

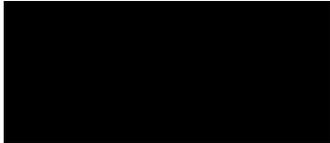


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U.S. Department of Justice
Immigration and Naturalization Service

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



25 JUL 2002

File: EAC 00 005 53298 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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]

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 Tennessee that claims to be engaged in the fast food service industry. 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 established that the beneficiary has been or will be performing the duties of an executive/manager.

On appeal, counsel for the petitioner asserts that the beneficiary's job duties fulfill the definition of executive capacity.

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

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.

The petition contained the following description of the beneficiary's proposed duties for the United States enterprise:

The position of corporate President involves planning, developing and establishing all company's policies and objectives. It also involves planning our company's business objectives and developing organizational policies and coordinating of functions and operations, as well as establishing responsibilities and procedures. It also involves the direction of

financial programs of the company to make sure that there is sufficient funding on hand at all times for corporate activities and functioning. In order to carry out these functions, and in her capacity as corporate President, [the beneficiary] has had, presently does have and will continue to have 100% latitude in discretionary decision-making, and will receive no supervision from anyone, since there is no higher person in the United States than she. The position does not involve the actual provision of our company' goods or services, which is done by one or another of the 6 other persons who work at the petitioner company.

The petitioner also included the position description provided to the Service in support of the beneficiary's original L-1A visa classification and extension thereof. These descriptions indicated that the beneficiary would also have hiring and firing authority, would have signatory authority for all corporate bank accounts and the authority to legally bind the petitioner to contracts. The petitioner noted that the beneficiary would be spending 100% of her time directing and supervising the entire business of the petitioner and would not be directly providing the goods and services of the petitioner.

The director requested additional documentation to establish that the beneficiary had been employed in an executive or managerial position in the United States.

In response, the petitioner provided the requested Internal Revenue Service (IRS) Forms 1120 for the year 1999 and the IRS 941s for all quarters in 1999 and for the first two quarters of 2000. Counsel for the petitioner also stated in a letter accompanying the requested information that the beneficiary held the position of corporate president and that another individual, labeled "general manager" had direct responsibilities for banking relationships; opening and preparing the store for business, scheduling employees, inventory and ordering and training. Counsel for the petitioner also asserted that the "concept of staffing levels is utterly absent in the definition of executive capacity" and that the petitioner is only requesting that the beneficiary be approved under the executive definition.

The director determined that the petitioner had not provided sufficient documentary evidence that the beneficiary had been employed in a primarily executive or managerial capacity or that the petitioner could support such a position. The director concluded that the beneficiary would be primarily engaged in the non-managerial day-to-day operations involved in producing a product or providing a service.

On appeal, counsel for the petitioner makes clear that the petitioner is requesting that the beneficiary be considered only

under the statutory definition of executive. Counsel for the petitioner again asserts that under the executive definition there is no requirement that the beneficiary supervise others. Counsel makes quite clear that, "the seven other persons working at the petitioner corporation are not managerial-level employees, and the [sic] do not have to be. They are workers in a restaurant preparing Subway sandwiches." Counsel also makes reference several times to the beneficiary directing the entire organization and the six subordinate employees providing the goods, i.e. making the Subway sandwiches. Counsel also notes the past approvals of the beneficiary's L-1A classification. Counsel concludes that the beneficiary has met the requirements set forth in the statutory definition of executive capacity.

Counsel's conclusion is unpersuasive. The first requirement under the statutory definition of executive is that the beneficiary, "direct the management of the organization." The record does not support a finding that the beneficiary directs the *management* of the organization. The petitioner's description of the actual duties of the beneficiary is vague and general in nature. There is no clear description of what the beneficiary will be doing on a day-to-day basis the forty hours a week she claims to work. The record is deficient in establishing that the beneficiary is acting in an executive capacity for the petitioner. The Service is not compelled to deem the beneficiary to be an executive solely because the beneficiary possesses an executive title.

Petitioner and counsel's reliance on previously approved petitions for the beneficiary's L-1A status is also misguided. If the previous petitions were approved based on the same evidence, the approvals 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). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988). Further, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decisions of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000).

Beyond the decision of the director, the petitioner has not established that it is doing business in the United States. The petitioner claims and in fact has submitted tax returns indicating that it owns a Subway shop. However, the original L-1A petition (approved December 1997) indicated that the beneficiary was coming to the United States to open a new office for the import and export of automotive and industrial components. In June of 1998,

the beneficiary (not the petitioner) entered into an agreement to purchase a Subway sandwich shop. There is no documentary evidence to indicate that the Subway sandwich shop, purchased by the beneficiary is owned by the petitioner. Both the purchase agreement and the lease agreement are in the name of the beneficiary. We do note that the petitioner guaranteed a promissory note for the purchase of the Subway sandwich shop but again there is no evidence of ownership by the petitioner. This inconsistent and insufficient information casts doubt upon the claims of the petitioner that it is engaged in the regular, systematic, and continuous provision of goods and/or services. Furthermore, it is questionable that the beneficiary is or will be employed by the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which she was employed overseas. 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).

Finally, though the director did not comment on the beneficiary's employment abroad with the claimed overseas entity, the record contains insufficient evidence to establish that the beneficiary was employed in either an executive or managerial capacity for the overseas entity. As the appeal is dismissed for the reason stated above, these issues are not examined 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.