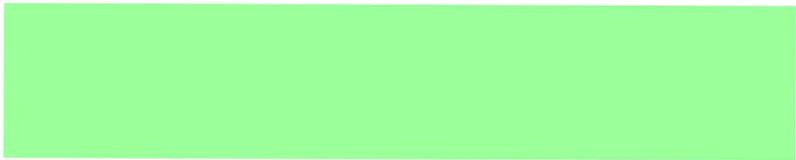




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **NOV 18 2014** 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 (AAO) in your case. This is a non precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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,

7 Ron Rosenberg
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 appeal will be sustained.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, seeking to classify 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). [REDACTED] is a Delaware limited liability company, established in 2012, that is wholly owned by [REDACTED], a holding company within the [REDACTED] of companies located in Brazil which includes the beneficiary's foreign employer. [REDACTED] is a Delaware corporation wholly owned by [REDACTED]. The petitioner is engaged in hotel ownership, operations and management. The petitioner seeks to employ the beneficiary as a chief operating officer (COO) for a period of three years.

The director denied the petition, concluding that the petitioner did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity. The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner contends that the director's denial is contrary to law and the evidence submitted.

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, Petition for a Nonimmigrant Worker (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.

¹ Although the Form I-129 lists both [REDACTED] at Part 1, item #2, the petitioner completed the Federal Employment Identification number for [REDACTED] only at Part 3 of the petition.

- (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.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

The petitioner filed the Form I-129 on October 25, 2013. The petitioner states that [REDACTED] purchased a [REDACTED] in Orlando, FL for over \$3 million in December 2012. The petitioner submitted evidence indicating that it is also negotiating the purchase of two additional hotels located in [REDACTED] County, Florida. The petitioner stated that it earned over \$1.1 million through September 2013 and that it employs approximately twenty-two individuals.

The petitioner explained that the beneficiary will act as its COO. The petitioner stated that "he will be instrumental in directing and overseeing all aspects of the business' day-to-day operations, including department expansion reviews and recommendations." The petitioner stated that the beneficiary will have "autonomous control" over its operations, including establishing the policies and objectives of the business, articulating the organization's vision, overseeing sales and marketing, developing strategic relationships, promoting a culture that reflects the foreign company's values, implementing human resources plans and policies, and conducting other human resources management. The petitioner indicated that the beneficiary will exclusively perform managerial and executive duties.

The petitioner provided a "Contract for the Sale and Purchase of Property" dated November 30, 2012 reflecting its purchase of a [REDACTED] in Orlando for \$3,175,000 from [REDACTED] including a detailed closing statement and deed to the property in the name of [REDACTED]. The petitioner provided an income statement relevant to [REDACTED] specifying that the company regularly paid substantial amounts for housekeeping supplies, laundry supplies, "payroll leasing," repairs and maintenance, pest control, and pool cleaning, amongst other hotel expenses during the first eight months of 2013. An attached ledger of expenses indicated that in August 2013 [REDACTED] paid over \$7,000 weekly to [REDACTED] and made various other payments to contractors for the provision of services and supplies relevant to the operation of a hotel, such as maintenance and repair, cleaning and food suppliers. A portion of the expense report dedicated to "gross wages" reflected that the petitioner issued checks to three individuals as employees. The petitioner submitted a Florida Department of Revenue Employer's Quarterly Report for the second quarter of 2013 indicating that [REDACTED] paid substantial quarterly salaries to three employees.

The petitioner also provided an "Independent Contractor Services Agreement" dated December 12, 2012 between [REDACTED] wherein the contractor agreed to supply personnel assigned to the petitioner's hotel locations, including room attendants, houseman, laundry attendants, maintenance workers, front desk clerks and senior front desk clerks. The petitioner provided an email dated September 23, 2013 to counsel listing thirteen employees provided by [REDACTED] for the operation of the [REDACTED]. In addition, the petitioner provided a franchise agreement between [REDACTED] and [REDACTED] dated December 21, 2012. The petitioner submitted

reports indicating the performance of the [REDACTED] against competitors and its occupancy rates and revenues per room. Furthermore, the petitioner provided two letters of intent indicating that an affiliate of [REDACTED] had entered into agreements in October 2013 to purchase two additional hotels in the Orlando area to be managed by [REDACTED], including the [REDACTED] for \$8,350,000 and the [REDACTED] for \$4,000,000.

The petitioner submitted a business plan reflecting plans to operate three hotels under the beneficiary's leadership as COO, noting that the [REDACTED] has 150 rooms and thirty-five employees and that the [REDACTED] has 130 rooms and thirty-five employees. The business plan included an additional duty description for the beneficiary indicating that he would review hotel acquisition proposals and franchise agreements, develop and disseminate the company's strategies and mission statements, and maintain and monitor staffing levels at the hotels. The petitioner included a detailed duty description for the beneficiary with percentages of time he would spend on his tasks, including reflecting that he would oversee surveys and due diligence of the company's new acquisitions and oversee the execution of all contractor work and acquisitions. Further, the petitioner provided a duty description for the general managers of each hotel, who would report to the beneficiary, specifying that these employees would manage front desk personnel, housekeeping staff, and maintenance personnel. The petitioner stated that in the first year the company would employ twenty-one employees at the [REDACTED] including three full-time front desk agents, four part-time front desk agents, six housekeepers, one part-time housekeeper, one head of housekeeping, one laundry service employee, a maintenance employee and a general manager. The petitioner projected that its staff would grow to ninety-one once it formally added the [REDACTED]

The petitioner submitted an organizational chart indicating that the beneficiary (COO) would oversee the general manager, who in turn would supervise a housekeeping supervisor, a maintenance supervisor, and a front desk manager. Further, a second organizational chart reflected that the beneficiary would oversee three general managers once it acquired the additional hotel locations.

The director later issued a request for evidence (RFE) stating that the petitioner had submitted insufficient evidence to establish that the petitioner currently employs twenty-one employees, noting that the provided tax documentation reflects that the petitioner has only three employees. The director requested that the petitioner provide a letter explaining the beneficiary's expected managerial or executive decisions and the percentage of time he would spend on each duty. Further, the director asked the petitioner to submit an organizational chart naming each employee, their job titles, duties, educational levels, and salaries.

In response, the petitioner emphasized that the beneficiary will oversee approximately 85-100 employees at three hotels once the latter two hotel acquisitions are completed, not including accountants, lawyers, auditors, and regulators involved in the company's business. The petitioner explained that it did not currently have the names of the prospective managers at the [REDACTED] since it had yet to complete the purchase of these properties. The petitioner indicated that the beneficiary would work with the company's chief executive officer and that his position is not that of a first-line supervisor. The petitioner also submitted the requested organizational chart.

In denying the petition, the director determined that the petitioner submitted an inadequate description of the beneficiary's proposed duties. The director pointed to the fact that the petitioner asserted that the general managers of each hotel would hold bachelor's degrees in management or tourism, but that the

evidence reflected that the general manager of the [REDACTED] motel holds a certificate in teaching music. The director stated that the petitioner failed to describe the duties of the beneficiary's subordinates as requested and did not provide sufficient evidence to demonstrate that he would have control over the company's independent contractors.

On appeal, the petitioner contends that the beneficiary will oversee approximately 85-100 employees and contractors engaged at three hotels operated by the petitioner and that he will have the authority to hire and fire these employees and contractors, including holding discretion to terminate its employee leasing agreement with [REDACTED]. The petitioner asserts that the director erred in concluding that the beneficiary is a first line supervisor of non-professional employees and states that the beneficiary is clearly a member of a senior management team assigned by the foreign parent to direct the company's affairs in the United States. The petitioner emphasizes that it submitted a detailed duty description for the beneficiary, including the percentages of time he spends on his tasks. The petitioner further states that the beneficiary will be responsible for reviewing the operational requests of general managers at each hotel and reporting to the CEO and board of directors of the petitioner on efficiency, loss, compliance, safety, and other relevant issues.

The petitioner submits additional evidence to support its assertions on appeal. The petitioner submits a support letter from the owner and president of [REDACTED] stating that his company was responsible for brokering the petitioner's purchase of the [REDACTED] in Orlando and also the execution of the letters of intent for the petitioner to purchase the [REDACTED] and the [REDACTED]. Mr. [REDACTED] affirms many of the previous assertions of the petitioner, indicating that the [REDACTED] requires twenty five persons to operate and that the petitioner's previously submitted organizational chart is accurate. Mr. [REDACTED] asserts that the petitioner's projected hotel chain cannot operate with general managers of the hotels alone, but that the company requires a higher level executive, such as the beneficiary, to make decisions regarding the functioning and operation of the hotels. Mr. [REDACTED] notes that the duties of the supervisors and managers subordinate to the general managers, such as housekeeping, maintenance and front desk staff, are self-descriptive. He indicates that these managers and supervisors will oversee the daily operational functions of the independent contractors engaged at these hotels and that the beneficiary retains the right to hire and fire these contractors.

In addition, the petitioner provides a letter from the general manager of [REDACTED]. Mr. [REDACTED] states that the beneficiary retains the right under their agreement to remove independent contractors from the [REDACTED] or to hire independent contractors to the payroll of his company. He confirms that the petitioner retains supervisory authority over the independent contractors assigned by [REDACTED] and asserts that the beneficiary will not be involved in the non-qualifying operational aspects of the business.

III. ANALYSIS

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has established that it will employ the beneficiary in a qualifying 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 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).

Here, the petitioner responded to the petitioner's RFE and provided a sufficiently detailed duty description along with percentages of time the beneficiary will devote to his tasks. Further, the petitioner has submitted supporting evidence to corroborate that the beneficiary will be responsible for overseeing a sufficiently complex organization where the services of a higher level manager or executive are required. For instance, the petitioner asserts that the beneficiary will be responsible for reviewing reports provided by his subordinate managers and the petitioner submits examples of these reports to substantiate this assertion. In addition, the petitioner has credibly established that the beneficiary will more likely than not be involved with substantial high-level due diligence responsibilities relevant to the acquisition of two additional hotel locations and their integration into the company's operations.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Further, the "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring).

Here, although the totality of the evidence in the record does not support the petitioner's claim that the beneficiary will perform exclusively managerial or executive duties, the petitioner has submitted sufficient evidence to demonstrate by a preponderance of the evidence that he will supervise other supervisory and managerial subordinates that will relieve him from performing primarily operational tasks. The petitioner has submitted evidence confirming that it currently employs four managerial level employees, including a

general manager and housekeeping, maintenance, and front desk supervisors. Further, the petitioner has provided a contract and support letter from [REDACTED], along with evidence of payments made to this company, for the provision of independent contractors that will perform the normal operational duties of a hotel, such as room attendants, laundry attendants, maintenance workers, front desk clerks and senior front desk clerks. The petitioner's financial and operational records credibly establish that the beneficiary will be responsible for managing various other independent contractors required for the functioning of the hotel. Further, the petitioner has established that the beneficiary will be involved in the company's acquisition of additional multimillion dollar properties, a responsibility that would not be entrusted to a first-line supervisor. Finally, the petitioner provided persuasive evidence that it is likely to acquire additional hotel locations in the near future, which in turn, will require further managerial and supervisory employees, all of whom will report to the beneficiary.

In sum, the evidence submitted establishes that it is more likely than not that the beneficiary will oversee subordinate managers and supervisors who will oversee the performance of the non-qualifying operational duties of the petitioner's hotel businesses under the beneficiary's direction. Therefore, the petitioner has demonstrated by a preponderance of the evidence that the beneficiary will be primarily engaged as a manager based on his supervision of subordinate managers and supervisors. The director's decision will be withdrawn.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has met that burden. Accordingly, the director's decision dated January 13, 2014 is withdrawn and the appeal is sustained.

ORDER: The appeal is sustained.