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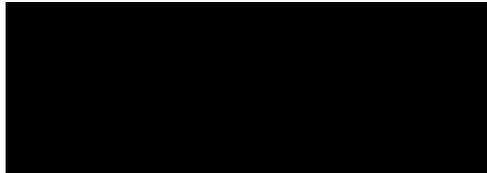
U.S. Department of Homeland Security

Citizenship and Immigration Services

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DA

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3 F
425 Street, N.W.
Washington, D.C. 20536



FILE: SRC 02 226 55585

Office: TEXAS SERVICE CENTER

Date: FEB 06 2004

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:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a hospitality management company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its managing director. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary had been and would continue to be employed primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties have been and will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2001 and is a hospitality management company. The petitioner states that the U.S. entity is an affiliate of Natu's, located in Zimbabwe. The petitioner declares one employee. The petitioner seeks a continuation of the beneficiary's services as its managing director at a yearly salary of \$36,000.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101 (a)(44)(C), provides:

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as

previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

In a memo, dated July 16, 2002, the petitioner lists the beneficiary's past and proposed job duties as follows:

Day-to-Day Operational Management-45%

As General Manager of Sarai, Mr. Patel has, and will continue to, plan, develop and establish policies and objectives of Sarai, conferring with other officials and subordinates in organizing and implementing these policies and objectives to coordinate functions and operations between divisions and departments as they are put into place. He has and will continue to, confer with subordinates in the negotiating of Management Agreement. He has, and will continue to, report any change in the hospitality industry to the Partners of Sarai. He has, and will continue to meet with Department Heads addressing any issues that would have a negative impact on the success of Sarai. He has, and will continue to, manage Aloha Motor Inn and to review all financial statements in protecting Sarai's thirty-five percent (35%) Membership interest in BB.

Finance and Accounting-25%

[The beneficiary] has, and will continue to, review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. He has and will continue to, be responsible for all budgetary and financial objectives. He has, and will continue to, direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize return on investment or to increase productivity.

Employment and Training-15%

[The beneficiary] has, and will continue to, plan and develop human resources and public relations policies designed to improve Sarai's image and relations with customers, employees and the public. He will be responsible for hiring and firing of personnel within the organization, as well as recruiting managers for the various departments. He will decide if any

personnel are in need of further training and determine their capabilities. Furthermore, he will evaluate the performance of personnel and determine what responsibilities best suit each individual. Currently [the beneficiary] has three BB employees reporting to him. They are the Night Auditor, the Head Housekeeper and the Front Desk Clerk.

Marketing-15%

[The beneficiary] will discuss the marketing of Sarai with the Partners and the Marketing Manager, communicating his opinion in the implementation of an aggressive marketing strategy. He will review comprehensive market studies to determine potential Management services. He has, and will continue to, develop a RevPar (revenue per available room) program and an ADR (average daily rate) building program and occupancy increases program for BB and other hotels/motels that Sarai may acquire or manage. He has, and will continue to, represent Sarai at conferences and official occasions.

In the U.S. entity's business plan, dated January 2001, the beneficiary is described as the managing director and is described as having the supervisory responsibilities of the day-to-day operation of the U.S. entity and its clientele. The beneficiary is also said to be responsible for keeping the other members of the team apprised of potential investment opportunities within the hospitality industry in Georgia and the southeastern states. The petitioner also lists the scope of the beneficiary's job duties, which will not be repeated here as it has been made a part of this record.

The director requested that the petitioner submit a list of employees of Sarai, LLC and state their job titles. The director also requested that the petitioner clarify its response of "3 projected" on the Form I-129.

In a response letter, dated October 16, 2002, the petitioner stated that a clerical error had been made on the Form I-129 when typing "3 projected" in the space provided for the current number of employees. The petitioner continued by stating that the beneficiary "at this stage of [the petitioner's] development . . . is the only one on Sarai LLC's payroll."

The director denied the petition stating that upon review, the evidence as provided was deficient in demonstrating that the

beneficiary would be employed in a primarily managerial or executive capacity. The director went on to state "the Service is not persuaded the beneficiary's duties in this position will be primarily those of a bona fide manager, the petitioner's claims of future hiring and their [sic] having "set in motion the goals and objectives entering the hospitality industry" notwithstanding."

On appeal, counsel disagrees with the director's decision and asserts that the documentation previously submitted supports a determination that the beneficiary's position is managerial or executive in nature. Counsel restates the duties and responsibilities of the beneficiary, and supplies a breakdown in percentages of the beneficiary's job duties as follows:

Management-35%

Finance and Accounting-25%

Marketing-15%

Employment and training-25%

Counsel's assertions are not persuasive. On appeal, counsel relies on evidence that was not in existence at the time the petition was filed, or at the time the initial decision to deny the petition was made by the director. The petitioner submitted copies of management agreements, dated December 1, 2002, between the petitioner and Gainesville Hospitality, Inc. and Talladega Hospitality, Inc., respectively. The petitioner also submitted copies of U.S. entity payroll register records dated, December 1, 2002, through February 28, 2003, and copies of the petitioner's payroll summary records dated January and February 2003. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

Pursuant to 8 C.F.R. § 103.2(B)(12): "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing

eligibility at the time the application or petition was filed." Where 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 is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that the beneficiary has been or will be functioning primarily in a managerial or executive capacity.

On review of the record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Future projections of company expansion cannot be used to establish intercompany transferee status where, as in the instant matter, the petitioning entity is not a new office. Furthermore, the beneficiary's duties that were described by the petitioner are not supported by documentary evidence, and do not establish that he directs the management of the U.S. entity. The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. The petitioner has not provided persuasive evidence to establish that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. The petitioner submitted a management agreement, dated August 31, 2001, between Sarai and BB. The scope of the beneficiary's job duties is identical to that which has been made a part of the record.

Counsel contends that the beneficiary managed personnel at the Aloha Hotel. However, there has been no evidence submitted that demonstrates the nature of the subordinates' job duties, their qualifications or training, or the extent to which the beneficiary managed and control their daily activities. The record does not demonstrate that the U.S. entity contains the organizational complexity to support a managerial or executive position. The record does not support a finding that the petitioner will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Counsel admits that at the time the petition for extension of stay was filed in the instant matter, the petitioner only had one individual (the beneficiary) on its payroll. The record reflects that the beneficiary will continue to perform the day-to-day services of the organization.

Position title alone is insufficient to establish that the beneficiary will be functioning primarily in a managerial or executive capacity.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. There is no evidence submitted to show the number of hours attributed to each of the beneficiary's executive and non-executive duties. The record demonstrates that there are inconsistencies in the percentages of time the beneficiary will devote to each job duty. For instance, in the memo submitted by the petitioner, dated July 16, 2002, the percentages read: management-45%, finance and accounting-25%, marketing-15%, and employment and training-15%. In contrast, counsel on appeal states that the following percentages are representative of the beneficiary's job duties: management-35%, finance and accounting-25%, marketing-15%, and employment and training-25%. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also claims that the beneficiary will be directing the activities of the overall organization. However, rather than directing the activities of the organization, it appears that the beneficiary will actually be performing the services of the business. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not submitted sufficient evidence to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity.

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 sustained that burden.

ORDER: The appeal is dismissed.