August [REDACTED] and funded in September [REDACTED]. The instant petition was filed October 11, 2013.

In a letter, dated October 9, 2013, appended to the Form I-129, the petitioner stated that the beneficiary, as its general manager, will be responsible for:

- Overseeing activities directly related to providing services;
- Directing and coordinating activities of businesses or departments concerned with the production, pricing and sales of products;
- Reviewing financial statements, sales and activity reports and other performance data to measure productivity and goal achievement;

- Managing staff, preparing work schedules and assigning specific duties;
- Directing and coordinating organization's financial and budget activities to fund operations, maximize investments and increase efficiency;
- Establishing and implementing departmental policies, goals, objectives and procedures;
- Determining staffing requirements and interview, hire and train new employees or oversee those personnel processes;
- Planning and directing activities such as sales promotions, coordinating with other department heads as required; and
- Determining goods and services to be sold, and set prices and credit terms based on forecasts of customer demand.

(Paraphrased and bullet points added for clarity.)

The petitioner submitted a copy of [REDACTED] business plan, which indicates that the company expects to staff the initial restaurant with ten employees, including two full-time pizza bakers per shift and part-time wait staff, cashiers and delivery drivers. The petitioner noted that the minority partner in the business will provide administrative support to the business by conducting operational, marketing activities, financial and accounting functions for a two and one-half percent fee.² The petitioner projected that with aggressive marketing it would have a positive cash flow by the fifth month of operations and that after six months, profits would exceed \$10,000. The petitioner anticipated that by the end of the first year, [REDACTED] would operate at 100 percent capacity.

The director issued a request for evidence (RFE) on October 24, 2013. With respect to the beneficiary's employment in the new office, the director instructed the petitioner to provide: (1) evidence that the new office will support an executive or managerial position within one year of petition approval; and (2) a statement describing the staffing of the new operation, including the types of positions, a summary of the proposed duties for each position, the expected number of employees, and expected educational levels for the positions.

In a response, dated December 11, 2013, the petitioner stated that the beneficiary's duties while at [REDACTED] will include:

Preparation of annual operating and capital budgets, business plans and financial projections for Partner approval (10% of week); implementing budgets and business plans approved by the Partners; represent the venture in business dealings with other parties (20% of week), as approved by the Partners (30% of week); negotiate contracts on behalf of the venture and sign contracts approved by the Partners (30% of the week); discharge other duties and powers which the partner may entrust to her [*sic*]; and doing all other things necessary or advisable to ensure that the business of the venture is carried out properly and legally and in the best interest of the JV (10% of week).

² The record includes a management contract between the petitioner and the 49 percent partner but the contract does not identify the dates or term of the contract.

The petitioner also submitted a proposed organizational chart indicating that the beneficiary will directly supervise a "Store Manager" and an "Accountant." The store manager is depicted as supervising a head baker, two cashiers and three delivery persons. The head baker is shown as supervising a baker.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive position within one year of commencing operations. In denying the petition, the director found that the new office is a pizza parlor with ten employees including the beneficiary. The director determined that the petitioner had not established that the proposed positions would be professional positions or that the beneficiary would be relieved from acting as a first-line supervisor and performing the day-to-day tasks of running a pizza restaurant.

On motion, the petitioner asserted that the beneficiary will supervise subordinates such as a manager and a head baker and that these positions could be classified as professional positions. The petitioner also referenced a letter authored by the beneficiary's partner. The petitioner re-submitted the documents initially provided in support of the petition and in response to the director's RFE.

In the director's motion decision, the director noted that the letter authored by the beneficiary's partner could not be located. The director determined that the petitioner had not submitted any new evidence that would overcome the original grounds for denial.

On appeal, the petitioner provides the same brief previously submitted in support of the motion as well as a copy of the letter authored by the beneficiary's partner. In the letter, dated February 12, 2014, [REDACTED] states that the beneficiary "will be responsible for the management and oversight of all employees, these employees include a store manager, Accountant and head baker whom are all professionals." Mr. [REDACTED] indicates that he will oversee the day-to-day operations, including renovations while also exercising organizational practices and policies. Mr. [REDACTED] states that once the beneficiary arrives, he will step out of the managerial role to focus on property management and acquisition.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year.

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.*

Here, while the petitioner has established that it has acquired physical premises to renovate and open a pizza restaurant and has established the size of the financial investment in the United States, it has not provided sufficient information regarding the company's proposed staffing and 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 look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner provided two descriptions of the beneficiary's proposed duties. Both descriptions describe the beneficiary's duties in abstract terms that convey little insight into the beneficiary's actual proposed tasks. For example, the initial job description included a number of general managerial functions such as "overseeing activities directly related to providing services," "[d]irecting and coordinating activities of businesses or departments," "[d]irecting and coordinating organization's financial and budget activities to fund operations, maximize investments and increase efficiency," "[p]lanning and directing activities such as sales promotions, coordinating with other department heads as required," and "[e]stablishing and implementing departmental policies, goals, objectives and procedures." However, the petitioner does not identify what businesses or departments the beneficiary will be expected to direct and coordinate and does not identify other "department heads" within the petitioner's organization during the first year of operation. In addition, establishing and implementing departmental policies, goals, objectives and procedures simply paraphrases the statute. *See* section 101(a)(44)(B)(ii) of the Act. 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).

Similarly, the beneficiary's responsibilities for managing staff, preparing work schedules and assigning duties as well as determining goods and services to be sold, and setting prices and credit terms appear to comprise non-qualifying duties. While it appears that the petitioner will hire staff to perform the duties associated with operating a pizza restaurant, the record does not establish that the beneficiary would be relieved from primarily performing operational functions within one year. To establish eligibility, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions, and must prove that the beneficiary will *primarily* perform the 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). Here, even if the petitioner opens and begins the operation of a pizza restaurant within one year, the petitioner's proposed staffing for the restaurant is insufficient to support a qualifying managerial or executive position.

Likewise the beneficiary's proposed responsibilities provided in response to the director's RFE are overly broad. A number of the beneficiary's proposed duties, as described in the record, could also be classified as non-qualifying duties associated with the company's operational and logistics functions. For example, the petitioner indicates generally that the beneficiary will prepare and implement budgets, business plans and financial projections, and will represent the "venture" in business dealings and will negotiate and sign contracts on behalf of the "venture." The petitioner did not explain how any of these duties rise to the level of managerial or executive capacity.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both general managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them.³ This failure of documentation is important because several of the beneficiary's proposed daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, we cannot determine whether the beneficiary would perform duties that are primarily in a managerial capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Overall, the 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 a pizza restaurant and will employ ten individuals within the first year. The petitioner's business plan indicates that the company anticipates hiring two full-time pizza bakers per shift in addition to the wait staff/cashiers and delivery persons. The petitioner's organizational chart submitted in response to the RFE indicated a different personnel structure. As noted above, the petitioner identified: a subordinate store manager and an accountant as the beneficiary's direct subordinates and the bakers, cashiers and delivery persons subordinate to the store manager. Further, on appeal, the minority partner in the petitioner's pizza venture appeared to identify three direct subordinates of the beneficiary which he claimed were professional positions. The petitioner did not explain the variance between the business plan, organizational structure, and the statement from the minority partner. 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

³ Although the petitioner allocated percentages to the beneficiary's broadly stated duties in response to the RFE, it is not possible to ascertain the beneficiary's specific tasks within the general description. That is, it is not possible to discern what actual duties the beneficiary will perform when "represent[ing] the venture in business dealings with other parties (20% of week), as approved by the Partners (30% of week)," for example.

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 such the petitioner has not consistently described its intended organizational structure. Moreover, the petitioner does not identify the proposed hours of operation of the pizza restaurant or identify the shifts that will be necessary to maintain and operate the restaurant. For this additional reason, it is not possible to determine if the petitioner's proposed organizational structure and staffing levels are realistic.

The record also does not support a finding that the beneficiary will supervise a subordinate staff comprised of supervisory, managerial or professional employees. 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 other supervisory, professional, or managerial employees.⁴ 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).

Here, as noted, the petitioner did not provide a consistent explanation of the company's proposed staffing and organizational structure. Further, although specifically requested by the director, the petitioner did not submit position descriptions for the beneficiary's proposed subordinates. 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). Accordingly, even if the petitioner had consistently identified the subordinate positions of store manager, accountant and head baker, the record does not support the claim that any of these are professional positions. For example, without a description of the duties that would be performed by the position labeled as "accountant," we cannot determine that the individual in such a position would perform duties that require a bachelor's degree. In addition, in the absence of position descriptions, the record does not establish that the beneficiary's subordinates would hold supervisory or managerial positions. Although the petitioner indicated in response to the RFE that it would hire a store manager to oversee all lower-level staff, that position is not mentioned in the petitioner's business plan. In fact, the petitioner initially indicated that the beneficiary would perform first-line supervisory duties such as making work schedules for the company's cashiers, bakers and delivery drivers.

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the combination of vague and non-qualifying duties in the beneficiary's job description, the discrepancies in the petitioner's description of its proposed structure, and the lack of information regarding the petitioner's potential operating hours and the actual

⁴ In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

duties to be performed by the beneficiary and his proposed subordinates, we cannot conclude that beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations.

We emphasize that 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").

III. CONCLUSION

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. 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.