

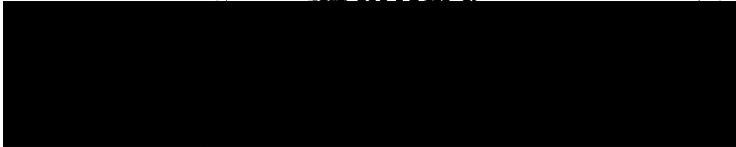


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



File: WAC 01 057 52969

Office: CALIFORNIA SERVICE CENTER

Date:

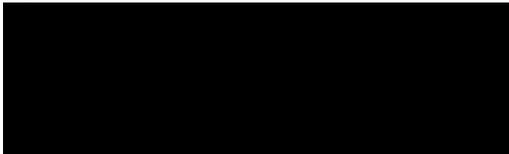
NOV 19 2002

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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Canadian corporation authorized to do business in the state of Arizona as a foreign corporation. It is engaged in the restaurant business. It seeks to employ the beneficiary as a managing chef. Accordingly, the petitioner requests 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 performing the duties of an executive or manager.

On appeal, counsel for the petitioner asserts that Service has applied inconsistent standards as the Service had previously granted the beneficiary L-1A classification and that his position had not materially changed. Counsel also asserts that the beneficiary is managing an essential function of the petitioner

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 performing executive or managerial 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.

The petition described the beneficiary's duties as a managing chef with a salary of \$36,000 per year.

The director requested a more detailed description of the beneficiary's duties in the United States. The director also requested the petitioner's organizational chart describing its

managerial hierarchy and staffing levels.

In response, the petitioner described the beneficiary's duties as follows:

[T]he beneficiary has had discretion to adjust menu offerings, introduce new recipes, direct three Assistant Cooks in all aspects of food preparation, and direct the serving activities of seven waitstaff [sic]. He is answerable only to the owner, Nikolay Otchkov.

The petitioner also provided an organizational chart depicting the owner of the restaurant, the beneficiary as managing chef, three assistant cooks, seven waiters, and three dishwashers.

The director determined that the beneficiary was working as a first-line supervisor of non-professional employees. The director concluded 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 inconsistently applied the standards of managerial capacity because the beneficiary had previously been approved for an L-1A classification. Counsel also asserts that the beneficiary manages the kitchen and identifies this as an essential function of the restaurant. Counsel also clarifies that the petitioner has offered the beneficiary a "managerial" position not an executive position. Counsel submits a statement from an unrelated food service employee that states that the beneficiary "does all the purchasing for this restaurant and is responsible for controlling costs as well recruiting, developing and evaluating a staff of more than 17." Counsel also submits a bill of sale showing that the petitioner had purchased an additional restaurant. Counsel asserts that the beneficiary's responsibilities have increased because the owner spends more time at the second restaurant and has entrusted the running of the kitchen of the first restaurant to the beneficiary.

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 case at hand, the petitioner's description of the beneficiary's job duties specifically describes an individual performing basic services for the restaurant. 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 statement submitted on appeal and signed by the outside foodservice employee confirms that the beneficiary is performing the basic operations of purchasing, controlling costs, and supervising the staff. As noted by the director, the beneficiary's supervision of assistant

cooks and wait staff is the duty of a first-line supervisor of non-professional employees.

Counsel's assertion that the beneficiary's management of the kitchen of the restaurant is an essential function of the restaurant 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). Contrary to counsel's claim that the beneficiary is performing an essential function for the petitioner, the evidence indicates that the beneficiary is serving the kitchen function of the restaurant by adjusting the menu, developing new recipes, and purchasing products.

Counsel's assertion that the responsibilities of the beneficiary have increased is not supported by the record. 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). The record remains deficient in a comprehensive description of the beneficiary's daily duties.

Counsel's reliance on a previously approved petition for the beneficiary's L-1A status is injudicious. 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). Further, if the previous L-1A petition was based on the same unsupported evidence that is contained in this petition, the approval would constitute clear and gross error on the part of the Service.

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial capacity or that the beneficiary's duties in the proposed position will be primarily managerial in nature. The descriptions of the beneficiary's job duties are general in nature. 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 for the United States enterprise.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish that the beneficiary's duties for the foreign enterprise were managerial or executive in nature. 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.