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U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: WAC 02 140 50311 Office: CALIFORNIA SERVICE CENTER Date JUN 01 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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

The petitioner is engaged in real estate development and acquisition. It currently employs the beneficiary as its chief executive officer, and seeks to extend the temporary employment of the beneficiary for three years. The petitioner filed a petition requesting the extension of the beneficiary's classification as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be functioning in the United States in a primarily managerial or executive capacity.

On appeal, counsel claims that the "petition was not considered under the regulatory definition of executive, in spite of the petitioner's request that it be so considered." Counsel asserts that the beneficiary "is clearly an executive," and submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.
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> (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 is whether the beneficiary will be employed in the United States in a primarily executive capacity.

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.

In a letter accompanying the petition, counsel explained that the beneficiary is employed in the United States in an executive capacity, and has sole responsibility for the company's hiring and firing, purchases, stocks, and finance decisions. Counsel stated that since the beneficiary's transfer to the U.S. entity in 1999, the company, under the guidance of the beneficiary, has acquired and recently sold a hotel, and is presently purchasing a second hotel in Birmingham, Alabama. Counsel further stated that "[o]nce this transaction is complete, [the beneficiary] will run the operations of the Inn until such a time as he can hire more employees to supervise the current employees." Counsel also noted that the remainder of the beneficiary's time would be devoted to additional acquisitions in the United States. Counsel submitted evidence of the sale of the company's first hotel, the purchase and sale agreement for the second hotel, years 1999 and 2000 U.S. Income Tax Return for an S Corporation, and additional documentation pertaining to the new hotel.

In a request for evidence dated June 3, 2002, the director asked that the petitioner submit the following documentation: (1) and organizational chart for the U.S. company identifying all employees, and specifically the beneficiary's position within the company, and describing its managerial hierarchy and staffing levels; (2) a description of the employees' job duties, educational levels, and annual salaries; and, (3) a detailed description of the beneficiary's job duties in the U.S. entity, including the percentage of time the beneficiary spends on each job duty, the education and employment qualifications for the position, and all subordinates of the beneficiary.

In a timely response, counsel provided a description of the U.S. business' organizational hierarchy, identifying the beneficiary as chief executive officer, and his subordinates as a vice-president and a secretary. Counsel noted that the previously owned hotel employed twenty-three individuals, and that the petitioner anticipated fifty salaried employees at the new hotel. With regard to the beneficiary's job duties as chief executive officer, counsel stated that the beneficiary is responsible for "primary decision-making in all aspects of the business and in proposed investments." Counsel further stated that the beneficiary is responsible for the hiring, training, and termination of personnel, the company's marketing and finances, planning, developing and implementing corporate objectives, establishing policies and procedures for acquiring new companies, and presiding over shareholders and board of directors meetings. Counsel also submitted employee W-2 verification reports for December 2001 and January 2002, IRS forms W-2, Wage and Tax Statement, for the years 2000 and 2001, and documentation related to the beneficiary's individual federal and states taxes.

In his decision, the director concluded that the record "does not persuasively establish that the beneficiary's duties will be primarily executive or managerial in nature." The director stated that the petitioner's assertion "that the beneficiary will be responsible for managing the U.S. company without further elaboration" does not establish that the beneficiary will function at a senior level within the organizational hierarchy. The director

also noted that the beneficiary's subordinate employees "cannot be considered a subordinate staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing nonqualifying duties." The director therefore determined that the beneficiary was ineligible for classification as a manager or executive, and consequently denied the petition.

On appeal, counsel asserts that the director failed to consider the petition "under the regulatory definition of executive, in spite of the petitioner's request that it be so considered." In an accompanying brief, counsel states that throughout the decision, the director refers to the requirements for managerial capacity, yet "did not apply the definition of executive capacity to its analysis . . . ." Counsel further asserts that an analysis of the beneficiary's job duties under the regulatory definition of executive capacity "clearly shows that the extension filed on his behalf should have been approved." Counsel outlines the four criteria for establishing executive capacity, and claims the following:

> [The beneficiary] directs the management of [the petitioning organization].
> As Chief Executive Officer and Managing Director of [the petitioning organization], [the beneficiary] is responsible for planning the company's business objectives, and for establishing procedures to obtain those objectives. As [the petitioning organization] is engaged in the purchase, development and sale [of] real estate, [the beneficiary] is responsible for identifying potential hotel properties for investment; negotiating the purchase of hotels and obtaining the required financing; determining the improvements and marketing efforts necessary to increase the value and revenues of the hotels purchased; and determining when to sell and buy new properties.
>
> [The beneficiary] is responsible for establishing the goals and policies of [the petitioning organization].
> [The beneficiary] determines which hotel to buy in which location; decides how to improve the hotel purchased, which includes an analysis of the physical premises, internal hotel management, and marketing activities; oversees the implementation of the necessary improvements; and decides when a hotel should be sold, and new property acquired.
>
> [The beneficiary] exercises wide latitude in discretionary decision-making.
> [The beneficiary] determines which hotel properties [the petitioning organization] should purchase. Before purchasing a property, [the beneficiary] reviews the hotel's books and sales records, and physical and structural reports. Once deciding that a particular hotel would be a good investment for the company, he is responsible for approaching lenders to obtain the best financing available. Once the hotel has been bought, [the beneficiary] decides on necessary renovations to the property and oversees their implementation. He also analyzes the hotel's internal operations, establishes necessary improvements, and oversees their implementation by [the petitioning organization's] Vice-President. Further, he oversees any necessary changes in staffing at the hotel, and retains the ability to hire and fire the hotel staff as needed. [The beneficiary] also plans and develops marketing strategies to increase the hotel's revenues.
>
> [The beneficiary] receives only general supervision from the company's stockholders.
> As Chief Executive Officer of [the petitioning organization], [the beneficiary] is at the top of the company's organization[al] chart, and owns 75% of the company. While [the

> beneficiary] will confer with the company's other stockholders before making major changes in [the petitioning organization's] investments, for example the sale or purchase of a new property, he has no superior to which he must report, and makes all decisions regarding the development of property owned by [the petitioning organization] without consultation.

(emphasis in original).

On review, the record does not establish that the beneficiary would be employed in the United States in a primarily 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In addition, because the definition of executive capacity has two parts, the petitioner must first show that the beneficiary performs the high level responsibilities that are specified in the definition. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-executive administrative or operational duties. Although specifically requested by the director, the petitioner's brief description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is executive in nature, and what proportion is actually non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The lack of documentation is important because several of the beneficiary's daily tasks, such as training personnel, developing marketing strategies for the acquired hotels, and determining necessary renovations to the acquired properties, do not fall directly under traditional executive duties as defined in the statute. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). 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). For this reason, the AAO cannot determine whether the beneficiary would be primarily performing the duties of an executive. *See id.*

Additionally, a critical analysis of the nature of the petitioner's business undermines counsel's assertion that the beneficiary would be employed in the U.S. entity in a primarily executive position. While the petitioning organization is described in the petition as a "real estate acquisition and development" company, the record supports a finding that the beneficiary is performing non-qualifying duties, which are not common to this type of business. As noted above, the beneficiary is responsible for "purchase decisions" at the hotel, developing marketing plans for the hotel, determining renovations, and training personnel, which, although not specifically identified, may be considered to be the employees of the hotel rather than the petitioning organization. These descriptions fail to address the true job duties of one employed as an executive for the purpose of acquiring and developing real estate. More importantly, counsel acknowledged in her letter submitted with the petition that the beneficiary "will run the operations of the Inn until such time as he can hire more employees to supervise current employees." It is therefore reasonable to conclude that the beneficiary plays a significant role in the actual operation of the acquired property, rather than primarily performing job tasks typical of an executive. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

This conclusion is further supported by counsel's failure to identify the present employment of any subordinate employees who would relieve the beneficiary from performing the non-qualifying functions. Although the director requested that counsel submit a job description for each employee, none was provided. 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). In response to the director's request, counsel noted only that the beneficiary's subordinates are a vice-president and a secretary. Counsel also stated that the petitioning organization anticipated the employment of fifty salaried employees following the purchase of the new hotel. Again, counsel did not provide any additional evidence as to the specific functions the employees would perform. Nor did counsel clarify whether these are existing employees of the hotel, and if so, whether, the employees will continue employment following the petitioner's purchase of the hotel.[1] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Based on the evidence provided, the beneficiary would not be employed in a primarily executive capacity in the United States.

Counsel also asserts on appeal that the director incorrectly considered the petition under the regulatory definition of managerial capacity, rather than executive capacity. The director cited in his decision the requirements for both managerial and executive capacity, as each is defined at §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). The AAO acknowledges that the majority of the director's analysis relates to the criteria for "managerial capacity." While it appears that the requirements for executive capacity were considered, the director should have identified the specific reasons the evidence failed to establish the beneficiary as an executive.

Beyond the decision of the director, the petitioner has offered no evidence to establish a qualifying relationship between the foreign and U.S. entities. The petitioner indicated on the petition that the U.S. company is an affiliate of the foreign entity. In an accompanying letter, counsel stated that the beneficiary is the owner of 75% of the U.S. company and 50% of the foreign company. However, counsel failed to provide evidence such as stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of annual shareholder meetings to demonstrate that both entities are owned and controlled by the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For this additional reason, the appeal will be dismissed.

Additionally, if established that the beneficiary is a 75% shareholder in the U.S. corporation, it remains to be determined whether the beneficiary's services are for a temporary period. 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

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[1] Pursuant to Section 4.9 of the Purchase and Sale Agreement for the Birmingham, Alabama hotel, the existing employees are terminable at will, and the Seller "is making no representations or warranties about the retention of any existing employees."

that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.