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FILE: WAC 04 213 54368 Office: CALIFORNIA SERVICE CENTER Date: **SEP 26 2006**

IN RE: Petitioner:
Beneficiary:



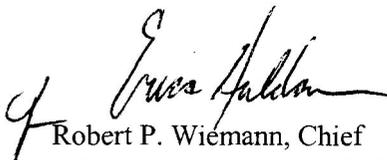
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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, operates a full-service motel. The petitioner claims to be a subsidiary of Yogi Steel Limited located in Kenya. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for two years. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary is employed in a managerial or executive capacity.

On appeal, counsel for the petitioner states that the beneficiary is employed in an executive capacity and the decision of the director is contrary to the law and the facts. Counsel for the petitioner asserts that the evidence submitted shows that a preponderance of the beneficiary's job duties are executive in nature. 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 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.

The nonimmigrant petition was filed on July 27, 2004. The Form I-129 indicates that the beneficiary will continue to be employed in the position of president for the petitioner. The beneficiary’s proposed duties in

the U.S. are described as the following: “As president, [the beneficiary] is responsible for corporation policies, goals and procedures, legalities, representation of corporation, long term development planning, capital assessment and requirements, hiring, firing, promotion etc. of management and subordinate staff, major decisions.”

In addition, the petitioner submitted the beneficiary’s responsibilities and duties as the following:

- Total responsibility for representing and signing of all legal documents and other on behalf of the corporation
- Signing of all corporate checks on behalf of the corporation
- Establishment of corporate goals and policies
- Establishment of corporate financial budgets and cash flows
- Overall control of corporation and its development for profitability and success
- Overall control of finances of corporation
- Setting of procedures
- Monitoring of all financial matters and decision making on any changes necessary to improve efficiency and profitability of corporation
- Training and delegation of duties to Managers to achieve corporation goals through them
- Preparation of Manager and staff training courses
- Delegation to Managers for training of staff and monitoring of work performances
- Recruitment, interviewing, hiring, and training of managerial staff
- Promotion or firing of managerial staff when necessary
- Setting of all staff pay levels and vacation allowance
- Approval of all legal paperwork
- Approval of all Tax Returns prepared by accountant
- Assessment and monitoring of competition
- Review of alternative franchise and decision made on changing franchised trading name
- Organization of legalities regarding change of trading name
- Decision making and organization of refurbishment of motel
- Obtaining estimates for refurbishment work, negotiating and decision made on contractors to use
- Approval of refurbishment work completed and approval of payment to contractors
- Research into improving services to business professionals, such as in house report typing, photocopying, conference room facilities, etc.
- Research into providing “special weekends” such as romantic weekends with candlelight dinners, golfing weekends, etc.
- Determining new services for improved facilities
- Determining marketing materials and media of facilities for weddings, birthdays, etc.
- Delegation of responsibilities to Manager, including new marketing strategies and promotional weekends
- Reports only to the Board of Directors of the Kenyan parent company

On October 12, 2004 the director requested additional evidence. Specifically, the director requested an organizational chart of the U.S. company including a brief job description for each position, and the employee's educational level and salary. The director also requested copies of the U.S. company’s IRS Form

941, Quarterly Federal Tax Return, for the last four quarters, and the California Employment Development Department Form DE-6, quarterly wage reports for the last four quarters. In addition, the director requested additional information regarding the executive capacity of the duties performed by the beneficiary including: (1) a list of the specific goals and policies the beneficiary established in the last six months; (2) a list of the specific discretionary decisions that the beneficiary has exercised in the last six months; (3) evidence that the highest level executives, the board of directors, or stockholders of the organization require only general supervision of the beneficiary; and (4) a specific day-to-day description of the duties the beneficiary has performed over the last six months.

In a response dated December 15, 2004, the petitioner submitted all of the requested information. The submitted organizational chart for the U.S. company indicates the beneficiary as president who supervises the manager who then supervises maintenance, the head housekeeper, two housekeepers, one desk manager and one desk clerk. The U.S. company has eight employees in total. The employees work anywhere from 15 to 40 hours. None of the employees have an education level higher than a high school diploma. The petitioner provided a job description for each employee, as required by the director.

In response to the director's request, the petitioner submitted the policies and goals the beneficiary has made in the past six months in property improvement policy, marketing policy and service policy as the following:

PROPERTY IMPROVEMENT POLICY

Re designing the Front Lobby and investing in new flooring

- Changing Carpets in some Guest Rooms
- Converting a guest room to a separate Breakfast Area so as to accommodate more people

SERVICES POLICY

- Offer the Hotel guests a more expanded breakfast to include hot breakfast in addition to the already heft continental breakfast.
- Create a Computer System and create a Hospitality Area (business center) for Hotel Guests for access for checking and sending email and other computer related work.
- Ppgrade [sic] the already hard wired speed internet access to a wireless system so that guest can access the interested from anywhere within the hotel.

MARKETING POLICY

Continue advertising in the Yellow Pages, The Chamber of Commerce and the Local newspapers.

Furthermore, the petitioner submitted a detailed day-to-day description of the duties performed by the beneficiary. The beneficiary's duties in the U.S. are the following:

- Walking the property, buildings and grounds most mornings with Manager to monitor cleanliness and tidiness and to ascertain that all maintenance and cleaning work is being covered correctly. Discussions with Manager during and following inspections on various items arising. Any problems found are the Manager's responsibility to follow through on and get corrected, and to report back to [the beneficiary] on the conclusion.
- Meeting with Manager, [REDACTED], to go over Reports on:

- finances, bank account balances, future supplies, purchase invoices, future reservations, etc.
- merchant credit card payments
- current reservation numbers
- future reservation numbers
- **approval of any large supply orders**
- approval of purchase invoices
- signing of checks
- **discussion and determining resolution** on any staffing problems
- discussion and determining resolution on any customer complaints
- discussion and determining resolution of any property and/or business activity problems
- Review of weekly budgeted figures comparison to actual figures and determination of any changes necessary to increase profit margins
- Review of daily figures with comparison to previous years to ascertain growth and comparisons of marketing achievements
- Read e-mails and return telephone calls
- Conference call to Kenyan parent company once a week to report and discuss U.S. progress
- Contact local Chamber of Commerce and local Council Representatives to know about future local events coming up where accommodation would be required
- Join and attend Chamber of Commerce meeting to represent company and to promote conference facilities to local businesses.
- Review of monthly management account, discussed with Manager on questions arising and determining resolution of any problem areas. Final approval of accounts.
- Looking at various marketing media and determining the best to be used to increase reservations for rooms and conference rooms, and relating and delegating implementation to Manager. Planning advertising for local newspapers to increase conference room use. Determination of marketing budget to include advertising in SCB Yellow Pages, the Chamber of Commerce and local newspaper The Californian, The Valley Yellow Pages and to link these advertisements with new web site.
- Planning all development and/or refurbishment, including determining of capital required additional services to be offered, timescale for project, financial forecasts including lost review of rooms being refurbished, financial projections following completion of project. Projects have included refurbishment of bedrooms and bathrooms, painting exterior and interior, creation of fitness room, resurfacing of parking lot, new computer reservation system, resurfacing of walkways and changing the color scheme to match walkways, new enhanced web site, camera surveillance system for staff and guest security, new accounting software program. Future development decisions are to redesign the front lobby and install new flooring and convert a guest room into a separate breakfast area to accommodate more guests.
- Review, approval and acceptance of building and grounds maintenance and renovation work quotations. When work is underway, monitoring progress and subcontractors work, and discussing and solving problems that arise.
- Checking that the building, grounds, and recreational facilities (such as fitness room) comply and are not in violation of any Government and local rules and regulations, or insurance

requirements. The President takes full responsibility for insuring the corporation's liability risks is kept to a minimum.

- Customer relations policies – setting customer relations example for staff by acknowledging guests when in lobby area to create and promote excellent customer relations with a very personalized professional service.
- Increase and improve services offered to guests – decisions have been made to buy a new accounting software program to improve checking in, create a computer system and create a hospitality area (business center) to give guests access to email facilities, upgrade hard wired high speed internet accept to give guests access throughout the hotel and add a hot breakfast menu to the current continental one

The director denied the petition on March 2, 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 also suggested that the beneficiary does not supervise a subordinate staff of professional employees and thus the beneficiary must be performing non-qualifying day-to-day activities of the company's operations, rather than performing managerial or executive duties.

On appeal, counsel for the petitioner asserts that the duties performed by the beneficiary are executive in nature. Counsel for the petitioner asserts that the job description for the position clearly establishes duties that are executive in nature. In addition, counsel for the petitioner declares that the statute does not require an executive to direct and supervise a subordinate staff of professionals. Furthermore, counsel for the petitioner asserts that the law does not prohibit an L-1 executive from performing some functions of the business that are not executive in nature, but instead only requires that the beneficiary perform duties that are primarily executive in nature. Finally, counsel for the petitioner indicates that the motel has seven employees in addition to the beneficiary who perform the day-to-day duties of the motel, and only the highest level executive duties would be performed by the beneficiary.

Counsel's assertions are not persuasive. 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 test is basic to ensure not only that a person has the requisite authority, but that a majority of his or her duties are related to operational policy management, not to the supervision of lower-level employees or the performance or the duties of another type of non-managerial or non-executive position.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner's description of his current and proposed duties suggests that the beneficiary's actual duties are and will continue to be providing the services of the business.

While the petitioner provided a comprehensive list of the job duties performed by the beneficiary, the job description includes several non-qualifying duties such as: "looking at various marketing media and determining the best to be used to increase reservations for rooms and conference rooms," "checking that the building, grounds, and recreational facilities (such as fitness room) comply are not in violation of any Government and local rule and regulations, and insurance requirements," "preparation of Manager and staff training courses," "obtaining estimates for refurbishment work, negotiating and decision made on contractors to use," and "research into improving services to business professionals." In addition, it appears the beneficiary would be responsible for the corporation's finance and marketing, and for personally negotiating and obtaining estimates from contractors for renovations and researching improved motel services and travel packages to offer guests. Although a portion of the beneficiary's time would be spent performing executive and managerial tasks, the record does not indicate the amount of time the beneficiary would devote to these tasks, or more importantly, whether the beneficiary would be primarily performing the non-qualifying job duties previously listed. 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. 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).

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.*

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. It appears from the organizational chart submitted by the petitioner that the only individuals performing any marketing, sales,

accounting, human resources, corporate development, budgeting, payroll, finance-related functions are the beneficiary and the manager. It is implausible that the manager is able to handle all the day-to-day operations of a 40-room motel on her own. The manager only has a high school diploma and does not appear to be trained in all the areas mentioned above. It can only be assumed, and has not been proven otherwise, that the beneficiary is performing a majority of the marketing, sales, finance and development functions, including devising marketing plans, contacting advertisers, and performing any public relations tasks since the beneficiary only has one other subordinate, the manager, to assist him with all these tasks. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An employee who "primarily" performs the tasks necessary to produce a product or to 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, when examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and 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; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the maintenance, front desk and housekeeping operations. Although the beneficiary has one manager with a high school diploma as a subordinate, the petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

The director based his decision partially on the size of the enterprise and the number of staff, and thus the regulations require that the reasonable needs of the enterprise must be considered. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a full service motel that claimed to have a gross annual income of nearly half a million dollars. The firm employed the beneficiary as president, plus a general manager, one desk manager, one desk clerk, one housekeeping head, one housekeeping staff and one maintenance staff. The AAO notes that two of the employees have managerial or executive titles. The petitioner did not

submit evidence that it employed sufficient amount of subordinate staff members needed to perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and two managerial employees. For example, petitioner indicated in the petition that the front desk of the hotel operates 24 hours per day. The petitioner employed two desk employees, one of whom is stated to work on a part-time basis. Given the nature and operating hours of the petitioner's business, the record does not establish that the subordinate staff would relieve the beneficiary from performing non-qualifying duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based upon evidence submitted, it appears that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president and general manager. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily executive. Although counsel refers to the beneficiary's overseas position as Director, the beneficiary was one director out of three. The other employees were one sales executive, two store assistants and one driver. The petitioner has not demonstrated that the beneficiary was functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner failed to demonstrate that the beneficiary was employed primarily in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.