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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



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DATE: **SEP 20 2012** Office: CALIFORNIA 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

██████████ presents to [the beneficiary] his work and then [the beneficiary] directs him to which additional analysis is required – either analysis of the market's supply comparable properties or financial structure of the property. In advanced stages of the acquisitions, [the beneficiary] sets the goals in negotiating a certain purchase price of properties with certain financing terms, and Ryan conducts these negotiations based on the guidelines set.

With respect to the beneficiary's supervisory authority, the petitioner further states:

[The beneficiary] is responsible for overseeing the property management work of ██████████ who oversees ██████████ both from the ██████████ in Las Vegas. . . . While ██████████ responsibilities include Tenant Fit-out Management, Leasing and Marketing Management and Property Management Implementation in addition to negotiating leases with potential tenants, and providing services to the tenants, [the beneficiary's] responsibilities are to make all the final decisions, such as which properties will be available for sale, and what should be the policies regarding credit approval. Then he conveys these policies and decisions to ██████████

Further, the petitioner states that the beneficiary "has been directing the information technology services of the company, and has specifically made the decision to develop and design a website for the company which he directs."

Finally, the petitioner states:

[The beneficiary's] responsibilities are executive in their nature in every sense. He directs business development. He establishes the goals and policies of the organization, such as his decision to enter the Las Vegas market, with a certain profile of homes at a certain price range, or policies of the terms in which to hire subcontractors. These decisions show that he exercises wide latitude in discretionary decision-making, and the only general direction that he receives is from [the petitioner's] Chief Executive Officer.

Counsel emphasizes that the beneficiary "has authority over acquisitions and development involving investments of millions of dollars," and has had "minimal supervision . . . in the investment, acquisition and marketing of [the company's] homes."

## II. ANALYSIS

Upon review, the petitioner has not established that the beneficiary will be employed in the United States in a primarily 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 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.*

As observed by the director, the petitioner, despite multiple opportunities to supplement the record, has provided a series of vague descriptions of the beneficiary's proposed duties that fail to demonstrate what the

beneficiary will on a day-to-day basis. At the time of filing, the beneficiary stated that the beneficiary would be engaged in the "negotiation and execution of agreements," "acquisition of land sites," "negotiation and execution of contractual agreements with skilled craftsman," and maintaining relationships with banks. The petitioner further indicated that the beneficiary will "analyze projects . . . on a daily basis," "research the U.S. real estate market in order to purchase land." These duties suggest that the beneficiary would be involved in the day-to-day activities required for ongoing business development, but do not clearly identify the scope of his authority or delineate any specific managerial or executive tasks associated with this responsibility. Without further explanation, duties such as market research and project analysis do not fall under the statutory definitions of managerial or executive capacity. While the AAO does not doubt that final decisions regarding property acquisitions would be entrusted to a manager or executive, the process of locating, researching and analyzing potential acquisitions would require the performance of non-managerial duties.

The petitioner further stated that the beneficiary will "lead the development of multi-family projects," "manage properties," and "manage the marketing and rentals of properties" located in Las Vegas. However, the petitioner again failed to explain the nature of the beneficiary's specific duties within the context of the petitioner's business. In fact, it is not clear whether the petitioner has begun to rent or sell its Las Vegas properties, as the company reported no sales in 2009 and has not provided any more recent financial information. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Overall, the petitioner's initial description of the beneficiary's duties suggested that the petitioner may require him to perform a combination of qualifying and non-qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-executive. The petitioner listed the beneficiary's duties as including both managerial and administrative or operational tasks, but failed to quantify the time the beneficiary spends on them.

Accordingly, the director expressly requested a more detailed description of the beneficiary's duties, advised the petitioner that it should "be specific" and requested the percentage of time the beneficiary will allocate to "each of the listed duties." The petitioner's response to the RFE was not responsive to the director's request for a more detailed position description, and was actually less specific than the description provided at the time of filing. The petitioner indicated that the beneficiary "oversees the business development, legal and marketing," "is responsible for business development," and "sets the company's strategy in each of the above-mentioned fields and oversees the execution of these strategies."

Similarly, although the petitioner provided a breakdown of how the beneficiary's time would be allocated among "legal issues," "marketing issues" and "business development issues," this did not provide a meaningful response to the director's request for the percentage of time the beneficiary would allocate to specific tasks. 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). USCIS cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed.

By issuing a second RFE, the director provided the petitioner with yet another opportunity to describe the beneficiary's proposed duties, and clearly specified that the petitioner should submit "a detailed description of the beneficiary's day-to-day duties." The director once again requested that the petitioner "be specific" and "indicate the percentage of time spent in each of the listed duties. Once again, the petitioner provided a cursory response, noting that the beneficiary "shall be seeking out appropriate properties for investment and construction in New York," "will oversee negotiations and contractual arrangements," and will supervise "the details of construction, the selection of sub-contractors and employees, the pricing of the homes for sale, and financing."

The petitioner once again failed to provide information regarding the beneficiary's specific, day-to-day duties associated with these broad responsibilities and the percentage of time he would allocate to specific tasks. Again, 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).

Further, this account of the beneficiary's proposed duties is not necessarily consistent with the petitioner's earlier claim that the beneficiary's time will be allocated entirely to legal, marketing and business development issues. Nor is it entirely consistent with the petitioner's initial claim that the beneficiary would "manage properties," and "manage the marketing and rentals of properties" located in Las Vegas. The petitioner's third attempt to describe the beneficiary's duties indicates that he will primarily be responsible for market entry in New York. 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).

It is insufficient for the petitioner to state that the beneficiary will have oversight responsibility over certain functions or components of the business, or that he will exercise discretionary authority in regard to making company decisions, without explaining the specific tasks he is expected to perform as a vice president of the petitioning company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The AAO acknowledges that the petitioner attempts to expand upon the nature of the beneficiary's proposed duties on appeal. 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.

Furthermore, the petitioner's statement on appeal regarding the beneficiary's subordinates is inconsistent with the information it provided in response to the requests for evidence. For example, the petitioner states that [REDACTED] is responsible for business development and supports the beneficiary in market research and analysis related to the identification of potential properties for purchase. The petitioner never mentioned [REDACTED] either at the time of filing or in response to either request for evidence. Further, the petitioner states

on appeal that [REDACTED] supervises a subordinate and is part of the company's "property management team," while it previously stated that he is a marketing manager responsible for performing completely different duties. Again, 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. at 591-92.

The petitioner's vague description of the beneficiary's duties cannot be read or considered in the abstract. Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner stated on the Form I-129 that it has 25 employees. In response to the RFE, when asked to document payments to its employees, the petitioner stated that all of its personnel are "self-employed subcontractors." The AAO acknowledges that the nature of the petitioner's business requires the use of subcontractors to perform construction-related work and as well as the use external legal, accounting and real estate services. However, the petitioner does not claim to have any permanent staff to support ongoing corporate office functions related to expansion, business development and marketing efforts or the administrative affairs of the company. Further, the petitioner claims to have paid \$1.8 million to self-employed subcontractors in 2009; however, the company's 2009 corporate tax return does not reflect payments in this amount. Finally, and most critically, the petitioner has not adequately documented its payments to any of the beneficiary's claimed subordinates. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Although the director specifically noted this deficiency in the notice of denial, the petitioner has not supplemented the record on appeal with evidence of payments to the beneficiary's three claimed subordinates. Further, prior to the appeal, the petitioner did not claim that the beneficiary would have any supporting staff to assist him with administrative or operational aspects of the "business development" function, which is claimed to require half of his time.

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 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-day 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.*

While the petitioner has consistently stated that the beneficiary will be employed in an executive capacity, it has also consistently failed to provide a detailed description of his actual duties or a corroborated account of the company's organizational structure sufficient to show that someone other than the beneficiary would be available to perform non-qualifying duties associated with the company activities he is claimed to oversee.

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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while the AAO does not doubt that the beneficiary will possess the requisite level of authority, the deficiencies addressed above prohibit a finding that his actual duties will be comprised primarily of qualifying executive duties. Therefore, the petitioner's claims fail on an evidentiary basis, and the petitioner has not sustained its burden to establish that the beneficiary's position will be primarily executive or managerial in nature. The petitioner has not submitted additional evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

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.