

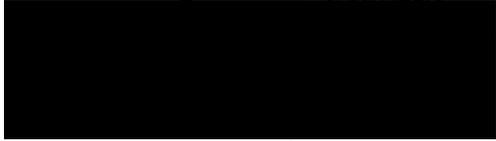


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC 00 016 51706 Office: CALIFORNIA SERVICE CENTER

Date: NOV - 4 2002

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:



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, California 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 California in January 1998. It is engaged in the restaurant business. It seeks to employ the beneficiary as its president. Accordingly, 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 would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service decision is based on erroneous reasoning and should be reversed.

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 issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity 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.

The petitioner submitted a letter with the petition stating that the beneficiary would work in an executive capacity and provided the following description of the beneficiary's proposed duties for the United States enterprise in pertinent part:

. . . He will oversee all aspects of [the petitioner's] business activities, including developing menu items, determining prices, market research, marketing and advertising strategies, budgeting and cost control, and establishment of contractual relationships with U.S.

restaurant service distributors. He will also be responsible for hiring and evaluating the performance of U.S. restaurant employees, including cooks, waiters and waitresses, hostesses, janitorial staff, and administrative personnel. . . . [The beneficiary] will also review and analyze reports on the activities, costs, and operations of [the petitioner] in order to provide forecast data and to evaluate progress toward stated company goals. He will meet with restaurant staff on a regular basis in order to review company policies and procedures and to develop appropriate plans to promote the continuing growth of the restaurant's clientele and improvement of its cuisine.

. . . He will develop and establish the long-range policies and objectives of the business, including coordinating activities concerning the expansion, franchising, and development of additional New Orient Café locations. He will formulate and administer the organizational policies and develop the business goals and objectives of the company's expansion and franchising program. In addition, he will establish and direct accounting, budgeting, advertising, and personnel policies for the company.

. . . he will be solely responsible for formulating, establishing, and directing the company's policies and strategies concerning marketing, advertising, purchasing, menu selection and pricing, personnel hiring and supervision, and policies concerning financial accounting and personnel functions. He will also be granted complete autonomy with regard to decisions concerning business creation and development of the company's franchise expansion program.

. . . [The beneficiary] will receive only general supervision and direction from higher executives, the board of directors, and the stockholders of the company. He will be granted autonomous decision-making authority over all activities of the U.S. company. . . . [H]e will be provided broad discretion in determining the actual specific marketing and food service strategies and business expansion goals of the U.S. company.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998. The 1998 1120 revealed gross receipts of \$205,932, salaries paid in the amount of \$35,331, no compensation paid to officers, and taxable income of \$42,684.

The director requested further details regarding the beneficiary's specific day-to-day duties as well as a list of discretionary

decisions that the beneficiary had made in the last six months. The director also requested the petitioner's organizational chart.

In response, the petitioner stated that in addition to the petitioner filling a void for affordable high-quality dining in the San Ysidro community, the petitioner was also the central business headquarters for the parent company's plans to expand its business throughout the United States. The petitioner noted that these plans were a "critical component/function of the parent company" and that the plans required an experienced executive president. The petitioner re-stated portions of the job description previously submitted and added that it also required a president whose duties and responsibilities were executive and managerial in nature. The petitioner also added the following description of the beneficiary's duties:

As President, [the beneficiary] plans, organizes, and controls the major issues, challenges, and decisions of the U.S. company. He supervises, manages, and directs all managerial employees and operational activities of the U.S. company. He ensures that the restaurant provides quality dining and services in the context of an extremely competitive market. He operates the restaurant in such a way that it is as efficient and profitable as possible given the prevailing circumstances and market environment. [The beneficiary] establishes the standards for personnel administration and performance, service to patrons, advertising, publicity, credit, food selection and service, and type of patronage to be solicited. He plans the dining room, bar, and banquet operations. [The beneficiary] is also in charge of allocating funds, authorizing expenditures, and assisting in planning operational budgets. He oversees the interviewing, hiring, and evaluation of personnel by the General Manager.

In addition, [the beneficiary] coordinates all food service activities of the U.S. company. He estimates food and beverage costs and manages requisitions and purchase of supplies. [The beneficiary] confers with his staff to oversee the proper preparation of Cantonese cuisine, to create the menu and develop new specialty items. [The beneficiary] reviews financial transactions and monitors the budget to ensure the U.S. company's efficient operation, and to ensure expenditures remain within budget limitation.

The petitioner then provided a "partial list" of the beneficiary's duties:

- Direct complex market analysis;
- Formulate financial programs to secure funding and

- direct other managers in the execution of such tasks;
- Network within the restaurant and hospitality industries to promote the company's image and develop investor relations;
 - Find investors and establish franchises;
 - Oversee the establishment of new franchises;
 - Direct regular meetings of franchise owners to evaluate business progress and review stated corporate goals;
 - Negotiate real estate leases and purchases for the creation of new franchises;
 - Evaluate the productivity and profitability of all franchises and the effectiveness of each franchise's management/ownership;
 - Allocate funds to necessary resources, including inventory and material for new start-ups, real estate leases and purchases, and bulk food purchase for multiple restaurants;
 - Create budgets and manage executives to ensure that expenditures remain within stated limits;
 - Determine bulk food and beverage costs;
 - Manage a staff of financial, human resource, and administrative directors and managers;
 - Oversee statistical analysis regarding business growth and development;
 - Review new business proposals and investments;
 - Negotiate joint venture contracts; and
 - Coordinate overall franchise operations.

The petitioner noted that in addition to the above duties, the beneficiary was also in charge of running the first New Orient Café restaurant. The petitioner also stated that the beneficiary executed the duties of the restaurant through other managers making this position both managerial and executive in nature. The petitioner further stated that the beneficiary exercised all major management decisions for the company including food and beverage purchases, equipment rental and acquisition, furniture and fixture purchases, and facilities maintenance and cleaning. The petitioner also included its organizational chart depicting the beneficiary as president, a general manager, two chefs, two kitchen crew and two waitresses.

The director determined that the record demonstrated that the preponderance of the beneficiary's duties would be directly providing services of the business. The director determined that the petitioner had not provided a comprehensive description of the beneficiary's duties that demonstrated that the beneficiary would be managing the organization or managing a department, subdivision, function or component of the company. The director further determined that the record did not demonstrate that the beneficiary would be managing a subordinate staff of professional,

managerial, or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary will plan, organize, direct, and control the organization's major functions by working through other managerial subordinate employees. Counsel asserts that it is clear from the descriptions previously provided that the beneficiary is not simply providing services to the petitioner. Counsel further asserts that the record shows that the beneficiary's duties are primarily executive and managerial in nature and that the beneficiary spends 85 percent of this time engaged in executive management of the organization as a whole. Counsel also provides a new organizational chart depicting the beneficiary as president, a general manager, an accounting manager, a facilities and inventory manager, three chefs, three kitchen crew, three waitresses, and a janitor.

Counsel's assertions and evidence 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). We agree that the petitioner has provided a comprehensive position description for the beneficiary. The descriptions provided, however, support the director's determination that the beneficiary is involved primarily in providing services to the petitioner. 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).

For example, the petitioner initially states that the beneficiary will oversee all aspects of its business activities including the development of menu items, determination of prices, market research, marketing and advertising strategies, budgeting and cost control, and the establishment of contractual relationships with U.S. restaurant service distributors. The petitioner also states that the beneficiary formulates and establishes policies regarding these same functions. In response to the director's request for evidence the petitioner indicates that the beneficiary executes the duties of the restaurant through other managers but in the next sentence indicates that it is the beneficiary who exercises all "major management decisions" regarding the basic operations of the restaurant. Also in response to the request for evidence the petitioner for the first time indicates that it also employs a "general manager." However, this same individual is noted on the petitioner's list of employees as a chef from October 2000 to present. The petitioner has not provided sufficient consistent information on whom actually performs the basic functions of the restaurant thereby leaving the beneficiary to merely oversee or direct these basic functions. 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). Further, 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). Likewise, counsel's assertions that the beneficiary plans, organizes, directs, and controls the organization's major functions by working through other managerial subordinate employees is without merit. 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). The submission of an expanded organizational chart on appeal also does not contribute to a finding that the beneficiary is engaged in a primarily managerial or executive capacity. A petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

In addition, the petitioner has not submitted sufficient evidence to establish that the beneficiary has actually conducted the broadly cast description of duties listed in the response to the request for evidence. Although the beneficiary's duties are claimed to include reviewing and analyzing reports and developing policies that include expanding and franchising the restaurant the petitioner has not provided copies of reports, minutes of meetings, or other evidence that would demonstrate that the beneficiary is actually involved in this activity. The record demonstrates only that the petitioner continues to be a Cantonese restaurant with the beneficiary as the individual performing the necessary operations of ordering food and beverages, allocating funds, planning banquets, ordering the advertising, and planning a marketing strategy to gain a greater clientele.

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 in the proposed position will be primarily managerial or executive in nature. The record does not demonstrate that the beneficiary directs the management or manages the organization or an essential function of the organization. The record does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. 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, non-managerial duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established

that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, 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, this issue is 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.

