

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

87



FILE: EAC 08 070 51203 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

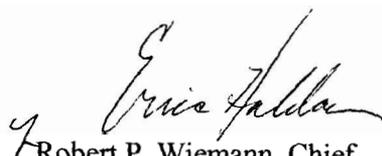
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend its employment of the beneficiary as its store manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Texas corporation that owns and operates a restaurant. The petitioner seeks to continue to employ the beneficiary as its store manager from January 12, 2008 until February 23, 2010.

The director denied the petition based on the conclusion that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The AAO notes that the director's consideration of the beneficiary's salary was inappropriate in so much as the director relied, at least in part, on this factor in determining that the beneficiary does not occupy a bona fide managerial or executive position. As such, the director's observation with regard to an irrelevant factor is hereby withdrawn. Nevertheless, the record supports the director's ultimate conclusion with regard to the petitioner's eligibility for the immigration benefit sought. The director's decision will therefore be affirmed. A full discussion of the underlying basis for the AAO's conclusion is provided below.

On appeal, counsel disputes the director's conclusion, arguing that the petitioner has two previously approved Form I-129s filed on behalf of the instant beneficiary, which are based on facts similar to those in the instant matter. A brief and supporting evidence are also provided.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 primary issue in this proceeding is whether the United States petitioner will employ the beneficiary in a primarily managerial or executive capacity under an approved petition.

In support of the Form I-129, the petitioner provided a letter dated January 8, 2007 from its president, [REDACTED], who provided the following list of the duties and responsibilities the beneficiary would be expected to carry out in his proposed position with the U.S. entity:

- The [b]eneficiary will bear responsibility to [sic] oversee all aspects of operations in the restaurant, including sales, costs, hiring and terminating, ordering, inventory and marketing.
- He will exercise discretion over the day-to-day routines and operations of the restaurant to keep it running smoothly.
- He will attend the monthly co-op meeting, [sic] with the authority to vote.
- The [b]eneficiary will also be responsible to [sic] implement Pizza Inn [c]orporate's concept or products, and through management of his lower level employees maintain food quality. [He] is also responsible to [sic] meet financial and operational goals set by the company.
- He will bear responsibility to [sic] supervise and control, assign and schedule duties, motivate and develop each employee to maintain a friendly and efficient restaurant, with authority to hire and fire personnel.
- [T]he [beneficiary's proposed] position . . . is within a multi-tier reporting structure.
- The [c]hief [c]ook reports directly to the [beneficiary], and the four (4) cooks report directly to the [c]hief [c]ook.
- In addition, the [h]ead [d]river reports to the [beneficiary], and the four (4) [d]rivers report to the [h]ead [d]river.
- In addition, two (2) receptionists report to the [h]ead [r]eceptionist who in turn reports to the [beneficiary].
- The [beneficiary] bears supervisory control over the [c]hief [c]ook, the [h]ead [d]river, and the [h]ead [r]eceptionist, as well as all personnel beneath those mid-manager positions.
- The [b]eneficiary will maintain and continuously improve the company's high standard of cleanliness and manage through employees below him [for] preventative maintenance of the restaurant.

He will review individual performance[s] at least every three months and recommends [sic] salary adjustments in wages as deserved, as well as bear responsibility for purchase of food, beverages, and supplies as needed and will supervise food preparation to ensure the quality

and standards of restaurant products.

- The [b]eneficiary will utilize all management tools to keep neat, accurate and current records providing the historical data to effectively plan for increased sales and profit.
- He will supervise the [a]ssistant [s]tore [m]anager in the maintenance of proper accounting and cash handling procedures, proper record retention, and sales reporting to be followed as required by the franchise agreement.
- He will identify opportunities to improve quality in the store.

The petitioner also provided an organizational chart, depicting the beneficiary's position as third from the top within the company's hierarchy, subordinate directly to the company's vice-president. The chart indicates that the beneficiary's direct subordinate is an assistant manager, whose direct subordinates include the head cook, the head driver, and the head receptionist. Thus, according to the hierarchy depicted in the organizational chart, the beneficiary is purportedly relieved from having to oversee the restaurant employees by virtue of having an assistant manager who is depicted as the individual with this oversight responsibility.

On March 3, 2008, Citizenship and Immigration Services (CIS) issued a request for additional evidence, (RFE) instructing the petitioner to indicate how the beneficiary's duties in the United States have been and would be within a qualifying managerial or executive capacity. The petitioner was asked to provide job descriptions for its employees accompanied by hourly breakdowns of their assigned duties. The petitioner also requested that the petitioner provide its quarterly tax returns for all four quarters of 2007, as well as copies of any IRS Forms W-2 and W-3 the petitioner issued in 2007.

In response, the petitioner provided a letter dated April 15, 2007, which included the following additional description of the beneficiary's proposed employment:

- The [b]eneficiary exercises discretion over the day-to-day routines and operations of the restaurant to keep it running smoothly *primarily* through [the] management of subordinate employees. These are the employees who prepare the food and report to the [h]ead [c]ook, and the employees to take orders and report to the [h]ead [r]eceptionist. It is on these activities that the [b]eneficiary spends the vast majority of his time.

The employment of [h]ead [c]ook, [h]ead [d]river, and [h]ead [r]eceptionist relieve the [b]eneficiary of the need to *directly* supervise the employees immediately below each of them.

- The employment of lower level employees, such as cooks, drivers, and receptionists involve the core tasks that are required to be done to operate the restaurant. Our statements relating to purchase of food, beverages, and supplies as needed, occur resulting from reports others make to the [b]eneficiary, not from his own hands-on primary efforts to determine.

- [The petitioner] has assistance to [sic] the [b]eneficiary as [s]tore [m]anager in the form of an [a]ssistant [s]tore [m]anager, Mr. [REDACTED] who assist[s] the [b]eneficiary in preparing reports, maintaining inventory, executing advertising plans, conducting interviews, ensuring adherence to cash handling procedures, maintaining weekly revenue and expenses and maintaining and updating monthly spreadsheets which he presents to the [s]tore [m]anager, relieving the [b]eneficiary of *directly* performing all of these tasks.
- The [b]eneficiary has direct supervisory management control over the [h]ead [c]ook, the [h]ead [d]river, and [sic] the [h]ead [r]eceptionist, [and] the [a]ssistant [m]anager. He has indirect supervisory control over lower level personnel beneath those mid-manager positions.
- The way that the [b]eneficiary implements Pizza Inn Corporate's concept of products, [sic] is through management of lower level employees to maintain food quality. In this way, the [b]eneficiary uses the personnel within his chain of command to meet food quality requirements making each mid-level manager responsible to the [b]eneficiary for the performance of lower level employees. He cannot and does not do this alone.
- The [h]ead [c]ook reports to the [s]tore [m]anager, and the four (4) cooks reports directly to the [h]ead [c]ook, including an [a]ssistant [c]ook within this structure.
- In addition, the [h]ead [d]river reports to the [s]tore [m]anager, and the four (4) [d]rivers report to the [h]ead [d]river, including an [a]ssistant [d]river.
- In addition, two (2) receptionists report to the [h]ead [r]eceptionist who in turn reports to the [s]tore [m]anager.
- Tasks such as maintaining and continuously improving [the petitioner]'s high standard of cleanliness occur through the chain of command for employees below the [b]eneficiary related to preventative maintenance of the restaurant.
- Tasks such as review of individual performance at least every three months and making salary adjustments in wages as deserved, are *primarily* managerial tasks.
- The [b]eneficiary's supervision of food preparation to ensure the quality and standards of restaurant products is also through the [h]ead [c]ook and the [c]ooks as lower level employees, not directly.
- The [b]eneficiary supervises and controls, assigns and schedules duties. He sets the tone and motivates and develops each employee to maintain a friendly and efficient restaurant, and he has authority to hire and fire employees who work for him.

While non-qualifying tasks such as utilizing all management tools to keep neat, accurate

and current records providing the historical data to effectively plan for increased sales and profit, identifying opportunities to improve store quality, and technically bearing overall responsibility for store operations exist here as in any business, the *primary* activities in which the [b]eneficiary engages involve the direct management of persons through the chain of command in the operation of the store to make the store run smoothly and efficiently.

The petitioner also provided a list of fourteen employees and hourly breakdowns of their respective job duties. While the petitioner provided each employee's corresponding W-2 statement for 2007, it is unclear which employees, if any, were still working for the petitioner's pizza restaurant in January 2008 when the petition was filed.

On May 6, 2008, the director denied the petition discussing the job duties and responsibilities of the petitioner's restaurant employees. The director determined that the petitioner's staff is primarily comprised of non-professional employees whose positions do not require college degrees. The director found that the nature of the subordinates' job duties suggests that the position occupied by the beneficiary is neither managerial nor executive in nature. The director also commented on the beneficiary's job description, finding that the petitioner provided an overly broad job description, which included only general managerial functions but failed to specify exactly which of the beneficiary's job duties can be deemed managerial or executive.

The AAO notes that the director erred in considering the beneficiary's salary as a factor in whether or not he has been and would be employed in a qualifying capacity. The director also made reference to the petitioner's 2006 tax return, which is not relevant in the matter of a petition filed in 2008. Nevertheless, the director properly concluded that in light of the petitioner's organizational hierarchy and the lack of specific managerial duties attributed to the beneficiary, it cannot be concluded that the beneficiary has been and would be employed in a managerial or executive capacity as previously claimed.

On appeal, counsel vehemently opposes the director's decision, citing three grounds as the basis for his arguments.

First, counsel refers to the petitioner's previously approved L-1A petitions for the same beneficiary. However, each nonimmigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. CIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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. 593, 597 (Comm. 1988). 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).

Additionally, 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).

Next, counsel provides a copy of an interoffice memorandum, which sets guidelines for denying petitions that had been previously approved for the same petitioner.¹ Counsel asserts that the director in the present matter failed to comply with pertinent instructions issued in the cited memorandum. However, CIS memoranda merely articulate internal guidelines for service personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

Lastly, counsel asserts that the director confused the duties for which the beneficiary "bears responsibility" with those duties that the beneficiary personally performs. Counsel states that the director ignored the petitioner's "[two-]tier managerial structure" in which the beneficiary directly oversees the work of three managerial employees, who in turn oversee the work of other lower-level employees within the petitioner's organizational hierarchy. Counsel contends that the petitioner has provided sufficiently detailed job descriptions, which clarify the actual job duties the beneficiary will perform.

Upon review, the AAO finds that counsel's assertions are not persuasive.

Despite the petitioner's depiction of a multi-tiered management structure, which purports to establish that the beneficiary is separated from lower-level employs by three managerial employees, the record does not establish that the head cook, the head driver, and the head receptionist are managerial or supervisory employees as claimed. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

In the present matter, while the petitioner stated that the receptionists, drivers, and cooks are under the direct supervision of the head receptionist, head driver, and head cook, respectively, there is no indication that the heads of these respective functions have any control or authority over any employees. Despite the fact that all

¹ *See* Memorandum from William R. Yates, Associate Director for Operations, *Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004).

three "heads" have been charged with responsibilities to schedule and train employees within their respective functions, it appears that control and authority over all staff members, including their performance reviews and salary increases, remains with the beneficiary. There is no indication that any of the heads review the performance of other employees or that they have any authority to hire and fire those within their given functions. Furthermore, while the petitioner has provided an organizational chart indicating that the assistant store manager supervises the head cook, the head driver, and the head receptionist, the beneficiary's job description does not support such a conclusion. In fact, the petitioner has failed to clarify exactly what role the assistant manager would play within the organizational hierarchy if the head of the restaurant's three functions are required to report directly to the beneficiary. In summary, the multi-tier structure that the petitioner has artificially created does not persuade the AAO that the beneficiary has not and would not act as a first-line supervisor of a staff of non-professional employees. Contrary to the common understanding of the word "manager," the statute plainly 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; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

Additionally, as properly noted by the director, the petitioner's descriptions of the beneficiary's proposed position lack sufficient detail to convey a meaningful understanding of what actual tasks the beneficiary would carry out on a daily basis. This information is particularly crucial in the context of the petitioner's business wherein the beneficiary appears to be filling the role of a first-line supervisor. Despite the petitioner's repeated claims that the beneficiary is not acting as a first-line supervisor, the AAO cannot make an accurate determination without a detailed description of the duties assigned to the beneficiary. As determined by precedent case law, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the present matter, the petitioner placed great emphasis on the duties that the beneficiary would not need to perform, rather than affirmatively stating which duties the beneficiary would perform. The petitioner repeatedly stated that as a result of the lower-level employees who have been and would continue to take customers' orders and cook and delivery the food, the beneficiary's time has not and would not be consumed with non-qualifying duties. In other words, the petitioner believes that the only non-qualifying duties are those that are directly related to customers' food orders. However, the petitioner has provided no documentation to establish who carries out the marketing and advertising duties for the restaurant and who performs the daily bookkeeping and accounting tasks that are inherent to operating a retail-based business. Rather, the petitioner stated that the primary portion of the beneficiary's time is devoted to "the direct management of persons through the chain of command." The petitioner does not provide insight as to the specific tasks that are associated with the beneficiary's management responsibilities. Moreover, in light of the above determination that the beneficiary's subordinate staff does not consist of professional, managerial, or supervisory employees, the AAO can only conclude that the beneficiary's managerial responsibilities require the performance of non-qualifying duties. While the petitioner has failed to specify exactly what duties the beneficiary has and would perform, the mere fact that the petitioner has stated that the primary portion of the beneficiary's time will be consumed by the management of non-professional, non-managerial, and non-supervisory employees, it cannot be concluded that the beneficiary has been or would be employed in a qualifying managerial or executive capacity.

EAC 08 070 51203

Page 10

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.