

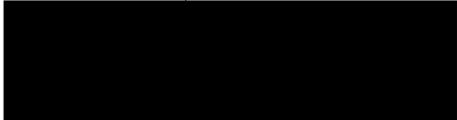


U.S. Department of Justice

Immigration and Naturalization Service

BH

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



**PUBLIC COPY**

File: WAC 99 095 52304

Office: CALIFORNIA SERVICE CENTER

Date: JAN 25 2001

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



identification data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

  
Mary C. Mulrean, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that claims to engage in the export of raw ice cream materials to [REDACTED] franchises in [REDACTED]. The petitioner seeks to employ the beneficiary as its president and, therefore, endeavors to classify her as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director of the California Service Center denied the petition because the petitioner failed to establish that the beneficiary is currently and will continue to be employed in an executive or managerial capacity for the U.S. entity. On appeal, counsel submits a brief.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The director denied the petition because the petitioner is a small company (three employees) whose organizational development cannot sustain a position that is primarily executive or managerial in nature.

On appeal, counsel claims that despite the director's finding that the beneficiary did not supervise supervisory, professional or managerial employees, the organization chart shows that the beneficiary supervises a marketing manager and two assistant managers, all three of whom perform supervisory duties. Counsel further argues that the prior approval of an L-1A nonimmigrant petition, which contained the same facts as the instant petition, attests to the petitioner's claim that the beneficiary functions in

a primarily executive or managerial capacity.

Counsel's arguments are not persuasive. The Service cannot find that the beneficiary functions in a primarily executive or managerial capacity based upon the evidence in the record.

8 C.F.R. 204.5(j)(2) states, in pertinent part:

*Executive capacity* means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

*Managerial capacity* means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

The beneficiary's duties do not fall within the definition of executive capacity. Pursuant to 8 C.F.R. 204.5(j)(5), a petitioner must submit a job offer in the form of a statement, which clearly describes the duties to be performed by the alien. In the initial I-140 petition filing, the petitioner described the beneficiary's

duties on a Form ETA 750 as follows:

As President of the U.S. subsidiary company, directs and coordinates all aspects of management and operation of the U.S. subsidiary company, 100% owned by the parent company in Korea. Plans, develops, and establishes business policies and objectives. Reviews analysis, costs, operations, and forecasts data to determine progress toward the goals and objectives. Prepares monthly report to head office in Korea.

This job description is vague, and does not provide any insight into the beneficiary's daily activities. By using general terms such as "coordinates all aspects of management" to describe the beneficiary's job duties, the petitioner has merely paraphrased the definition of executive capacity. Without adequate proof of the beneficiary's duties, the Service cannot find that the work of the beneficiary is in a primarily executive capacity.

The petitioner also failed to establish that the beneficiary's duties fall within the definition of managerial capacity. The petitioner failed to detail whether the beneficiary has the authority to hire and fire or recommend other personnel actions. The petitioner also failed to show the beneficiary's level of autonomy and control with respect to any discretionary decision-making, and to illustrate how the beneficiary exercises direction over the day-to-day operations of the U.S. entity.

The evidence in the record does not enable the Service to conclude that the beneficiary's primary role within the company fits the definition of executive capacity or managerial capacity noted in Sections 101(a)(44)(A) and 101(a)(44)(B) of the Act. The job description merely paraphrases the definition of executive capacity, and the petitioner failed to show how the beneficiary's daily activities fall within the definition of managerial capacity. Therefore, the director's denial on the basis that the petitioner has not clearly established the primarily executive or managerial role of the beneficiary within the company is affirmed.

Finally, counsel suggests on appeal that this petition must be approved because the beneficiary was previously granted nonimmigrant classification as an L-1 executive/manager. The director's decision does not indicate whether the beneficiary's nonimmigrant file was reviewed. Copies of the initial L-1A nonimmigrant visa petition and supporting documentation are not contained in the record of proceeding. Therefore, it is not clear whether the beneficiary was eligible for L-1A classification at the time of the original approval, or if the approval of the L-1A nonimmigrant classification involved an error in adjudication. However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in this

immigrant petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988).

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.