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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: WAC 00 098 53472 Office: CALIFORNIA SERVICE CENTER Date: SEP - 3 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:
[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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 restaurant and catering business that was organized in the state of California in July of 1998. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, it seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C). The director determined that the petitioner had not established that the beneficiary had primarily worked in a managerial or executive capacity for the foreign company and would not be primarily acting in an executive or managerial capacity for the United States company.

On appeal, counsel for the petitioner asserts that the number of staff is not a proper basis for denial where the beneficiary is clearly identified as the top manager of the organization. Counsel states that the current matter is similar to two unpublished decisions rendered by the Administrative Appeals Office. Counsel concludes that the evidence submitted is more than sufficient to establish eligibility for the benefit sought.

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 petitioner has established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity and will be employed in a primarily managerial or executive capacity for the United States company.

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-

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.

In the initial submission, the petitioner failed to provide a description of the beneficiary's job duties for either the foreign company or the United States company. The petitioner, through its chief financial officer, simply referenced its previous L-1 nonimmigrant petitions that had been filed on behalf of the beneficiary. The I-140 petition filed February 16, 2000 stated that the beneficiary's job title would be president and chief executive officer and that the beneficiary would be employed at a salary of \$3,584.00 per month.

The petitioner also provided the State of California Form DE6, Quarterly Wage Report, for the quarters ending March, June, and September of 1999. The Forms DE6 show five employees in January and February of 1999, three employees in March of 1999, three employees in April of 1999, six employees in May and June of 1999, nine employees in July and August of 1999, and eight employees in September of 1999.

After reviewing the petition, the director requested a more detailed description of the beneficiary's duties both abroad and in the United States and a description of the staffing levels of each company.

In response, the petitioner stated that the beneficiary had managed the formation of the foreign company during the period of April and June of 1996. The petitioner further stated that the beneficiary served as the general manager for the foreign company for one year. The petitioner stated that the beneficiary was responsible for the following as the general manager:

[H]e was responsible for the direction and overall operation of the company. He directed and supervised other supervisory and managerial employees, and he also had the authority to hire and fire employees. He was the senior manager of the company, and he exercised full discretion over the day-to-day business operations.

The petitioner also provided the following description of the beneficiary's duties for the United States company:

He is Chief Executive Officer, and all of the personnel report to him including waiters, barmen and various casual labor.

The petitioner also provided the current organizational chart of the beneficiary's foreign employer and an organizational chart of the United States company in response to the request for evidence. The organizational chart for the foreign entity did not reflect the beneficiary's previous position for the foreign company. The organizational chart for the United States petitioner depicted the following positions: the beneficiary as chief executive officer, a chief financial officer, a chairman, a catering representative, head chef, assistant chef, grill chef, two cashiers, a function coordinator, and "various casual labor."

The petitioner also provided its California Form DE6 for the quarter ending September of 2000 depicting five employees in July of 2000 and six employees in August and September of 2000. The petitioner further provided its Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Returns for its tax year beginning July 1998 and ending June 30, 1999 (1998 tax return) and beginning July 1999 and ending June 30, 2000 (1999 tax return). The IRS Form 1120-A for 1998 reflected gross receipts in the amount of \$239,390, no compensation paid to officers, and salaries paid in the amount of \$39,925. The IRS Form 1120-A for 1999 reflected gross receipts in the amount of \$292,741, no compensation paid to officers, and salaries paid in the amount of \$82,237.

The petitioner also submitted its internal employee's earnings summary for the calendar year 2000. The summary reflected payment of \$40,153.72 to the beneficiary and a total payment of \$37,388.51 divided amongst eighteen different employees. Sixteen of the eighteen employees earned less than \$5,000 for the year and eleven of the eighteen employees earned less than \$1,000.

The director determined that the petitioner had not established that the beneficiary had been employed for the foreign entity in a managerial or executive capacity for one year prior to entering the United States as a nonimmigrant. The director also determined that the petitioner had not established that the beneficiary would be employed in an executive or managerial capacity for the United States company.

On appeal, counsel asserts that this case is similar to two unpublished decisions issued by the Administrative Appeals Office. Counsel also submits a letter from the petitioner that attempts to expand on the beneficiary's duties for both the foreign entity and United States entity. Counsel asserts the evidence is sufficient to establish the beneficiary worked for the foreign company and is working for the United States company in a managerial or executive capacity.

Counsel's citation to unpublished decisions is not persuasive. First, counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

The letter submitted on appeal is signed by the chief financial officer of the petitioner and states that the beneficiary was the general manager for the foreign entity. The letter states that his responsibilities included:

He supervised and directed all of the company's operations. . . . He operated at a senior level, and he directed the overall operation of the whole company, including overall supervision of such matters as estimating production, ordering supplies, hiring, firing and promotion of employees, advertising, contracting and general public relations. He directed and supervised all managerial and supervisory personnel, and he had the final authority on the firing and hiring of personnel. He had full discretion in the management of the company on a day to day basis. His responsibilities included negotiating and signing contracts and leases and establishing the long and short term goals for the total company. In this regard, he had virtually unfettered discretion and received only general supervision from the board of [sic] Board of Directors.

The letter submitted by the petitioner on appeal also included a further description of the beneficiary's duties for the United States company as follows:

He has complete discretion to formulate policies, establish long-term goals and set financial policies, and he receives only "general" supervision from the Share owners. At his discretion, he must estimate business income and negotiate and enter into contracts with suppliers, supervise the hiring, firing and promotion of all personnel, and make financial decisions so that the company will have sufficient operating capital to negotiate the next round of contracts with suppliers. He also sets, at his complete discretion, advertising and sales campaigns, and he has general responsibility for public relations goals.

The petitioner states that "since [the beneficiary] virtually runs, and is responsible for the total operation of our company, I do not see how the Acting Director could conclude that he was not acting at the 'executive' level."

It is noted that the petitioner indicates only on appeal that the beneficiary is claiming to be an executive under section 101(a)(44)(B) of the Act. Although the petitioner claims that the beneficiary is primarily employed in an executive position, the petitioner's description of the duties paraphrases the statutory definition of "managerial capacity" under section 101(a)(44)(A) of the Act. The petitioner cannot rely on partial sections of the

two statutory definitions or an "executive" label in order to be identified as a hybrid "executive/manager." In order to be classified as both a manager and an executive the petitioner must demonstrate that the beneficiary meets all the elements of each definition.

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 did not provide a description of the beneficiary's duties for either the foreign company or the proposed duties for the United States company. Counsel and petitioner's reference to previously submitted documentation for a different petition is not sufficient. The petitioner must provide sufficient evidence to establish eligibility for each petition filed. The director properly requested a more definitive statement regarding the beneficiary's job duties for both the foreign entity and the petitioner.

In response to the director's request for more information, the petitioner stated that the beneficiary was a general manager for the foreign entity for one year prior to coming to the United States as a nonimmigrant. The petitioner further stated that the beneficiary "was responsible for the direction and overall operation of the company," and the "direct[ion] and supervis[ion] of] other supervisory and managerial employees," "had the authority to hire and fire employees," and "was the senior manager of the company, and he exercised full discretion over the day-to-day business operations." This statement merely paraphrases the statutory definition of "managerial capacity" without clearly describing the actual duties of the beneficiary with respect to the daily operations. See section 101(a)(44)(A) of the Act. Furthermore, contrary to the director's request, the petitioner did not establish the number of employees previously under the beneficiary's direction, their job duties, educational levels, and annual salaries. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. 103.2(b)(14). 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).

Likewise, the petitioner's description of the beneficiary's proposed duties for the United States company contained no detail and simply stated that the beneficiary "is Chief Executive Officer, and all of the personnel report to him including waiters, barmen and various casual labor." The petitioner did provide evidence that it employed personnel other than the beneficiary. However, the evidence does not support the conclusion that any of these individuals held managerial, supervisory, or professional positions. Instead, the petitioner reported that the "waiters, barmen and various casual labor" all reported to the beneficiary. Based on this description of the beneficiary's duties, the

beneficiary at most appears to be a first-line supervisor of non-professional employees. 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) of the Act.

On appeal, the petitioner attempts to expand the previously submitted descriptions of the beneficiary's job duties for the foreign company and the United States company. However, where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

Furthermore, even if the expanded job descriptions were considered on appeal, the job descriptions provided for both the foreign entity and the United States company are indicative of an individual performing the basic non-managerial tasks of the company such as "guest relations," negotiating with suppliers, ordering food and supplies, maintaining inventory, and arranging advertising. 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).

It is further noted that the evidence submitted on appeal and the expanded position description contradicts the previously submitted description of the beneficiary's job duties. Although the petitioner previously stated that the waiters, barmen, and various casual labor reported directly to the beneficiary, the petitioner now claims on appeal that these employees report to an "assistant manager" and a "catering coordinator," two lines of authority that were not revealed on the previously submitted organizational chart. The petitioner did not indicate that it employed an assistant manager until after the petition was denied. In addition, it is noted that the petitioner originally claimed to employ seven employees. After the director requested additional information, the petitioner submitted an organizational chart that represented the company as employing ten persons and additional "casual labor." On appeal, the petitioner now submits an organizational chart that represents the restaurant as employing more than 18 persons. All of these claims are contradicted by the petitioner's state and federal wage reports and tax returns which indicate that the petitioner has employed as few as three and at most nine employees at any given time. 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, 591-92 (BIA 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity or that the beneficiary's duties in the proposed position for the United States company 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 capacity. Further, the record does not sufficiently demonstrate that the beneficiary has managed or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. Although the beneficiary may be functioning in the highest position of authority within the organization, the record indicates that the beneficiary is primarily acting as a first-line supervisor of non-professional staff and performing the day-to-day tasks necessary to operate the restaurant. Such a position is directly contrary to the statutory definitions of managerial and executive capacity at section 101(a)(44) of the Act. 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 primarily employed in either a managerial or executive capacity.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The statute states that "[a]n individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed." Section 101(a)(44)(C) of the Act.

At the time of filing, the petitioner was a two-year-old restaurant and catering business that claimed to have a gross annual income of \$239,000. The firm employed the beneficiary as president, an unpaid Chief Financial Officer, an unpaid Chairman, a catering representative, a function coordinator, three chefs, two cashiers, and various waiters, barmen, and other casual labor. Although the subordinate employees appear to perform the menial functions of the petitioning enterprise, the petitioner has submitted conflicting information regarding the actual duties of the beneficiary. In light of the lack of information and the lack of consistency in the assertions of the petitioner regarding the beneficiary's day-to-day duties, it is not possible to determine the reasonable needs of the company at the time the petition was

filed. As noted, the Service may not make a determination of eligibility based simply on the number of employees supervised, especially when they are not professional employees. Regardless, the reasonable needs of the petitioner at the time of filing this petition appear to have been the beneficiary and a small number of "waiters, barmen and various casual labor." The petitioner must establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to section 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, it is noted that the petitioner has continuously pointed to the beneficiary's previously approved nonimmigrant petitions as evidence of the beneficiary's current eligibility. The director's decision does not indicate whether he reviewed the prior approvals of the other 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 and contradictory assertions that are contained in the current record, the approvals would constitute clear and gross error on the part of the Service. The Service is not required to approve a petition 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 Enng. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988). The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. March 15, 2000).

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.