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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



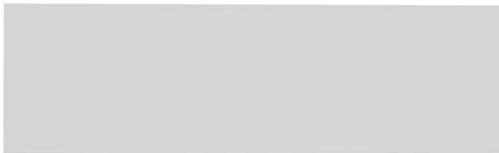
DATE: **JUN 30 2015**

PETITION RECEIPT #: [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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

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 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this 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 states that it is engaged in the preparation of pizza dough. The petitioner was established in Puerto Rico on [REDACTED] and claims to be a wholly owned subsidiary of [REDACTED] the beneficiary's foreign employer located in Venezuela. The petitioner seeks to employ the beneficiary as its director of administration for a period of three years.

The director denied the petition, concluding that the evidence of record did not establish: (1) that the petitioner had a qualifying relationship with the foreign employer; (2) that the beneficiary was employed abroad in a managerial or executive capacity; and (3) that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner asserts that the director's decision was erroneous and contends that the record establishes that it has satisfied all evidentiary requirements.

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.

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 ISSUES ON APPEAL

A. Managerial or Executive Employment Abroad

The first issue we will address is whether the petitioner established that the beneficiary has been employed in a managerial capacity abroad. The petitioner does not claim that the beneficiary has been or will be employed in an executive capacity as defined at section 101(a)(44)(B) of the Act.

1. Facts

The petitioner filed the Form I-129 on June 13, 2014. According to the record, the foreign entity operates retail stores selling [REDACTED] pizza and employed the beneficiary as its director of operations from November 2008 through November 2013. In a letter of support dated June 9, 2014, the petitioner claimed that the beneficiary's most important responsibilities were to "guarantee the brand's performance standards, including the quality of the product, customer service, and cleanliness and maintenance of the restaurants." The petitioner explained that the beneficiary was also responsible for "organizing and maintaining the budget throughout the year, guaranteeing the control of costs within optimal ranges, specifically, raw materials, payroll, and all controllable expenses." The petitioner further noted that the beneficiary directed recruitment and selection of the operational staff and training and development of the staff.

The petitioner provided a list of the foreign entity's "active personnel" indicating that it currently employed a general director, a director of operations, two assistant managers, ten line operators, one manager, and one "inside." The list provided the names of these employees, their identification numbers, start date, position name, and monthly salary.

The director issued a request for evidence (RFE) on July 15, 2014, instructing the petitioner to provide additional information. Specifically, the director requested clarification as to the scope and nature of the foreign entity's business, noting that while the record suggests that it operates [REDACTED] it is unclear whether it is one location or multiple locations. The director also requested additional evidence to demonstrate that the beneficiary was engaged in a managerial capacity, such as a more detailed and specific duty description including his discretionary authority and the percentage of time allocated to specific duties, and an organizational chart depicting all employees within the beneficiary's department, along with their duties, education levels, and salaries.

In a letter dated September 15, 2014, the foreign entity, represented by [REDACTED] stated that the beneficiary performed managerial functions and evaluated its operations and finances. The letter also stated that the beneficiary "evaluated operations" for two other companies, [REDACTED] and [REDACTED] both of which were companies primarily owned by the same shareholders as the

foreign entity. According to [REDACTED] these two companies and the foreign entity operate the [REDACTED] in Venezuela. [REDACTED] explained that the beneficiary "administered through his team of managers and supervisors" the complete inventory and cost administration process of the operations. [REDACTED] stated that the beneficiary ensured that the managers and supervisors complied with their responsibilities at each of the three companies. The record appears to indicate that the foreign entity is one of three companies that manage all [REDACTED] current restaurant locations.

The petitioner also included a separate document which included the beneficiary's principal responsibilities, a description of functions, and responsibilities and time distribution as follows:

PRINCIPAL RESPONSIBILITIES

1. Guarantee compliance with [REDACTED] policies and procedures.
2. Guarantee operation's compliance with national laws; municipalities; and the application of good manufacturing practices.
3. Ensure profitability through cost structure and sales model established and designed by the franchise.
4. Define and resolve situations or problems by analyzing the implied points and evaluating the alternatives.
5. Developing marketing strategies that boost increments in sales for each branch.
6. Manage multiple projects and effectively prioritize tasks, goals and objectives; guide actions and create detailed plans of action; organize schedules and tasks; utilize resources in an efficient manner to complete objectives.

DESCRIPTION OF FUNCTIONS

1. Perform the execution of all policies, programs and systems that permit operational optimization.
2. Effectively use company resources for planning, deployment and management training.
3. Provide the necessary resources for the proper functioning of the restaurant.
4. Control and supervise the delivery of products, tailored to the needs of each restaurant.
5. Develop solid work relationships with operations team and the corporation's labor units.
6. Deploying the formation of new products.
7. Provide and guarantee quality service to build and maintain a client base, create and participate in client oriented programs and maintain a strong presence in the professional community, and promptly address client's concerns or subjects that may include their complaints.
8. Solicit feedback from clients, shares feedback with the team to improve the restaurant's operations and create market loyalty.

9. Configure the high yield market environment focused on positivity and quality through recruitment, training and development, rewarding and retaining the best leaders in the industry.
10. Maintain adequate staff.
11. Identify new opportunities for sales growth; create a vision for the direction of the market, using effective strategies and plans for specific marketing and business development strategies.
12. Supervise financial goals through effective use of discretionary budgets, investments and expenses.
13. Evaluate operations profitability and efficiency by creating and analyzing various reports, trends, and budgets, elements of comparison, labor evaluations; and timetables to plan ongoing strategies.
14. Perform market planning and direct efforts for the development and optimization of adequate restaurant infrastructure, analyzing remodeling needs, or relocation if needed.

RESPONSIBILITIES AND TIME DISTRIBUTION

Ensure execution of the operations of each restaurant, ensuring policies, cleanliness and maintenance: 40%

Inventory control, cost management, preparation, revision and interpretation of statistics and financial reports for each store: 15%

Guarantee compliance of [REDACTED] policies and procedures: 8%

Develop market strategies and local publicity in order to build sales: 10%

Human Resources: Recruiting, selecting and contracting employees (Base and Managerial). Exit interviews. Ensure availability of human resources for the various positions and responsibilities at each restaurant: 15%

Participate, coordinate and supervise activities related to training and development of the labor team (Base and Managerial) of each restaurant through courses, symposiums, training manuals, teleconferences and other tools to help the development and growth of the organization's integrants: 10%

Periodic analysis and revision of service providers and contractors for line cost, performance, consistency, service and result: 2%

The petitioner provided an organizational chart indicating that the beneficiary had a subordinate manager, [REDACTED] who, in turn, managed two named assistant managers and 11 named line operators. The petitioner also provided a list of restaurants in Puerto Rico.

In denying the petition, the director was unable to determine the scope of the beneficiary's duties with the foreign entity since the beneficiary also devoted his time to two other companies. The director determined that the foreign entity oversaw a single [REDACTED] location and, therefore, could not reconcile the claimed large management staffing needs for such a small operation. The director also noted that the petitioner failed to provide duty descriptions for any of the beneficiary's subordinates to allow for a determination of whether the beneficiary supervises or controls their work.

On appeal, the petitioner asserts that the beneficiary's performance for two other companies should "in no way detract" from the beneficiary's managerial duties for the foreign entity. The petitioner refers to the beneficiary's involvement in personnel actions, his placement in the company's organizational hierarchy, and his job performance in areas such as hiring marketing companies, designing special offers, and creating a successful coupon program strategy as evidence of his position as a functional manager.

2. Analysis

Upon review, we find that the petitioner has not sufficiently established that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

When examining the 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(1)(3)(ii). Beyond the required description of the job duties, we review the totality of the record when examining a beneficiary's claimed employment in a managerial or executive capacity, 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 understanding a beneficiary's actual duties and role in a business.

The record indicates that, as director of operations, the beneficiary had a wide range of responsibilities including quality control, customer service, facility management, budget and finance oversight and human resource duties. In response to the RFE, the petitioner provided a second duty description for the beneficiary that listed six principal responsibilities, 14 functions, and a breakdown of the beneficiary's responsibilities into seven areas with a percentage of time allocated to each. Nevertheless, these descriptions are too broad to provide any insight into how the beneficiary spent his day. For example, the record indicates that the beneficiary devoted 40% of his day to ensure execution of operations of each restaurant, 8% to guaranteeing compliance with policies, 10% to a full range of human resource activities, and 15% of his day devoted to duties involving inventory control, cost management, preparation, revision and interpretation of statistics and financial reports for each store. No specific tasks were provided and these descriptions are too

vague. 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). We note that at least another 22% of the beneficiary's time was allocated to duties that included non-qualifying tasks such as conducting analysis, participating in training, and developing marketing strategies. The 14 point function list provided no clarification of qualifying duties since it listed many non-qualifying tasks such as marketing, business development, and customer service. Further, based on the broad duties required for up to 73% of the beneficiary's time, we are unable to determine if he will be primarily engaged in qualifying duties. 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 *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Furthermore, we find that the petitioner did not establish the scope of the beneficiary's duties pertaining to his position working for the foreign entity as opposed to the other two companies discussed within the record. It does not appear that the record contains any information regarding the two other companies for whom the beneficiary works but therein lies the problem since we cannot determine how much of the beneficiary's time was devoted to performing managerial duties specifically for 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). We acknowledge the petitioner's assertion on appeal that the beneficiary's work for the other foreign companies should not detract from the beneficiary's managerial duties for the foreign entity however, the petitioner must still demonstrate that the position meets the requirements of this petition as it relates to the foreign entity in particular. Here, the petitioner has not done so.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 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).

The petitioner submitted an organizational chart reflecting that the beneficiary supervised a manager. According to the chart, the manager, in turn, supervised two assistant managers, and 11 line operators reported to the assistant managers. Although the petitioner provided the employee names,

it did not provide any additional information as requested by the director such as their job descriptions, payroll information, or educational levels. 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). This failure is especially significant given the inconsistencies in the record regarding the nature and scope of the beneficiary's duties. Specifically, the evidence does not clearly establish whether the foreign entity manages a single restaurant location or several locations. Therefore, we cannot determine whether the claimed staffing reasonably supports the needs of the company. 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).

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. at 604).

Here, the petitioner provided no descriptions for the subordinates listed under the beneficiary. Therefore, it has not established that the beneficiary was primarily engaged in managing the operational function as opposed to performing those duties necessary to accomplish the function. For example, nothing in the record established who performed the finance, marketing, business development, and other lower-level administrative duties in order to relieve the beneficiary from primarily performing those duties himself. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what proportion of those duties would be managerial or executive, nor can we deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. See section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has

sustained its burden of proving that his/her duties are "primarily" managerial. On appeal, the petitioner's reiteration of some of the beneficiary's responsibilities was insufficient to overcome the basis of the director's finding.

We acknowledge the petitioner's assertion on appeal that it seeks to obtain approval of the beneficiary in an L-1A status as a manager and not as one having specialized knowledge. We also recognize that despite the director's mention of specialized knowledge in his decision, he properly adjudicated this matter based on his assessment of the beneficiary's eligibility in a managerial or executive capacity.

Based on the foregoing, the petitioner has not established that the beneficiary was employed abroad in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

B. Managerial or Executive Employment in the United States

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity in the United States.

1. Facts

The petitioner produces pizza dough and then supplies its dough exclusively to [REDACTED] [REDACTED] distributes the dough to [REDACTED] pizza outlets located in Puerto Rico in accordance with an agreement [REDACTED] has with [REDACTED]. The petitioner stated that [REDACTED] is its only client. The petitioner explained that it is required to use the [REDACTED] recipe and its plant operations are subject to "periodic audits" by [REDACTED]. The petitioner expects growth of its company as it anticipates the number of [REDACTED] outlets to double by 2016. In 2013, the petitioner claimed to have sold \$800,000 in pizza dough.

The petitioner stated that the beneficiary will be its director of administration responsible for all aspects of administration including "budget development in conjunction with the general manager and supervision of its implementation, quality control of its products, staffing, facilities, logistics and database management, purchasing, inventory, delivery, etc." The petitioner explained that the beneficiary's "most important function is to implement logistics plans" and ensure that the petitioner produces sufficient pizza dough to meet the demand and standards of the [REDACTED] pizza stores while managing production to avoid waste.

The petitioner provided its organizational chart depicting the President/General Manager, [REDACTED] [REDACTED] at the top of the hierarchy with three direct reports: (1) the beneficiary, director of administration; [REDACTED] administrative assistant; and (3) [REDACTED] plant supervisor. The chart indicated that eight unnamed production line operators also reported directly to the president/general manager.

In the RFE, the director instructed the petitioner to provide additional evidence such as the beneficiary's duty description and the percentage of time the beneficiary would devote to his specific duties. The director also requested an organizational chart to demonstrate the petitioner's staffing with a focus on employees within the beneficiary's department, along with their names, positions, duty descriptions, education levels, and salary information.

In response to the RFE, the petitioner provided documents including a list of eight named production line operators, 17 restaurant locations in Puerto Rico, and the beneficiary's job description as follows:

Responsible for all administration aspects of [the petitioner] including staffing, facilities, database management, purchasing, shipping/receiving, budget development and implementation. Participates in the development of the strategic plan in conjunction with the General Manager for approval by the Board of Directors. Drafts business plans and operational plans annually for facilities management.

Directs the Human Resources function of the Company including employee policy handbook, recruitment (including screening and interviewing of all candidates and temporary staff), performance appraisals, grievance procedures, disciplinary actions, benefits administration, and payroll.

Liaison with the Board of Directors including attendance at all Board meetings and taking the official minutes of the Board meetings.

TASK DESCRIPTION

ADMINISTRATION (55%)

1. Facilities management
2. Shipping/receiving
3. Inventory Control
4. Support Services
5. Employment Services
6. Board of Directors, attendance and taking of official minutes
7. Liaison with company attorney for legal aspects of employees' issues
8. Budget development and management
9. Staff and member travel
10. Confidential records of the association

HUMAN RESOURCES (45%)

1. Development of corporate policies and procedures and implementation of same
2. Salary administration and benefits program
3. Payroll
4. Personnel records/documentation

5. Position posting, screening and interviewing candidates
6. New hire orientation program; exit interview program
7. Employee programs and activities

The petitioner further indicated that the beneficiary will perform these duties with minimal supervision, and will report to the petitioner's General Manager/President.

In denying the petition, the director found that the beneficiary's duties were too vague to demonstrate that the beneficiary would be engaged in a primarily managerial or executive capacity. Further, the petitioner's organizational chart depicted no subordinates to the beneficiary, leaving unresolved the question of who would relieve the beneficiary from performing non-qualifying tasks as a personnel manager or the functional tasks as a function manager.

On appeal the petitioner asserts that the beneficiary will be managing the administration function. Specifically, the petitioner claims that he will implement and coordinate pizza dough distribution to cover the petitioner's current contract and manage an anticipated increase in demand based on the anticipated development of additional stores requiring dough in the next several years. The petitioner states that the beneficiary is "required to calculate inventory of materials and production of dough based on an analysis of each store's sales volume."

2. Analysis

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

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). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does 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 petitioner's initial duty description for the beneficiary was brief and vague; therefore, the director requested additional detailed information. 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. The petitioner has not provided any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. In response to the request, the petitioner again provided a very general duty description including responsibility over areas of the business such as staffing, database management, facilities, purchasing, budget development, drafting business plans, and directing human resource functions. Rather than providing detail regarding these responsibilities, the petitioner merely allocated the

beneficiary's time into two categories: "ADMINISTRATION (55%)" and "HUMAN RESOURCES (45%)." The administration category included a list of 10 responsibilities including "Employment services," "Support Services," and "Board of Directors, attendance and taking of official minutes." The human resources category included seven areas of responsibility such as "Payroll," "Salary administration and benefits program," and "Position posting, screening and interviewing candidates." Despite the director's request for specific tasks, the petitioner once again provided vague statements relating to the beneficiary's general responsibilities leaving us unable to determine how the beneficiary would actually spend his day. Again, 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). Moreover, once again the duties discussed suggest that the beneficiary will be performing non-qualifying duties, though we cannot determine the extent of those activities from a review of this record.

As noted previously, 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 (citing *Matter of Church Scientology International*, 19 I&N Dec. at 604). In this matter, the petitioner asserted that the beneficiary will manage an essential function relating to the administration of the company. However, the record suggests that the beneficiary's broad range of responsibilities will require the performance of non-qualifying tasks yet the record indicates that the beneficiary has no subordinates to perform those tasks. Therefore, it is reasonable to conclude that the beneficiary will be required to complete non-qualifying tasks and the petition provided insufficient evidence to establish that the beneficiary will be primarily engaged in those non-qualifying tasks.

On appeal, the petitioner's assertions regarding the beneficiary's duties only highlight the beneficiary's role in performing non-qualifying duties, such as implementing distribution and calculating inventory. Further, the petitioner's asserted reliance upon the beneficiary in the face of its anticipated increased production requirements is not relevant to this petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

C. Qualifying Relationship

The last issue to be addressed is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The pertinent regulations at 8 C.F.R. § 214.2(I)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(J) Parent means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In this matter, the director determined that the petitioner established that the foreign entity owned 100% of the petitioner's stock thereby establishing the parent-subsidary relationship. However, the director found that despite the 100% ownership of the petitioner's stock, the foreign entity did not have de jure control over the petitioner. The director determined that because the petitioner will produce dough to be used by [REDACTED] in Puerto Rico, [REDACTED] could elect to withdraw the petitioner's right to produce dough using their recipe. The director concluded that such an event would put the petitioner out of business, and thus concluded that the foreign entity does not have de jure control of the petitioning company. The petitioner disputes the director's conclusion and we agree with the petitioner.

An association between a foreign and U.S. entity based on a franchise agreement or a license is insufficient to establish a qualifying relationship. See 8 C.F.R. § 214.2(l)(1)(ii)(G) (defining the term "qualifying organization"). Franchise and licensing agreements set forth terms agreed upon between two parties acting at arm's length, and are not typically reflective of entity's sharing common ownership and control as required by the regulations. *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm'r 1970) (finding that no qualifying relationship exists where the relationship between the foreign and U.S. entities was "purely contractual," or based on a license and royalty agreement subject to termination and not reflective of common ownership and management).

In this matter, there is no franchise agreement between the petitioner and the foreign entity. The foreign entity owns 100% of the petitioner's stock. The petitioner has a single client who has a contract with [REDACTED] to provide the petitioner's dough to franchise restaurants located in Puerto Rico. While the petitioner's business is reliant upon its current agreement to produce [REDACTED] pizza dough, as noted this arrangement does not form the basis of the relationship between the foreign entity and the petitioner. Consequently, the director's finding with regard to this issue will be withdrawn.

III. CONCLUSION

In this matter, upon review of the totality of the record, the petitioner has not demonstrated that the beneficiary had been or will be employed in a primarily managerial or executive capacity abroad or for the U.S. petitioner. Accordingly, we will uphold the director's determination on these issues. We will withdraw the director's finding that the petitioner did not establish a qualifying relationship with the foreign entity.

The petition will be denied and the appeal dismissed for the above stated reasons. 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. § 136; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

(b)(6)

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NON-PRECEDENT DECISION

ORDER: The appeal is dismissed.