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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



APR 25 2003

File: EAC-01-098-53719 Office: Vermont Service Center Date:

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, a restaurant, seeks authorization to employ the beneficiary temporarily in the United States as general manager of its new office. The director determined that the petitioner had not established that the beneficiary had been employed abroad or would be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner argues that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Regulations at 8 C.F.R. § 214.2 (1)(3)(v) state that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- A) Sufficient physical premises to house the new office have been secured;
- B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The U.S. petitioner states that it was established in 2000 and that it is an affiliate of [REDACTED] located in Pusan, Korea. The petitioner fails to claim any employees, but indicates an estimated gross annual income of approximately \$14 million. It seeks authorization to employ the beneficiary for three years at an annual salary of \$40,000.

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

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

"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:

"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 describes the beneficiary's duties with the foreign entity as follows:

Duties for past three years planning and establishment, property acquisitions and factory constructions, loan acquisition and financing, construction administration of factories and facilities, general accounting, personnel governance, export administration, sourcing management, collection, and annual financial and business planning. She is in charge of [a] total of one manager who in turn oversees the work of three professionals and clerical workers.

She [the beneficiary] left [named company] to join our affiliate company, [redacted] in April 1993. She has been working at our affiliate company as its Director of Business Administration Division [sic] since then.

The petitioner describes the beneficiary's proposed duties with the U.S. entity as follows:

[redacted] in the US. In this position, she will be responsible for the following duties: [1] managing our company; [2] setting sales goals and sale

policies for the company; [3] overseeing supervisors who will in turn manage a staff of cooks, waiters and cleaning crew; [4] perform marketing and feasibility studies new business ventures by hiring outside consultants on behalf of our foreign affiliate company; [5] recruiting, hiring and firing employees; [6] exercising wide discretion over the day-to-day operation and setting general operation policies for the company; and [7] represent our company in dealings with the our [sic] head franchise company, [REDACTED] Mongolian Festival, Inc.

In a letter dated March 6, 2001, the Immigration and Naturalization Service, now the Bureau, requested that the petitioner respond, in pertinent part, to the following:

Submit additional evidence to establish that the beneficiary has been employed abroad, by a qualifying organization, in a(n) Managerial capacity for one continuous year of full-time employment within the three years prior to February 7, 2001, the filing date of the petition.

Submit additional evidence showing the management structure and personnel structure of your entity outside the United States, including the number of employees and the duties performed by each employee.

Submit a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis.

In response to the request for additional information, the petitioner stated, in pertinent part, that:

Submission of additional evidence to establish that the beneficiary has been employed by our foreign affiliate company for one continuous year of full-time employment within the three years prior to the filing date of the petition.

Please note in our letter of December 26, 2000, we have clearly indicated that [named individual], the beneficiary worked at our foreign affiliate company... She left [named company] to join our affiliate company, [REDACTED] in April 1993. She has been working at our affiliate company as the Director of Business Administration Division [sic] since then. As the Director Business Administration Division [sic], she was and is in charge of the following responsibilities: corporate planning and establishment, property

acquisitions and factory constructions, loan acquisition and financing, construction administration of factories and facilities, general accounting, personnel governance, export administration, sourcing management, collection, and annual financial and business planning. She is in charge of a total of one managers [sic] who in turn oversees the work of three professionals and clerical workers.

Submission of number of hours devoted to each of [named individual's] proposed job duties on a weekly basis.

Please note that [named individual] will assume the position of General Manager of Great Khan NY, Inc. once she is transferred to our company from our Korean affiliate company. It should be noted that this is the highest position in the company.

In this position, she will be responsible for the following duties in the following manner: [1] managing our company in that she is expected to solve business problems in a systematic, well organized and methodical manner, and overseeing [sic] development of the business both qualitatively and qualitatively [sic]. She is expected to devote approximately 15% of her 40 plus hours of week [sic] on this. [2] setting sales goals and sale policies for the company. She is expected to devote approximately 10% of her 40 plus hours per week on this task. [3] overseeing supervisors who will in turn manage a staff of cooks, waiters and cleaning crew. She is expected to devote approximately 30% of her 40 plus hours of week on this task. [4] perform marketing and feasibility studies [for] new business ventures by hiring outside consultants on behalf of our foreign affiliate company. She is expected to devote approximately 5% of her 40 plus hours of week on this task. [5] recruiting, hiring, firing employees. She is expected to devote approximately 5% of her 40 plus hours of week on this task [ONCE ALL OF THE MEMBERS OF EMPLOYEES ARE SET UP [sic]] [6] exercising wide discretion over day-to-day operation and setting general operation policies for the company. She is expected to devote approximately 30% of her 40 plus hours of week on this task. [7] represent our company in dealings with our head franchise company, Great Khan's Mongolian Festival, Inc. She is expected to devote approximately 5% of her 40 plus hours of week on this task.

The petitioner submitted an organizational chart for the foreign entity indicating that the beneficiary reported to the president and that the beneficiary had an administrative manager reporting to

her position. The chart further indicated that a contracting specialist, a sourcing specialist and a bookkeeper reported to the administrative manager.

The petitioner also submitted an organizational chart for the United States entity indicating that the beneficiary, as general manager, reported to the president of [REDACTED]. The chart reflected that a restaurant manager reported to the beneficiary and that the restaurant manager supervised chef, cook, cashier, and kitchen help positions.

On appeal, counsel asserts that the director's decision is capricious and arbitrary in denying that the beneficiary is a qualifying manager. Counsel further states that the Bureau failed to take into consideration that the beneficiary's position is the highest position in the United States company since the position of president is "inactive." The petitioner also takes issue with the director's findings that, since the work performed by the beneficiary for the foreign entity is not related to the proposed duties for the United States entity, the beneficiary is ineligible for the benefits sought.

The petitioner states, in pertinent part, that:

The skills and experience attributed to the beneficiary does not have to be related to the retail food category in light of the fact that she is assuming the position of **General Manager** and not the position of restaurant manager. It is common in many industries to hire [sic] the high managerial positions with people with good managerial skills and leadership qualities rather than a specific knowhow in a particular business.

Regulations at 8 C.F.R. § 214.2(1)(3)(iv) does state, in pertinent part, that: "the work in the United States need not be the same work which the alien performed abroad." However, the beneficiary must have been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity. The petitioner has not established that the beneficiary managed a subordinate staff of professional, managerial, or supervisory personnel who relieved her from performing nonqualifying duties in her position abroad.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although the petitioner's descriptions are lengthy, there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. The duties described repeatedly for the foreign entity and the proposed duties for the United States entity are without any context in which to reach a determination as to whether they would be qualifying. Duties such as solving

business problems, setting sales goals and sale policies, representing company in dealings with a franchise company, performing marketing and feasibility studies, hiring outside consultants and overseeing the development of the business have not been demonstrated to be managerial or executive in nature.

Further, the beneficiary's proposed position is unclear. The petitioner initially claimed that the beneficiary would be employed as a general manager reporting to the president. In response to a request for additional information, the petitioner claimed that the beneficiary would be employed as general manager and that the position of president would be "inactive", making the position of general manager the highest position in the company. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on 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 (Comm. 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner's description of the stock distribution of the U. S. and foreign companies does not meet exactly the definition of a qualifying affiliate relationship. 8 C.F.R. § 214.2(l)(1)(ii)(G). As the appeal will be dismissed on the grounds discussed, this issue need not be 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.