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U.S. Citizenship
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Services

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FILE: WAC 05 091 50509 Office: CALIFORNIA SERVICE CENTER Date: **NOV 09 2006**

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

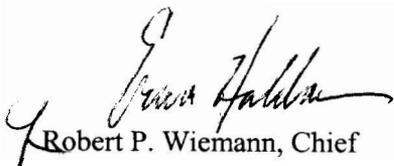
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Chief
Administrative Appeals Office

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

The petitioner, a California corporation, claims to be an affiliate of [REDACTED] located in the United Kingdom. The petitioner states that it is in the restaurant business. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner was initially granted an L-1 classification and subsequently was granted an extension of status. The petitioner now seeks to extend the beneficiary's status so that he may continue to perform the duties of president for the U.S. company.

The director denied the petition based on the conclusion that that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

On appeal, counsel for the petitioner states that the beneficiary will in fact be employed in a managerial capacity and executive capacity since he will “direct the management of the businesses owned by the company.” Counsel for the petitioner indicates that the beneficiary will oversee the management of two restaurants and one real estate development project. Counsel for the petitioner outlines several investments made by the beneficiary and explains that the beneficiary will not manage a restaurant or supervise the restaurant’s employees. Instead, the majority of the beneficiary’s duties will be “primarily directing the management of the organization.” Counsel submits a brief and additional documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the petitioner established that the beneficiary will be employed in the United States 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.

The nonimmigrant petition was filed on February 10, 2005. On the Form I-129, the petitioner described the beneficiary's proposed United States duties as: "continue manage [sic], direct start up affiliate company." In addition, in a supporting letter dated February 8, 2005, the petitioner explained the duties the beneficiary has performed for the U.S. company since his entry into the United States in L status as the following:

[The beneficiary] as proven to be a successful businessperson and demonstrated by the continuing growth and vitality of his European operations [sic]. Since his entry he has been instrumental obtaining all governmental licenses, permits etc. meeting [sic] with banks, real estate brokers in order to further expand and contribute to the growth of the U.S. company.

The petitioner stated on Form I-129 that the company has 6 to 15 employees, and noted that the number varies. The petitioner submitted its California Forms DE-6, Quarterly Wage and Withholding Report, for all quarters of 2004, which confirmed the employment of six employees as of December 31, 2004. The petitioner paid wages to only one employee from January 2004 until November 2004, when the additional staff was hired. Only the beneficiary and one other worker appeared to be full-time employees.

On February 17, 2005, the director requested additional evidence. Specifically, the director requested: (1) the total number of employees at the U.S. entity; (2) an organizational chart of the U.S. entity, including the job titles, job description, educational level, annual salaries/wages and immigration status for all employees supervised by the beneficiary; (3) a detailed description of the beneficiary's job duties in the U.S., indicating the percentage of time spent on each job duty; and, (4) a list of all the U.S. entity's employees from the date of establishment to the present, including names, job titles, social security numbers, dates of employment and wages per week.

In a response dated April 22, 2005, the petitioner submitted the requested information. The petitioner indicated that the U.S. entity hired a total of nine employees. According to the U.S. organizational chart submitted by the petitioner, the beneficiary will hold the position of president who will then supervise the manager. The manager will supervise the assistant manager who in turn supervises the bartender, head chef, assistant chef, kitchen prep, and two servers.

In addition, the petitioner described the beneficiary's proposed duties in the U.S. as the following:

Set all corporate policies and is developing the affiliate company in the U.S. Instrumental in obtaining governmental licenses, permits (see attached) meets with banks [sic], real estate brokers, accountant, issuing permits agencies. Continues to secure business premises and staff, negotiate contracts. Overall plan within the framework of the organization. Staffing, oversee and motivate workers to achieve financial objectives and goals of company. The beneficiary is directing the Manager and Assistant Manager related to affiliate company. He directs and coordinates all activities and operation with regard to the funds under his control and directed [sic]. All employees under the beneficiary's direction are listed on the organization chart. The percentage of time spent in each of the listed duties is as follows:

Percentage of time spent in listed duties above are 90% of time in the above noted duties and 10% of time spent in marketing related to the affiliate company business.

In addition, the petitioner submitted a brief job description for all of the employees hired by the U.S. entity. The petitioner further described the duties performed by the president as follows:

President, Directing all financial aspects of organization, establishes goals and policies of organization: Exercise wide latitude of discretionary-making. Meet with corporate accountants, bank manage[r]s, meet with all governmental agencies for permits licenses, set up and meet with entertainment companies [sic] discuss contracts, determine required security, enter into contracts, etc.

The director denied the petition on May 9, 2005 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director observed that based upon the nature of the business, the description of the duties, and the organizational structure, it did not appear that the beneficiary would be employed in a primarily managerial capacity.

On appeal, counsel for the petitioner outlines several investments the beneficiary made in restaurants and construction projects. Counsel for the petitioner further states that the petitioner has hired nine employees at the DENJ restaurant, of which only two are full-time employees, as well as six to nine independent contractors and one architect and one engineer. In addition, counsel for the petitioner further states the duties performed by the beneficiary as the following:

[The beneficiary] holds the title of President of [the petitioner] and directs the management of the businesses owned by the company. These businesses consist of two restaurant [sic] and one real estate development project. He establishes the company's goals and policies, oversees the development and expansion of the businesses as he did with the Central property and DENJ, located new properties as they become available on the market as he did with DENK and Kebab Express, performs initial profitability analyses, negotiates the acquisition or lease of real estate, negotiates with major subcontractors for the refurbishing of the properties.

[The beneficiary] does not manage the restaurant, be it The Flames, QQ, or DENJ nor their day to day operations...[The beneficiary] does NOT perform the tasks necessary to produce any goods or services.

* * *

Beneficiary is now looking for other restaurant and investment opportunities and concentrating on the development of the Central property into a high rise. Clearly, the business of the petitioning entity possesses the complexity to warrant having an executive or someone with "managerial capacity" to run it.

Counsel's assertions are not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of

counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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 beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such as: "set all corporate policies and is developing the affiliate company in the U.S."; oversee the "overall plan within the framework of the organization"; "directs and coordinates all activities and operation with regard to the funds under his control and directed [sic]"; and, "exercise wide latitude of discretionary-making [sic]." 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 failed to provide 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will be "instrumental in obtaining governmental licenses, permits (see attached) meets with banks [sic], real estate brokers, accountant, issuing permits agencies," "continues to secure business premises and staff, negotiate contracts," will manage the "marketing related to the affiliate company business," and the beneficiary "will set up and meet with entertainment companies [sic] discuss contracts, determine required security, enter into contracts, etc." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. 593, 604 (Comm. 1988).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial in nature, and what proportion are actually non-managerial. See

Republic of Transkei v. INS, 923 F.2d 175, 177 (D.C. Cir. 1991). 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

In the response to the director's request for evidence, dated April 22, 2005, the petitioner indicated that the beneficiary will supervise nine employees, including the manager who supervises the assistant manager who in turn supervises the bartender, head chef, assistant chef, kitchen prep worker, and two servers. In addition, the petitioner submitted documentation of the U.S. entity doing business which consisted of documents for the restaurant, Denj, owned by the petitioner. However, on appeal, the counsel for the petitioner now states that the beneficiary will not manage the restaurant, Denj, and will not supervise the employees of that restaurant. 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).

In addition, the record contains several inconsistencies regarding the staffing of the U.S. entity. In response to the director's request for evidence, the petitioner submitted a detailed list of all employees hired by the U.S. entity since it commenced its operations. Moreover, the petitioner submitted the company's California Form DE-6, Quarterly Wage and Withholding Report, for the quarter ended on December 31, 2004. According to the master employer list, the U.S. entity employed nine employees, as of the date of filing. However, three individuals are not listed on the most recent Form DE-6 submitted by the petitioner. The quarterly wage report confirms the employment of six employees, including the beneficiary, a full-time chef, a part-time manager, and three part-timer servers, as of December 31, 2004. An assistant manager, a bartender and an assistant employee, listed on the master employee list, are not included in the most recent Form DE-6 submitted by the petitioner. 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). Furthermore, it appears that the dates of certain individuals listed on the master list of employees are inaccurate. 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).

As noted above, the U.S. company's Form DE-6 for the last quarter of 2004 confirms that the U.S. entity hired the beneficiary, a full-time chef, a part-time manager and three part-time servers. Thus, it appears that the only individual in charge of running the business and managing the administrative tasks, marketing, clerical, bookkeeping, customer service and finance operations is the beneficiary himself since the petitioner has not indicated in the job descriptions for the staff that they will relieve the beneficiary from performing these operational and administrative tasks. Thus, the beneficiary is the only employee who will perform the majority of the operational tasks required in running a business. Accordingly, the director reasonably concluded that the beneficiary as the petitioner's only managerial employee will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or 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 International* 19 I & N Dec. at 604.

Furthermore, counsel for the petitioner indicates on appeal that the beneficiary manages the operations of the company rather than the operations of the restaurant. In addition, counsel for the petitioner states that the beneficiary is "now looking for other restaurant and investment opportunities and concentrating on the development of the Central property into a high rise." On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On appeal, counsel for the petitioner indicated that the beneficiary will not supervise any subordinate employees. 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 employed in a managerial or executive capacity. *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. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *manages* the function rather than *performs* the duties related to the function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, 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 operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the beneficiary's job description appears to include non-qualifying operational and administrative duties associated with the petitioner's finance, development and marketing functions, and

the petitioner has not identified any other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from perform routine duties inherent to these functions. The fact that the beneficiary has been given a managerial job title and its not clear if any other employees will perform the non-qualifying duties in the sales and marketing function is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

The petitioner has not shown that the beneficiary will perform primarily managerial duties, nor has it been established that he would function at a senior level within an organizational hierarchy, other than in position title. Thus, the evidence is insufficient to establish that the beneficiary is a senior level manager for the petitioner. Accordingly, the petitioner has not established that the beneficiary will be employed primarily as a manager of an essential function.

On appeal, counsel for the petitioner asserts that the beneficiary will perform duties that are executive in nature. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity.

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

Furthermore, beyond the decision of the director, the petition indicates that the beneficiary own 100 percent of the foreign entity, and thereby of the petitioning company. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. In addition, the fact that the owner of the original foreign corporation resides in the United States raises the question of whether the parent organization is still doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For these additional reasons, the appeal will be dismissed and the petition denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial

decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.