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**U.S. Citizenship
and Immigration
Services**

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FEB 15 2005



FILE: WAC 03 035 52891 Office: CALIFORNIA 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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in June 1999, which is trading as Red Hawk Steakhouse Restaurant. It claims to be the affiliate of [REDACTED], S.A., a Mexican corporation. It seeks to employ the beneficiary as its president and managing director. 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 (1) the beneficiary would be employed in a managerial or executive capacity for the United States entity; and (2) that it was the affiliate of the Mexican corporation.

On appeal, the petitioner submits a letter in response to the director's decision.

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 language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary's assignment for the petitioner will be primarily managerial or executive.

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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that it had ten employees. In an organizational chart appended to the petition, the petitioner identified the employees as managing director (the beneficiary's position), a manager, a bartender, two cooks, three wait staff, one maintenance worker, and one busboy. In a letter dated October 18, 2002, the petitioner stated that the beneficiary had been employed by the U.S. entity as an L-1A nonimmigrant intracompany transferee since September 1999, and stated that his duties as president/managing director included:

As President and Managing Director of [the petitioner], [the beneficiary] will be responsible for managing the company's U.S. restaurant business operations including the Red Hawk restaurant, undertaking all steps required to achieve smooth, effective and profitable business operations, and exercising overall authority for all business operations of [the petitioner]. In this capacity, he will also continue to be responsible for managing, directing, and developing our U.S. restaurant business.

Specifically, [the beneficiary's] duties as President and Managing Director will continue to include:

1. Exercising executive authority within the company with regard to strategic planning and implementation of corporate policies and procedures and exercising broad discretion in determining the direction of future business development;
2. Developing policies to coordinate the company's restaurant business operations in the U.S., including sales, marketing and distribution, and financial operations with [the foreign entity] in Mexico;
3. Exercising wide latitude in discretionary decision-making authority over day-to-day operations, including short- and long-term management decisions, and related accounting and finance management functions;
4. Directly supervising the activities of staff, including nine current employees, and exercising authority to make personnel decisions, such as hiring, promotion, leave-of-absence authorization, and termination;
5. Serving as an executive representative of [the petitioner] to negotiate contractual and general agreements;
6. Functioning at an executive and upper management level within the company with regard to leadership, decision-making and coordination of our restaurant business operations in the United States;
7. Communicating customer needs and requirements to product development engineers, and coordinating "shared cost" product development;
8. Planning, directing, and controlling operations, policy, administration and personnel management of [the petitioner's] restaurant operations in the U.S.; and
9. Developing specific policies and directing the study of expansion and diversification plans.

The petitioner also noted that the beneficiary, who began working for the foreign entity in 1990, had been performing similar tasks there since his promotion to Personnel Manager in 1997.

On April 7, 2003, the director requested additional evidence including: (1) a concise organizational chart for the U.S. entity listing all employees by name and title, a brief description of each employee's duties, the educational background of each employee, and evidence of wages paid to employees; (2) a more detailed description of the beneficiary's duties; and (3) copies of the petitioner's recent DE-6 forms, or quarterly wage reports, evidencing the wages paid to its employees.

In a June 26, 2003 response, the petitioner provided an updated organizational chart accompanied by a description of the positions filled by the petitioner's employees, quarterly wage reports for the last quarter of 2002 and the first quarter of 2003, and a revised description of the beneficiary's duties, alleging that he was a function manager and not a first line supervisor.

The director determined that the statement of duties for the beneficiary did not establish that his duties would be primarily managerial or executive in nature. Nor did the petitioner establish that the beneficiary would be supervising professional, managerial, or supervisory employees. Finally, the director determined that the beneficiary could not be deemed a function manager. The director concluded that the petitioner had not established that the beneficiary was eligible for the I-140 managerial/executive visa classification.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are solely managerial and/or executive duties, and resubmits the organizational chart and position description for the beneficiary's co-workers that were previously provided in response to the request for evidence. The petitioner also submits a new description of the beneficiary's duties, presented in a chart-like format that equates each stated duty with an element of the definition of managerial capacity. Finally, the petitioner references the beneficiary's past approvals as an L-1A intracompany transferee and submits past approval notices.

The petitioner's documents and counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager.

The petitioner has provided, in part, a vague and nonspecific description of the beneficiary's duties. For example, the petitioner states that the beneficiary will perform duties such as: "[d]irecting others in performing daily tasks involved in running the restaurant," and "exercising wide latitude in discretionary decision-making authority over day-to-day operations," and "[p]lanning, directing and controlling operations, policy, administration, and personnel management of [the petitioner]." These statements do not clarify the beneficiary's daily duties. Moreover, such broad statements can encompass a wide range of duties that are not necessarily managerial or executive duties.

In addition, the petitioner indicates that the beneficiary is: "exercis[ing] direction over the day-to-day operations of the function of restaurant business management operations," and "manag[es] the restaurant

business management component of the organization." The petitioner does not, however, further define the function or component. The petitioner also does not clarify who carries out or implements the petitioner's policies, procedures, strategies, and objectives, if not for the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the beneficiary's duties specifically include the supervision of all subordinate staff members. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. In the instant case, the petitioner has not established that an advanced degree is actually necessary, for example, to wait on customers as required by the bartender and wait staff, who are among the beneficiary's subordinates. Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See *e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this case, the record indicates that the majority of the petitioner's staff is based in the service industry, and provides customer service to guests in the form of preparing food, waiting on and clearing tables, preparing drinks, and providing maintenance assistance. As noted by the director and confirmed by a review of the petitioner's wage reports, many of these employees are part-time employees. The director concluded, therefore, that the beneficiary's position as a full time manager, in conjunction with the other employee who was given the title of manager, could not be primarily devoted to managerial or executive tasks. In the initial petition, the petitioner stated that one of the beneficiary's main duties was to supervise the staff. In response to the request for evidence, it stated that the beneficiary instead would manage the function of the restaurant business. There was no claim that the "manager" would supervise staff, nor was there any discussion as to

who would handle administrative functions such as accounting and payroll services. Assuming that the restaurant was open seven days per week, as is customary in the business, there is insufficient evidence to support a finding that the beneficiary does not engage in any low level tasks essential to the business operations of 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 petitioner's claims that his duties are primarily managerial or executive are insufficient. As there is no concrete evidence to suggest otherwise, it cannot be concluded that the beneficiary will function primarily as a manager or executive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. The petitioner has not established that the beneficiary's duties will be primarily managerial or executive. For this reason, this petition may not be approved.

Alternatively, the petitioner alleged that the beneficiary qualified as a function manager in response to the director's request for evidence. In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding items such as: plan, organize, direct, and control the function of the restaurant business management/operations as well as business development. The petitioner also provided contrary to its statements in the initial petition that the beneficiary was not a first line supervisor but it fact was a function manager because he had managerial control and authority over a function or component of the company. In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job description has the beneficiary managing more of the actual work done in the petitioner's operation.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Consequently, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity as compelled by the regulations. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In this case, the director determined that the U.S. and foreign entities were not affiliates. Specifically, the director determined that based on the ownership interests set forth in the foreign entity's Articles of Incorporation, dated March 21, 1981, there was insufficient evidence to establish that the two entities were owned and controlled by the same parent or individual, or that they were owned and controlled by the same individuals with each individual owning approximately the same share or proportion of each entity.

The foreign entity's Articles of Incorporation, upon which the director relied in his decision, indicated that the company was owned as follows:

Name	Shares
[REDACTED]	300
[REDACTED]	147
[REDACTED]	1
[REDACTED]	1
[REDACTED]	1

In addition, the U.S. entity's documentation indicated that [REDACTED] and [REDACTED] were the sole owners of the entity, with each owning a 50% interest.

On appeal, counsel for the petitioner states that the director erroneously relied on percentage of ownership for another of the petitioner's affiliated foreign companies, namely, [REDACTED] S.A., in rendering the decision. Counsel contends that the above breakdown for the "foreign entity" is therefore erroneous in this case, and that the true ownership of the foreign entity in this matter is shared by [REDACTED] (53.5%) and [REDACTED] (46.5%).

Upon review, the AAO notes further discrepancies in this matter. First, the Articles of Incorporation for the claimed foreign entity, [REDACTED], were in fact submitted and relied upon by the director as stated above. A careful review of this document indicates that they pertain to the claimed foreign entity, and not La [REDACTED] S.A., as claimed by counsel. Therefore, it is clear that the initial ownership of the foreign

entity was shared between the five persons listed above. However, upon review of the record, the AAO notes that the director overlooked a subsequent document which corroborates the claims of the petitioner in this matter. A summary translation of a General Shareholders Meeting of [REDACTED] dated March 1, 1999 and pertaining to a meeting that took place on April 29, 1996, indicates that a change in the foreign entity's ownership took place on this date. According to the translation, a new distribution of the company's capital stock was designated as follows:

[REDACTED]	240 Shares
[REDACTED]	210 Shares

Counsel alleges that this is the proper breakdown of ownership of the foreign entity, and that as a result of these percentages, the two entities should be deemed affiliates by definition.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this instance, there are several deficiencies in the evidence presented. First, the only evidence submitted that supports the foreign entity's current ownership is a summary translation of a general shareholders meeting. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, and corporate bylaws must also be examined in addition to the minutes of relevant annual shareholder meetings to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

On review, the petitioner has not provided credible evidence to establish that it has a qualifying relationship with a foreign entity. For this additional reason the petition cannot be approved.

Finally, the petitioner's reference to the past approvals of the beneficiary's status as an L-1A intracompany transferee is not relevant to this proceeding. It must be noted that many I-140 immigrant petitions are denied after Citizenship and Immigration Services (CIS) approves prior nonimmigrant I-129 L-1 petitions. *See e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa

classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. at 593. It would be absurd to suggest that CIS 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). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.