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U.S. Department of Homeland Security

Citizenship and Immigration Services

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Washington, DC 20536

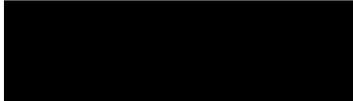


File: WAC 02 114 50738

Office: CALIFORNIA SERVICE CENTER

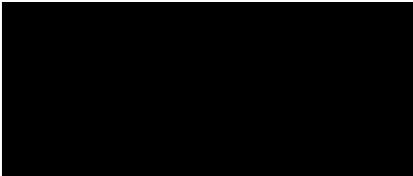
Date: MAR 05 2004

ON 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:



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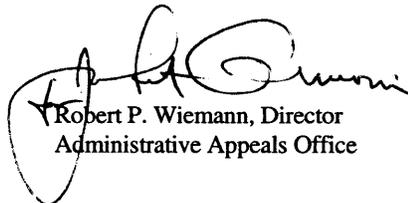
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is in the restaurant and restaurant supplies business. It seeks to continue to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the beneficiary has consistently been approved for L-1A status as an intracompany transferee in an executive capacity since August 1998. Counsel further states that the position, duties and circumstances concerning this case have remained consistent throughout his employment yet the director has now decided to deny the extension request based on an erroneous claim that the beneficiary is not in an executive capacity.

Counsel argues that the director's denial is impermissibly vague, and a violation of CIS regulations, that there is little factual reference in the director's denial, and no analysis of the few facts that were raised was provided. Counsel states that a determination of whether a business is sufficiently complex to support a managerial or executive position cannot be predicated on the number of individuals the company employs and certainly cannot serve as the basis for denial. Counsel asserts that the California Corporations Code requires that a corporation nominate a chief executive officer in the form of a chairman of the board or a president as determined by its articles of incorporation. Counsel states that the petitioner has elected a president (the beneficiary) to serve as the chief executive officer and that to deny the petitioner the opportunity to have a president would violate California law and would effectively place State law in the hands of a federal agency. Counsel also cites three unpublished decisions in support of the appeal.

Counsel's argument that to deny this petition would also deny the petitioner the opportunity to have a president and/or CEO for the United States entity for California state law purposes is without merit. The petitioner would retain the ability to name another responsible person or persons other than the beneficiary in the roles of president and/or CEO in the future and thereby satisfy the requirements of the State of California.

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.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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;

organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner's descriptions of the beneficiary's projected job duties are fully described in the director's decision dated July 8, 2002 and will not be repeated here. No further evidence concerning the beneficiary's job duties was provided on appeal.

The petitioning entity was incorporated on January 27, 1998. On February 12, 2002, the date the visa petition was filed, the petitioning corporation had a staff of employees listed by the director in his order. At the time of filing, the petitioning entity consisted of one restaurant in San Diego, California, with a staff of thirteen employees including the beneficiary as president, a general manager, an accounting manager, a facility and inventory manager, a supervising chef, a kitchen supervisor, a two-person wait staff, three cooks, and two kitchen staff employees.

The director determined that the second job description submitted by the petitioner contained contradictory claims that had not been reconciled. The director stated that for example, the petitioner claimed that the beneficiary manages a staff of financial, human resource, and administrative directors and managers; directs regular meetings of franchise owners to evaluate business progress and review stated corporate goals; and create budgets and manages executives to ensure that expenditures remain within stated limits.

The director noted that there is no record of a staff of financial or human resource employees. Nor does the petitioner employ an administrative director or other executives. The director also noted that the petitioner had indicated that the long-term goal is to franchise the U.S. entity's name throughout California but that there is no record of franchise owners in the record. The director found that none of these claims have been resolved. On appeal, the petitioner has failed to address these legitimate concerns of the director. Therefore, the petition may not be approved.

Furthermore, the record does not clearly show that the petitioner had sufficient staff to relieve the beneficiary from performing non-qualifying duties. Without more compelling evidence, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization, and that he is not directly providing the services of the business. 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). Consequently, the petition may not be approved for this additional reason.

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.