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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: FEB 05 2007
EAC 05 215 52537

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

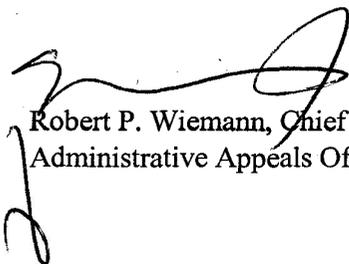
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in 1986. It states that it is a hotel operations company and claims to be the "parent company of the subsidiary [h]otel . . . the Hotel [REDACTED],] the corporate owner." It seeks to employ the beneficiary as its food and beverage manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on May 3, 2006, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial or executive capacity and submits additional evidence intended to clarify the beneficiary's duties and staffing levels. Counsel submits a brief and documentary evidence in support of the appeal.

Section 203(b) of the Act 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.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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 as a multinational executive or manager. 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 a managerial or executive

capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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.

The immigrant petition was filed on July 29, 2005. The petitioner stated on Form I-140 that the U.S. company has nine employees and seeks to employ the beneficiary as its food and beverage manager. The petitioner submitted an organizational chart of the United States entity which indicated that the general manager of the hotel will supervise the beneficiary as food and beverage manager, who in turn supervises

the executive chef and assistant food and beverage manager, who in turn supervise the line chefs and restaurant managers, who in turn supervise kitchen staff and restaurant and bar staff.

The director issued a request for additional evidence on January 19, 2006. The director advised the petitioner that its supporting documentation did not adequately establish the beneficiary is to be employed in a position that is primarily managerial or executive in nature. Specifically, the director requested: (1) a detailed description of the beneficiary's proposed duties, including the number of hours devoted to each of the duties on a weekly basis; and, (2) evidence of the management structure and personnel structure of the United States entity. The director suggested that the petitioner may include the number of subordinate supervisors under the beneficiary; the job titles and job duties of the employees managed by the beneficiary; the percentage of time the beneficiary will devote to qualifying duties and non-qualifying duties; the beneficiary's degree of discretionary authority in day-to-day operations; and the person who will operate the business in the absence of the beneficiary. In addition, the director requested copies of the United States company's Form W-2 and W-3 for 2004, the payroll for 2005, and the company's employer quarterly report, Form 941, for the second and third quarters of 2005.

In response, the petitioner submitted the U.S. entity's organizational chart. The chart indicates the beneficiary as food and beverage manager and head of the food and beverage department. The beneficiary will supervise two assistant food and beverage managers and one executive chef, who in turn supervise five managers and two sous chef, who in turn supervise four assistant managers and twenty line chefs, who in turn supervise sixty-nine servers and bus persons. In addition, the petitioner submitted a letter from the vice president and general manager of the U.S. hotel stating that the beneficiary "heads the Food and Beverage Department at our hotel," and is "responsible for the day to day management and profitability of the Food and Beverage Department." The letter further stated that the beneficiary is a "vital member of our Executive Committee and is involved with strategic Food and Beverage decisions including Menu planning, Costing and Quality Standards." Aside from the organizational chart of the U.S. entity, the petitioner failed to submit the specific documentation requested by the director.

The director denied the petition on May 3, 2006, concluding that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that the petitioner failed to provide the documentation requested by the director and thus it is not clear how many employees are subordinate to the beneficiary and their positions and duties. In addition, the director found that the job description submitted by the petitioner was "vague and do not specify exactly what duties the beneficiary will be performing which are bona fide as a manager or executive."

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a primarily executive and managerial capacity. Counsel asserts that the beneficiary will not be a function manager. In support of this claim, the petitioner submitted detailed duties of the beneficiary's position as food and beverage manager, and position duties of the beneficiary's subordinates.

In support of the appeal, the petitioner submits a document titled "brief responsibilities and job description of food and beverage trees as of May '06" which describes the beneficiary's U.S. duties as follows:

- Making yearly budget in comparison with last year, looking at market growth and economy.
- Responsible for the welfare and growth of company and employees.
- Plan events and promotions calendar for the year. Plan the various cost cutting measures to achieve the desired bottom line.
- Responsible for maintaining higher level of service standards and guest satisfaction levels, by putting a proper guest satisfaction program in place.
- Attend daily meetings with General Manager. (Conduct departmental heads meetings in absence of General Manager).
- Play a very important role in communicating company's vision to employees.
- Plan incentives and motivational activities for the employees to be on top of employee satisfaction levels.
- Hire employees (managerial and line) looking at business demands.
- Alliance with Local 6 Union to conduct any negotiations as an [sic] when required.
- Along with training manager, introduce a training program for the managers and line staff.
- Make final decision in the selections of vendors (food, equipment, linen, stationary and catering supplies), taking Chefs and managers recommendations into consideration.
- Take daily briefing of all the managers and monthly meeting with all the employees.
- Set goals for the Catering Sales team along with Director of sales.
- Make final decision in accepting or refusing a piece of catering business depending on the profitability and liability values.

When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties and those of his claimed subordinates elevate the beneficiary's position to a primarily managerial or executive position.

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 show 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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

The director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States. The petitioner did not submit the requested job description as requested by the director. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Nevertheless, while the petitioner attempts to clarify the beneficiary's duties on appeal, the record still lacks a comprehensive description of the actual managerial or executive duties to be performed by the beneficiary in the United States as of the date the petition was filed. The petitioner again states that the beneficiary has "total operational responsibility for the Food and Beverage Department," and is responsible for the "day to day management and profitability of the Food and Beverage Department." The petitioner, however, fails to identify the specific managerial or executive tasks the beneficiary will perform within the context of these broadly-drawn responsibilities. 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial duties related to the petitioner's sales, marketing and day-to-day operations. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Therefore, while it is evident that the beneficiary exercises a certain level of authority over the petitioner's operations, the fact that a beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The record shows that as of the date of filing, the petitioner asserts that the beneficiary will control and direct subordinate managerial staff. According to the organizational chart of the U.S. entity, it appears that the beneficiary will supervise an executive chef, four sous chef, three assistant food and beverage directors, five restaurant manager, twelve assistant restaurant managers, two banquet managers, two catering sales and services managers, one food and beverage purchasing manager, twenty kitchen line employees, and sixteen servers, bus persons and banquet housemen. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *Id.*

Despite the director's suggestion in the request for evidence, the petitioner failed to describe the duties of the beneficiary's subordinate employees. Although many have managerial titles, the petitioner did not establish the exact nature of their duties.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the food and beverage operational functions of the employees of the U.S. entity, who will be among the beneficiary's subordinates. Thus, the petitioner has not shown that the beneficiary's subordinate employees are professional, as required by section 101(a)(44)(A)(ii) of the Act.

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.*

The petitioner indicated on the Form I-140 that the hotel had nine employees in total. However, according to the organizational chart of the U.S. company submitted by the petitioner, the chart indicates that the hotel has 106 employees. In addition, the organizational chart indicates that the beneficiary directly supervises a staff of 80 subordinates. The petitioner also stated in a letter of support, in response to the director's request for evidence, that the beneficiary supervises 103 employees. The petitioner does not explain the inconsistencies found in the record regarding the staffing levels of the U.S. 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).

Based on the foregoing discussion, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the U.S. company has a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate, or subsidiary of the foreign entity.

The petitioner stated in its letter dated June 15, 2005, that the United States company is a subsidiary of the [REDACTED]. The petitioner further claimed that the United States company owns and operates the [REDACTED] in New York. In a letter submitted on appeal, Mr. [REDACTED] states that the [REDACTED] New York is now named the [REDACTED] New York due to a sales franchise agreement with [REDACTED]. The letter asserted that the ownership structure has not changed. However, the petitioner did not submit the franchise agreement or any documentation evidencing that the original petitioner, [REDACTED] is still the owner of the [REDACTED] Hotel New York. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).¹

¹ The petitioner's claims are in conflict with published news articles. According to these articles, the petitioner sold the [REDACTED] New York in 1996, nearly ten year prior to the filing of the instant petition on May 3, 2006. Accordingly, the petitioner appears to be no longer affiliated with the hotel. See [REDACTED] " [REDACTED] to Complete \$143 mn US Deal Soon," available at www.tata.com/indian_hotels/media/20001008 (last accessed on February 1, 2007); see also [REDACTED] [REDACTED] July 7, 2005, available at [REDACTED]

In addition, the director requested additional evidence to establish the claimed parent-subsidary relationship between the foreign and U.S. entities. The petitioner did not submit any of the requested documentation. 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). Instead, the petitioner submitted an annual report for the petitioner dating back to 1999, and W-2 Forms for 2000, 2001 and 2002. The petitioner has not submitted any evidence to establish the current qualifying relationship between the United States entity and the foreign company.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, an expired annual report and hotel directory alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest, as well as documentation of monies, property or other consideration furnished by the foreign entity in exchange for stock in the U.S. company. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the appeal will be dismissed.

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 denial. 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.

ORDER: The appeal is dismissed.