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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: SEP 22 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

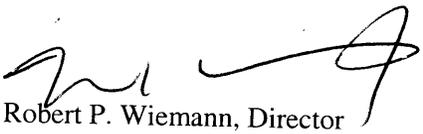
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion. The motion will be granted; however, the previous decision will be affirmed.

The petitioner is a New Mexico corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the foreign entity had not been doing business for at least one year at the time of filing the petition; (2) the beneficiary was not employed in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status; and (3) the proffered position in the United States is not in an executive or managerial capacity. In its appellate decision, the AAO determined that the foreign entity had been doing business, and it withdrew the director's comments on that issue. The AAO, however, affirmed the director's findings that neither the beneficiary's foreign nor proposed U.S. employment met the definition of executive or managerial capacity.

On motion, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it and Westgold Partnership of the United Kingdom are affiliates. The petitioner runs a "Days Inn" motel in Hobbs, New Mexico that employs 8-10 persons. The petitioner is offering to employ the beneficiary permanently, but fails to disclose the amount of the beneficiary's proposed

compensation. According to the record, the beneficiary is currently employed in the proffered position in L-1A nonimmigrant status.

The first issue to be discussed in this proceeding is whether the beneficiary's job with the foreign entity was in a managerial or executive capacity. Pursuant to 8 C.F.R § 204.5(j)(3)(i)(B), the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately his entry into the United States in a nonimmigrant status. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

Both the director and the AAO concluded that the beneficiary's foreign employment was not in a managerial or executive capacity because the record did not contain a definitive statement from the foreign entity about the beneficiary's job responsibilities. On motion, counsel reiterates that the beneficiary worked in a managerial or executive capacity simply because he is a managing partner/owner of the foreign entity. According to counsel, as an owner of the foreign entity, the beneficiary was responsible for the company's overall management. As evidence of the beneficiary's position with the foreign entity, counsel submits: (1) a copy of the partnership deed that lists the beneficiary as an owner of the foreign entity; (2) a September 10, 2002 letter from the parent company that lists the beneficiary's duties; (3) a functional flow chart that shows "the important managerial and executive duties performed by the beneficiary for the foreign parent"; and (4) an organizational chart that lists the duties of the employees who were directly supervised by the beneficiary.

The AAO will not now consider the evidence regarding the beneficiary's foreign employment that counsel submits on motion because the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In a February 28, 2002 request for evidence (RFE), the petitioner was asked to submit a definitive statement from the foreign entity describing the beneficiary's job duties. The petitioner declined to submit the requested evidence because "[the director] seem[s] to want that information as if [the beneficiary] was working with the parent company now." On motion, however, the petitioner submits a September 2002 letter from the parent company describing the beneficiary's position, along with other evidence of the beneficiary's job responsibilities. Neither counsel nor the petitioner explains why this evidence could not have been produced at the time it was requested by the director. Accordingly, the AAO will not consider this evidence now, and as there is no new evidence to consider regarding the beneficiary's foreign employment, the AAO will not disturb its previous finding.

The second and final issue to be discussed is whether the proffered position of president is in a managerial or executive capacity. The AAO noted in its appellate decision that the record did not contain any documentary evidence of the beneficiary's daily activities. The AAO also found that the nature of the petitioner's business operations lacked clarity because the petitioner claimed to solely operate a motel but then claimed to also be involved in the search for investment opportunities.

On motion, counsel states that the reasonable needs of the petitioner are satisfied by its employment of 8-10 individuals, and that the beneficiary is not involved in any non-managerial or non-executive duties. The petitioner submits an organizational chart of its operations as well as copies of W-2 forms and federal quarterly tax returns to attest to its operational size and staffing level.

Regarding the AAO's concerns about the dual nature of the petitioner's operations, counsel states that the motel operation is the petitioner's main business, but that the beneficiary is also involved in "seeking investment opportunities in the hospitality area." The petitioner submits several documents to attest that the petitioner has made several investment opportunities in the United States under the beneficiary's tutelage.

To support its contention that the beneficiary will work in a managerial or executive capacity is the September 2002 letter from the foreign entity that also addresses the beneficiary's U.S. employment. Counsel states that if the beneficiary is not primarily acting in a managerial or executive capacity, then no one is "minding the store."

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). The petitioner's September 2002 letter, which it claims outlines the beneficiary's responsibilities, is problematic. This letter indicates that the beneficiary will, among other duties, "direct and coordinate activities of the General Manager, other managers and employees in the production, operations, purchasing and marketing departments" However, the petitioner's organizational chart does not indicate that the petitioner's organization includes a production, operation, purchasing or marketing department. According to the organizational chart, a front desk manager and a housekeeping manager staff the petitioner. The chart does not show that the petitioner is organized into any type of "departments" as the petitioner stated in its September 2002 letter.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner's evidence on motion raises serious questions about the beneficiary's true responsibilities. The petitioner has not sufficiently established who executes the production, purchasing and marketing functions that the beneficiary allegedly directs if no departments relating to these areas exist, and no employees who perform these job duties exist. The petitioner has failed to adequately clarify the record regarding the true nature of the beneficiary's duties. Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and the AAO will not reverse its comments concerning this issue.

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. § 1361. The petitioner has not met that burden.

ORDER: The previous decision of the Administrative Appeals Office, dated July 29, 2003, is affirmed. The petition is denied.