



B4

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



File: EAC 00 014 53080

Office: VERMONT SERVICE CENTER

Date: 22 APR 2002

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:



Public Copy

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

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a corporation organized in the state of Massachusetts engaged in the restaurant business. It seeks classification of the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not demonstrated that the beneficiary was employed in a primarily managerial or executive position for one year within the three-year period prior to his entry into the United States as an L-1A nonimmigrant.

On appeal, counsel for the petitioner submits additional documents. The petitioner also asserts that the beneficiary has been and will be acting in a primarily managerial or executive capacity for the business.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside

the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The petitioner is a company organized in the state of Massachusetts that claims to be owned by two Canadian citizens. The same two individuals also purportedly own a restaurant in Canada. The petitioner claims that the beneficiary was employed as the general manager of the Canadian restaurant from 1992 to 1997. The beneficiary relocated to the United States with an L-1A visa in 1997.

The first issue in this proceeding is whether the petitioner provided sufficient evidence to establish the beneficiary was employed in a managerial or executive capacity for at least one year prior to entering the United States as a nonimmigrant.

The petitioner initially submitted numerous documents to establish a qualifying relationship between the petitioner and an overseas entity and to show that both enterprises were conducting business.

The director requested additional evidence to show that the beneficiary was employed in a qualifying managerial or executive capacity abroad. The director specifically requested an organizational chart of the foreign entity, a list of the employees supervised by the beneficiary abroad, including a position description and breakdown of number of hours devoted to each of the positions. The director also requested an audited or independently reviewed copy of financial statements for the foreign entity. The director further requested documentary evidence that the beneficiary had made managerial decisions while employed by the foreign entity.

In response, the petitioner submitted a statement from the alleged

owner of the foreign entity describing the beneficiary's position for the foreign entity as follows:

[The beneficiary] when being employed in Yenching Restaurant (Canada) ensured smoothness on the day to day operation of the restaurant, supervised over [sic] the workers in the kitchen and dining room area, hired and fired employees when needed, negotiated leases on behalf of the owner, dealt with agents like workers' compensation insurance, banks, suppliers, customers' complaints, if any, etc.

The petitioner also provided the foreign entity's organizational chart depicting the beneficiary as general manager and ten employees in various positions. The petitioner further provided a brief position description for the general manager, chefs, waiters/waitresses, cashier, hostess and dishwasher.

The director determined that the petitioner had not provided credible documentary evidence of the staffing of the foreign organization and the specific duties that the beneficiary performed abroad. The director concluded that the record did not reflect that the beneficiary was employed in a primarily managerial or executive position for one year within the three-year period prior to his entry into the United States as an L1 nonimmigrant.

On appeal, counsel for the petitioner asserts that the issuance of an L-1A visa is prima facie evidence that the applicant had been employed in primarily a managerial or executive position for one year within the three year period prior to the beneficiary's entry into the United States. Counsel also re-submits the foreign entity's organizational chart. Counsel also provides Canadian revenue documents for 1999 and 2000 to evidence staffing of the Canadian restaurant. Counsel further provides three letters from individuals attesting to the beneficiary's management of the Canadian restaurant.

Counsel's assertion is not persuasive. 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 Enqq. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). Issuance of an L-1A visa if based on the insufficient evidence contained in this record, would have constituted gross error. Further, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

In addition, the Canadian tax documents for years 1999 and 2000 do

not demonstrate the beneficiary's employment in one of the three years prior to his entry into the United States in 1997. The letters of support provided on appeal are letters that indicate the beneficiary was employed by the Canadian restaurant between the years 1992 and 1997 but do not describe the beneficiary's duties in detail. Furthermore, when a petitioner is put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). Tax records and other independent sources of evidence of staffing of the Canadian entity during the relevant years should have been available at the time of filing of the petition and should have been submitted at that time or in response to the director's request for evidence.

Upon review, the record is unpersuasive in establishing that the beneficiary was employed in a managerial or executive capacity by the overseas entity prior to his entry into the United States.

The second issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties for the United States enterprise.

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.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. 204.5(j)(5).

It is noted that the petitioner does not indicate whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not rely on partial sections of the two statutory definitions.

The petitioner initially indicated that the beneficiary's duties would be duties similar to those he performed for the Canadian restaurant. The director requested that the petitioner provide a complete description for all of its employees including the beneficiary with a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

In response, the petitioner provided the following description for the beneficiary's position of general manager:

Restaurant managers plan, direct, organize and control the operation of the restaurant, recruit and fire staffs, resolve customers complaints, ensure smoothness

of restaurant operation. Works approximately 70 hours per week.

The petitioner also provided a brief description for the positions of head chef, assistant chef, waiter/waitress, hostess/cashier and dishwasher.

The director determined that the record did not show that the beneficiary's duties would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that prior approval of the L-1A visa is prima facie evidence that the beneficiary is currently employed in a managerial or executive capacity. Counsel also submits an hourly breakdown of the staff duties on a weekly basis. Counsel also states that "a restaurant requires a restaurant manager to run the operation" and that "the applicant's day to day managerial duties contain all the necessary duties to operate a restaurant and its subordinate staff."

Counsel's assertion again is unpersuasive. Previous approvals of nonimmigrant visas do not necessarily mean that new petitions will also be approved. Eligibility must be demonstrated for each petition filed.

Counsel's submission of an hourly breakdown of the staff duties is information specifically requested by the director and not provided in the petitioner's response to the director. Again, evidence submitted on appeal will not be considered for any purpose if the information has been requested and not provided. Matter of Soriano, supra.

Furthermore, contrary to counsel's claim that the beneficiary manages the restaurant, the descriptions provided indicate that the beneficiary is primarily providing the necessary services to continue the operation of the restaurant. Regarding the actual operations of the restaurant, the description of the beneficiary's job duties states that the beneficiary is responsible for "communicat[ing] with suppliers," "check[ing] prices," "contact[ing] different contractors," "doing [the] books," and "communicat[ing] with customers." It appears from this description that the beneficiary is primarily performing these activities rather than managing these duties through the work of others. We note that if the Service were to consider counsel's delayed provision of the hourly breakdown of duties, these activities would consume 36 hours of the beneficiary's 50 hour work week.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not demonstrate

that the beneficiary will manage the organization through the work of others. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has provided inconsistent statements regarding its ownership. In a letter accompanying the petition, counsel for the petitioner indicates that Huan Chun Lee owns 60 percent of the petitioner and Richard Lee owns 40 percent of the petitioner. The Massachusetts Corporation Annual Report dated August 13, 1999, submitted by petitioner, indicates that the petitioner has authorized 200 shares and that 130 shares have been issued and are outstanding. The stock certificates provided indicate that Huan Chun Lee has been issued 60 shares of the petitioner and that Richard Lee has been issued 40 shares of the petitioner. The ownership and control of 30 shares is unrevealed. As the appeal is dismissed for the reasons stated above, this issue is not explored further.

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.