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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

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

[Redacted]

File:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

16 DEC 2002

IN RE: Petitioner:

[Redacted]

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:

[Redacted]

**Identifying 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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a limited partnership organized under the laws of the State of Florida in 1998. It is engaged in the operation of a buffet restaurant facility. It seeks to employ the beneficiary as its vice-president. Accordingly, the petitioner endeavors to classify 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 established that the beneficiary's duties for the foreign employer had been primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the Service ignored its submission of information in response to the request for evidence. Counsel asserts that the beneficiary was engaged in primarily executive and managerial functions for the foreign employer.

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 language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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).

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 issue in this proceeding is whether the beneficiary performed primarily managerial or executive duties for the foreign employer prior to entering the United States as a non-immigrant.

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.

It is noted that the petitioner and its counsel state that the beneficiary was both a manager and executive for the foreign employer. It should be noted, however, that a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

In a letter submitted with the initial petition, the petitioner stated that the beneficiary "had gained wide experience over the years in his work for [the foreign employer]." The petitioner stated that the beneficiary had worked in an executive capacity for the foreign employer since its inception until 1996 when he was transferred to the United States in an L-1A capacity.

The director requested further information on the beneficiary's duties for the foreign employer, including a complete job description, the percentage of time spent on each duty, and a description of the duties of subordinate employees or the function managed by the beneficiary.

In response to the director's request the petitioner provided a letter from the beneficiary's foreign employer. The letter listed the beneficiary's primary duties as follows:

- Direct market research, expansion and strategizing, advertising and sales in search of better ways to improve service, maximize return and increase productivity. This involves analyzing market, setting strategic planning goals, setting sales quotas and expenses, developing all the facets of the business. [20 percent]
- Full accountability for financial issues of the organization, exercising complete authority to manage all financial aspects of the business and the negotiation of contracts. [20 percent]
- Oversee and coordinate the day-to-day activities of the operation. Responsible for planning, formulating, and implementing administrative and operational policies, procedures and objectives. This also involves personnel management including hiring, training, firing staff in accordance with the company's guidelines. [60 percent]

The letter also provided brief job descriptions for two sales representatives and an administrator/bookkeeper. The letter indicated that the organization depended on its sales representatives to promote and develop business. The letter concluded that the beneficiary "had full managerial responsibility for the direction and coordination of activities and operations on a day to day basis and directed trading activities and those operations to control risk and maximize return for the organization."

The director noted the foreign employer's limited number of employees and determined that based on the evidence provided that the beneficiary had been providing a wide range of daily functions to the foreign employer and the functions were unrelated to the definitions of manager or executive. The director concluded that the beneficiary had not been employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner re-states the description of the beneficiary's duties provided by the foreign employer. Counsel asserts that the beneficiary did not sell products to customers, but rather negotiated major contracts and did not make entries into ledger books but rather had full responsibility for all financial issues. Counsel further asserts that the foreign employer used many outside contractors who handled storage, freight forwarding, and custom brokerage. Counsel finally asserts that the Service failed to recognize the substantiality of the foreign company (gross sales of 5,000,000 Canadian dollars) regardless of its number of employees.

Upon review, counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner initially provided a generalized statement that the beneficiary performed as an executive for the foreign employer. The petitioner's response to the director's request for evidence provided more information but is still general in nature. The beneficiary's foreign employer stated that the beneficiary was involved in marketing, in financial matters, and with the day-to-day operations of the company. The foreign employer explained the beneficiary's duties involving the day-to-day activities of the company by stating that the beneficiary was "[r]esponsible for planning, formulating, and implementing administrative and operational policies, procedures and objectives." Statements such as this merely paraphrase the definition of managerial and executive capacity. Section 101(a)(44)(A)(iv) and 101(a)(44)(B)(ii) of the Act. Statements paraphrasing the statutory definitions do not convey an understanding of exactly what the beneficiary was doing on a daily basis.

In addition, the foreign employer's description that contains some detail of the beneficiary's duties is more indicative of an individual that performs basic tasks for the company such as market research and financial organization. As noted by the director, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The description of the duties for the foreign employer's two sales representatives and the office administrator does not include responsibility for the company's market research and financial operations thereby freeing the beneficiary to primarily direct these activities.

Further, counsel's assertion that the beneficiary was not involved in selling or making entries into the ledger books does not contribute to a finding that the beneficiary was primarily performing executive or managerial duties. First, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N

Dec. 503, 506 BIA 1980). Second, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). As noted above, neither counsel nor the beneficiary's foreign employer provided a comprehensive description of the beneficiary's actual daily duties for the foreign organization. Stating what the beneficiary did not do is not sufficient. It is not possible to discern the nature of the beneficiary's day-to-day activities from the broadly cast description provided by the beneficiary's foreign employer. In addition, counsel's reference to the employment by the beneficiary's foreign employer of outside contractors is brought up for the first time on appeal and then is not supported by independent evidence. It appears that at most, the beneficiary had the duties of a first-line supervisor who was also actively engaged in the duties necessary to continue the operations of the beneficiary's foreign employer.

It is not possible to conclude from the foreign employer's description of the beneficiary's responsibilities that the beneficiary was performing managerial or executive duties rather than actually performing the activities. It appears that the beneficiary's tasks relate to the performance of services for the petitioner as a first-line supervisor. The foreign employer's description of its employee's job duties does not support a finding that the beneficiary directed the management of the foreign employer or actually directed other managers. The record contains insufficient evidence to demonstrate that the beneficiary's duties for the foreign employer were primarily managerial or executive in nature. The record does not sufficiently demonstrate that the beneficiary had managerial control and authority over a function, department, subdivision or component of the company. Rather, the description of the duties performed by the beneficiary are more indicative of an individual primarily performing the basic operations of the foreign employer. Further, the record does not sufficiently demonstrate that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who relieved 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 possessed an executive title. The petitioner has not established that the beneficiary was employed in either a primarily managerial or executive capacity for the foreign employer prior to his entry into the United States as a nonimmigrant.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas entity.

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

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.

The beneficiary's foreign employer in this proceeding is a Canadian corporation, identified as Cor-Lyn International. As explained by the petitioner, the Canadian company owns and controls a subsidiary company organized in the State of Florida, identified as Cor-Lyn (USA), Inc. The petitioner initially submitted a partnership agreement between Emerald Coast Restaurants, Inc., a Florida corporation allegedly owned by the beneficiary and two other Canadian citizens and Lee Li Wholesale Meat Ltd., a Canadian company and an individual. Lee Li Wholesale Meat Ltd. and the individual were identified as the limited partners. The partnership interest is designated as Emerald Coast Restaurants, Inc. holding 70 percent, Lee Li Wholesale Meat Ltd. holding 25 percent interest, and an individual holding 5 percent interest. The partnership agreement also states that the general partner has the exclusive right to manage the business and affairs of the partnership. The agreement further states that if there is more than one general partner, "they shall make all decisions regarding management and/or control affecting the business and/or the assets by a majority of their number."

The director requested clarification on how the above unsupported documentation created a qualifying relationship between the beneficiary's foreign employer, Cor-Lyn International, and the petitioner. In response, counsel for the petitioner provided an amendment to the partnership agreement stating that Cor-Lyn (USA) Corp. had been added to Article number 4 of the certification of limited partnership. The amendment was filed June of 2000. The petitioner also provided its 2001 Uniform Business Report filed with the Florida secretary of state that depicted Emerald Coast Restaurants, Inc. and Cor-Lyn (USA), Inc. as general partners of the petitioner.

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 the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings). The

petitioner has not provided sufficient evidence to demonstrate that the beneficiary's foreign employer indirectly owns and controls the petitioner. The documentation submitted raises questions regarding the petitioner's ownership and control. The ownership interest of the two general partners is not clearly set out. It is unclear how the addition of the subsidiary of the beneficiary's foreign employer affects the previous ownership interests. The partnership agreement is ambiguous in describing how two general partners make decisions by a majority of their number. It is not clear whether this refers to ownership interest or number of partners. The petitioner has not provided sufficient documentation that the beneficiary's foreign employer owns, directly or indirectly, less than half of the entity, but in fact controls the entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

For this additional reason, the petition may not be approved.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.