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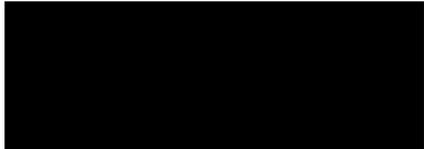


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

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DATE: **JAN 17 2012** Office: VERMONT SERVICE CENTER FILE:

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:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the service center for further review and issuance of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, established in April 2009, states that it operates a hotel. The petitioner claims to be an affiliate of Hotel Emperador C.A., located in San Jose, Venezuela. The petitioner seeks to employ the beneficiary as the president of its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a bona fide manager or executive position within one year of the beginning of operations for the United States business entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner states that the director's decision "cited facts not in evidence and used these non-existent facts as the rationale for denying the petition." Counsel submits a brief in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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.
- (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 regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign 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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a bona fide manager or executive position within one year of the beginning of operations for the United States business entity.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 13, 2009. In a letter dated July 8, 2009, the petitioner explained that it is affiliated with a Venezuelan company that operates a hotel with 60 employees and achieved gross sales in excess of \$3.6M in 2008. The petitioner stated that it expects to employ 10 people within one year of beginning operations and has a projected gross annual income of \$1M. In support of the petition, the petitioner submitted a letter stating that it has purchased a hotel building in Miami, Florida that will operate as a new hotel and provided invoices and contracts for setup and design of the hotel. The petitioner described the duties of the beneficiary as follows:

In his position as President, [the beneficiary] will exercise the following duties:

- *In charge of the oversight* and organization of the national and international business operations of the U.S. hotel operations, making discretionary decisions, and setting general operations policies and procedures, for implementation by managers and supervisors. For example, [the beneficiary] will decide the norms for content and scope of domestic and international operations and contracts in relation to the terms, price for services rendered, assumption of contractual liabilities and guarantee of performances. He will also be responsible for setting policies in terms of sales and distribution channels required to expand the U.S. company's business worldwide. *Percentage of time to be spent, 45%.*
- Establishes long-range national and international marketing objectives and specifying the strategies and actions to achieve them, including but not limited to establishing network alliances with travel agencies, travel companies and other entities in Latin America to generate booking by Latin tourists, especially groups, in the new U.S. hotel. *Percentage of time to be spent, 45%.*
- Confer with board of directors and organizational officials of the U.S. and Venezuelan companies to decide domestic and international business projections, financial goals, marketing strategies and resolve international and financial complex activities faced by the companies. *Percentage of time to be spent, 5%.*

The AAO notes that the percentage of time for the duties listed add up to only 95%. The petitioner did not provide any additional information on the beneficiary's job duties with the initial filing of the petition.

The petitioner indicated that the beneficiary's immediate subordinate is an operations manager who oversees all hotel operations and manages the day-to-day operational duties of the hotel. The petitioner anticipates that it will hire 3-6 hotel associates and 7-9 maintenance associates. Specifically, the petitioner stated that it will employ four hotel associates and three maintenance associates within one year.

The director issued a request for additional evidence ("RFE") on July 21, 2009, instructing the petitioner to submit, *inter alia*, evidence that the beneficiary, within one year, will be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service.

In response, the petitioner submitted additional information on the beneficiary's job duties. The petitioner stated that, of the ten employees, one will be a manager, one will be a supervisor, and the others will be mid and low level employees. The petitioner also stated that the hotel operations manager will manage the day-to-day operations of the hotel and interact with the front office staff. The beneficiary will not be involved in the day-to-day operations of the business, nor will he be involved in the actual delivery of hotel services to guests or clients; the beneficiary will focus on strategic planning, marketing and capital expending, budget issues, and expansion of the business.

The petitioner submitted a current listing of employees already hired and job descriptions for each of the positions that are projected within one year of operations. The petitioner described the job duties of the president and the hotel operations manager as follows:

1. President: [REDACTED]

Education: Secondary and primary education in Italy and Venezuela.

Duties: This is the number one executive level position in the company. President is responsible for overseeing all functions, and conceptualizing executive methodologies for the effective running of the company. President will be responsible for cash flow planning; strategic planning, especially decision as to whether to add extra wing to existing building in order to increase room capacity; international marketing to attract group reservations from international tourists in Latin America, via negotiation of alliances and marketing agreements with travel agencies and tour companies; budgeting; financial planning; marketing; and other functions.

2. Hotel Operations Manager: [REDACTED]

Education: High school and incomplete university studies.

Duties: The Hotel Operations Manager is responsible for overseeing the efficient running of all hotel operations, including overseeing front desk operations, maintenance, building management, customer liaison, reservation desk, communications and all other daily activities. Will meet or confer with the president at least once per week to present weekly reports on revenues and various customer and staff issues; will implement executive directives with regard to standards for pricing, discounting, customer relations and staff projected goals. Will supervise staff and conceptualize and implement work schedules. Will implement policies and procedures regarding hotel operations conceptualized and formulated by the president to assure that hotel operations comply with the predetermined quality standards.

The petitioner went on to describe the job duties for an administrative associate, front desk supervisor, two front desk clerks, and four hotel general workers. The petitioner provided evidence that it had already hired the hotel operations manager, the front desk supervisor, two hotel general workers, and has contracted the design and development of the renovations for the existing hotel.

The director denied the petition on August 24, 2009, concluding that the petitioner failed to establish that the beneficiary will be employed in a bona fide manager or executive position within one year of the beginning of operations for the United States entity. In denying the petition, the director determined that the nature of the petitioner's company is not such that it would require workers who have professional-level expertise to fulfill the duties affiliated with the job titles. The director further determined that the petitioner has not established that the beneficiary would be involved in the supervision and control of the work of other supervisory,

professional, or managerial employees who could provide relief from performing the services of the corporation.

On appeal, counsel asserts that all of the beneficiary's duties are primarily managerial in nature and do not involve the day-to-day operations of the company. Counsel further states, "[the] petitioner articulated two distinct managerial positions in the corporate hierarchy who would insulate the beneficiary/president from any involvement whatsoever in front-line or nonqualifying job duties." Counsel asserts that the director made an explicit error in denying the petition by stating that the petitioner provided a list of proposed job descriptions that were professional job listings.

Discussion

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence to establish that the beneficiary will be employed in a bona fide managerial or executive position within one year of the beginning of operations for the United States business entity. Contrary to the director's observations, the petitioner has provided a description of the beneficiary's duties sufficient to establish that his duties are primarily related to the management of the petitioner's hotel, and not to produce a product, provide a service, or perform other non-managerial functions. The evidence submitted establishes that the beneficiary will supervise and control the work of subordinate managerial and supervisory employees and exercise authority to hire and fire employees under his supervision. *See* sections 101(a)(44)(A)(ii) and (iii) of the Act.

Furthermore, the AAO notes that section 101(a)(44)(A) of the Act does not require that the beneficiary supervise only professionals; the beneficiary may supervise other supervisory or managerial employees as is the case here. The hotel operations manager will manage the day-to-day functions of the company as well as low-level personnel while the beneficiary attends to more executive duties like budgeting, strategic planning, and negotiating alliances for new business. The AAO is also satisfied that the beneficiary exercises discretion over the day-to-day operations of the hotel, as required by section 101(a)(44)(A)(iv) of the Act.

While the beneficiary will undoubtedly be required to perform some marketing and administrative tasks, the AAO is persuaded that the majority of the day-to-day non-managerial tasks required to operate the business will be carried out by the beneficiary's subordinates within one year. The petitioner need only establish that the beneficiary devotes more than half of his time to managerial or executive duties. The petitioner has met that burden.

III. Qualifying Relationship

Although the director's decision will be withdrawn, the AAO finds insufficient evidence in the record to establish that the petitioner has a qualifying relationship with the foreign company. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

At the time of filing the petition, the petitioner claimed to have a qualifying relationship with Hotel Emperador C.A. and indicated that this company is located in Venezuela. The petitioner indicated that it is an affiliate of the foreign company. Where asked to indicate the stock ownership and managerial control of each company on the Form I-129, the petitioner stated:

U.S. Co.: [redacted], [redacted], [redacted], [redacted], each 20%; [redacted] & [redacted] each 10%. Mgmt control: [redacted] (beneficiary)

Foreign Co.: [redacted] & [redacted], each 20%; [redacted], [redacted], [redacted], each 10%; [redacted], 25%; [redacted] 5%. Mgmt control: [redacted] (benef.), [redacted], [redacted], via combined 50% ownership control of company.

The petitioner provided the Articles of Incorporation for the foreign company, including an amendment that changed the share structure of the company, and the corporate records for the U.S. company. The petitioner also provided member certificates for each of the shareholders of the U.S. 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.

While it appears that the petitioner claims an affiliate relationship between the U.S. and foreign companies based on a common group of individuals with 50% interests in each company, the petitioner has failed to submit probative documentary evidence of control of either company. Here, the U.S. company has six individual shareholders where no one individual owns more than 20% of the interests; the foreign company has seven individual shareholders where no one individual owns more than 25% of the interests. The petitioner claims that the qualifying relationship derives from the same group of shareholders who own or control the group companies and that "there is a common denominator of control in each company through the majority group." While three individuals have an ownership stake in both companies, and their combined interest amounts to 50% in each company, the AAO notes that the other individual shareholders collectively also own 50% of the interests and without evidence of voting agreements or proxies that legally bind the "majority group" as a unit within each company, control of the companies has not been demonstrated.

The petitioner has not established that the U.S. and foreign entities have a qualifying relationship. For this reason, the petition cannot be approved.

IV. Conclusion

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determinations on this issue. So far, the director has not done so. Therefore, the AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. 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.

ORDER: The director's decision dated August 24, 2009 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision, which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.