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U.S. Department of Justice

Immigration and Naturalization Service

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[redacted]

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

File: WAC 01 098 50623 Office: CALIFORNIA SERVICE CENTER Date: NOV 19 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]

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 Hawaii in August of 1999. It is engaged in the restaurant and bar business. It seeks to employ the beneficiary as its 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 would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies as an executive or manager.

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 has been and will be primarily performing managerial or executive duties.

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).

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-
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> 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;
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> 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
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> 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;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the initial petition, the petitioner stated that the beneficiary would be responsible for directing and developing the day-to-day operation of its karaoke lounge and restaurant operations. The petitioner described the beneficiary's duties as follows:

> Hire, fire, and promote employees. Plan and prepare work schedules and assign employees to specific duties. Estimate food and beverage costs and ensure that there are sufficient supplies. Establish financial goals and budgets for the business. Direct food preparation and other personnel to plan menus and related activities such as dining room, bar, and banquet operations. Investigate and resolve food quality and service complaints. Call and preside [sic] management meetings.

After reviewing the petition, the director requested a more detailed description of the beneficiary's duties in the United States and a description of the staffing levels of the petitioner. The director also requested the petitioner's state and federal quarterly wage reports.

In response to the director's request the petitioner through its counsel provided essentially the same description as initially submitted but noted the amount of time the beneficiary spent on each activity and added an intermediate layer of personnel as follows:

> Hire, fire, and promote managerial and other employees of Restaurant [redacted]. [sic] Plan and prepare work schedules and assign employees to specific duties (15%). Direct Assistant Managers in estimating food and beverage costs and ensure that there are sufficient supplies (10%). Establish financial goals and budgets for the business (10%). Authorize and monitor expenditures to ensure efficiency of operation (10%). Direct food preparation and other personnel to plan menus and related activities such as dining room, bar, and banquet operations (30%). Direct Floor Manager in providing customer service (15%). Investigate and resolve food quality and service complaints (10%).

Counsel then stated that the beneficiary's duties were executive and managerial in nature because "(1) he manages two divisions (a Japanese restaurant and a bar) of the company, (2) he supervises and controls other supervisory, and managerial employees (the manager of the restaurant and the manager of the bar are under his management), and (3) he is responsible for directing the day-to-day operations of the businesses with the authority to hire and fire employees."

The petitioner also submitted its organizational chart depicting the beneficiary as the president and general manager of the petitioner. The chart depicted an assistant manager for the petitioner's bar along with two floor managers, three counter managers, six hostesses, and five bartenders. The chart also depicted an assistant manager for the petitioner's restaurant, a kitchen manager/chef, a floor manager, a cook, a supervisor, five kitchen workers, and five waitresses.

The petitioner further provided its Hawaii State Quarter Wage, Contribution and Employment and Training Assessment Report for the pertinent quarter ending March 31, 2001. The report reflected seventeen employees. The report did not reflect the names of the individuals identified as the assistant manager and the floor managers for the bar on the petitioner's organizational chart. The report also did not reflect the name of the individual identified as the assistant manager for the restaurant on the petitioner's organizational chart. The petitioner's Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return reflected only fourteen employees for the quarter including March 12, 2001.

The director determined that the petitioner's description of the beneficiary's job duties demonstrated that the beneficiary would be acting in the capacity of a first-line supervisor. The director concluded that the beneficiary had not been and would not be employed in a primarily executive or managerial capacity or that the petitioning organization required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies as both an executive and a manager. Counsel asserts that the beneficiary is in charge of both components of the company and that it was the beneficiary who negotiated the purchase of both the businesses on behalf of the company. Counsel further asserts that the beneficiary supervises and controls the work of other supervisory and managerial employees. Counsel concludes by noting that the Service recently approved the beneficiary's classification as an L-1A nonimmigrant multinational manager/executive.

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). In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "[e]stablish financial goals and budgets for the business," and "[h]ire, fire, and promote employees." These two statements paraphrase certain elements of the statutory definition of "managerial" and "executive" capacity without clearly describing the actual duties of the beneficiary with respect to the daily operations. See section 101(a)(44)(A)(iii) and section 101(a)(44)(B)(ii). The beneficiary's duties that were more clearly detailed plainly

indicate that the beneficiary would be performing the mundane tasks necessary to operate a bar and a restaurant. The petitioner identified the beneficiary as the individual responsible for planning and preparing work schedules and estimating food and beverage costs. 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 beneficiary's direction of other employees to prepare food, plan menus, and related activities are tasks associated with a first-line supervisor of restaurant and bar staff. In the definition of managerial capacity, the statute specifically states that "[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)(A)(iv). The petitioner has not ventured the claim that restaurant and bar staff positions are professional positions within the context of this definition.

In the response to the director's request for evidence, the petitioner adds that the beneficiary establishes financial goals and budgets and authorizes and monitors expenditures for the business. The Service cannot discern from these vague statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. Likewise, the beneficiary's responsibility for public relations in resolving customer complaints cannot be determined to be primarily executive or managerial in nature.

The petitioner's response to the director's request for evidence also raises concerns regarding the number of individuals employed by the petitioner at the time of filing the petition. The petitioner's organizational chart differs significantly from the petitioner's supporting documentation. The petitioner's quarterly tax returns reveal that the petitioner employed only fourteen to seventeen individuals. Neither individual identified as an "assistant manager" is reflected in the petitioner's employee tax returns. The petitioner does not explain this inconsistency. 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). Even if the petitioner hired additional employees after the petition was filed, the petitioner must establish eligibility at the time of 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).

Counsel's implication that as the beneficiary is in charge of both components of the company and negotiated the purchase of

both the businesses on behalf of the company, the beneficiary is automatically an executive of the company is not persuasive. As noted above, examination of the petitioner's description of the beneficiary's job duties reveals the beneficiary to be at most a first-line supervisor of non-professional employees. The purchase of a business on behalf of a company also does not make an individual an executive or manager. The Service looks further to determine the duties and responsibilities of the purchaser, in this case the beneficiary, as those duties and responsibilities relate to the petitioner's businesses. In this case, the petitioner has not provided sufficient information 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 descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The description of the duties to be performed by the beneficiary 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 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.

Counsel's statement that the Service had previously approved an L-1A petition for this beneficiary is noted. However, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the Service. 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. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 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).

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.