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U.S. Citizenship and Immigration Services

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[redacted]

FEB 28 2005

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 03 062 51857

IN RE: Petitioner:
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:

[redacted]

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, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this immigrant petition seeking to employ 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 petitioner is a corporation that is engaged in the hotel and restaurant business. It filed this immigrant petition requesting employment of the beneficiary as its hotel culinary manager.

The director denied the petition concluding that the petitioner had not established that the beneficiary was employed in the foreign entity, located in the Dubai, United Arab Emirates (UAE), in a primarily managerial or executive capacity.

On appeal, counsel claims that the director erred in his decision that the beneficiary was not employed abroad in a qualifying capacity. Counsel states that the beneficiary was employed by the foreign entity as its culinary manager from 1998 until August 2000, when he was transferred to the United States under his present L-1A visa. Counsel submits a brief and documentary evidence in support of the claim that the beneficiary was employed abroad in a managerial capacity.

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 or 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 his classification. The prospective employer in the United States must furnish a job offer in the form of a statement which 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.

The issue is whether the beneficiary was employed by the foreign employer in a primarily managerial capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(b).

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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-
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> (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 filed the immigrant petition on November 20, 2002. As neither counsel nor the petitioner provided evidence specifically related to the beneficiary's employment abroad, the director issued a request for evidence on June 19, 2003. In his request, the director asked that the petitioner provide the following evidence related to the beneficiary's prior employment in the foreign entity: (1) the number of supervisors under the beneficiary's management; (2) the job titles and job duties of the employees managed by the beneficiary; (3) the executive and technical skills necessary to perform in the beneficiary's position overseas;

(4) the amount of time the beneficiary devoted to executive duties compared to the time spent by the beneficiary performing non-executive duties; (5) the degree of discretionary authority in day-to-day operations possessed by the beneficiary while employed abroad; (6) an explanation of who is employed in the beneficiary's previous position.

Counsel responded in a letter dated September 11, 2003 and enclosed a "complete copy" of the documentation submitted by the petitioner in its previous petition for the beneficiary's classification as an L-1A nonimmigrant intracompany transferee. Counsel noted that the material, which included the petitioner's Form I-129S, Nonimmigrant Petition based on a Blanket L Petition, and a copy of a letter from the foreign entity's director of organizational development, "clearly describes and verifies the qualifying nature of [the beneficiary's] overseas employment duties. . ."

In the attached Form I-129S, the petitioner provided the following description of the beneficiary's job duties:

> Since 1998, [the beneficiary] has held the position of Culinary Manager at the [foreign organization]. He is responsible for cost-effective and efficient management of day-to-day operations at a luxury hotel. He supervises and directs all culinary staff in compliance with hotel high quality standards, policies and procedures. [The beneficiary] directs hiring, training and scheduling of the hotel culinary staff. From 1/97 to 10/98, [the beneficiary] was employed with Sheralton [sic] Hotel, [redacted] as Arabic Chef in charge of outside catering. Please refer to company letter for more information.

In an attached letter from the petitioner's director of organizational development, dated June 14, 2000 and submitted previously with the nonimmigrant petition, the corporate director stated:

> [The beneficiary] has been employed with [the foreign organization] for over two years. Since 1998, [the beneficiary] has been employed as a Culinary Manager with [the foreign organization] in Dubai, UAE. In this senior managerial position [the beneficiary] has the ultimate responsibility for the cost-efficient and effective management of all aspects of Culinary operations at the hotel. [The beneficiary] is responsible for establishing and implementing goals, policies and procedures related to the hotel's Culinary activities and he manages and oversees the administration, implementation and maintenance of hotel policies and ensures that all Culinary activities are performed in accordance with [the foreign organization's] standards and philosophy. [The beneficiary] is also responsible for assessing the hotel's Culinary needs and for identifying outside sources which address the hotel's specific needs. He participates in strategic planning and goals setting for the Culinary department and conducts pre-shift meetings with staff in order to review all information pertinent to each day's business. Moreover he directs the hiring, training and scheduling of Culinary staff, handles disciplinary problems, counsels employees according to hotel standards and for other personnel matters, as necessary. Naturally in this senior managerial position, [the beneficiary] exercises discretionary authority over day-to-day hotel Arabic Culinary operations.

In a decision dated January 12, 2004, the director determined that the petitioner had not demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity. The director stated that although the beneficiary held the title of manager, the description of the beneficiary's job duties does not

establish that his actual daily activities were managerial. The director stated "[h]aving discretionary authority and a managerial title such as culinary manager does not, in and of itself, mean that a person is employed in a qualifying managerial capacity." The director further noted that the majority of job duties provided by the petitioner in response to the director's request for evidence were non-managerial tasks, and also noted that the beneficiary spent 25% of his time cooking.[1] The director determined that the beneficiary's position in the foreign entity "was at the first line supervisory level only," and stated that in order to qualify for an employment-based visa, the petitioner must demonstrate that the beneficiary held authority over daily operations beyond that of a first-line supervisor. The director stated that the eight cooks supervised by the beneficiary were not professional, managerial, or supervisory employees, and therefore, the beneficiary did not qualify as a manager. Consequently, the director denied the petition.

In an appeal filed on February 11, 2004, counsel claims that the director erred in determining that the beneficiary was not employed by the foreign entity in a primarily managerial capacity. Counsel refers to the petitioner's previously filed nonimmigrant petition, a May 30, 2000 certification from the foreign entity's assistant director of human resources, and the June 14, 2000 letter from the petitioner's director of organizational development as evidence of the beneficiary's employment overseas in a managerial capacity. Counsel includes copies of each referenced document as evidence of the beneficiary's employment capacity. Counsel also submits a comprehensive brief claiming that the beneficiary's job duties abroad amounted to employment in a managerial capacity. As counsel's brief is part of the record, it will not be repeated herein.

Upon review, the petitioner has not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity.

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 description of the beneficiary's overseas position fails to outline the specific job duties performed by the beneficiary. The petitioner's broad statement in its June 14, 2000 letter, including claims that the beneficiary was responsible for establishing and implementing the goals and policies of the hotel's culinary operations, managed the administration, implemented and maintained hotel policies, assessed the hotel's culinary needs, participated in strategic planning, and directed the culinary staff, is actually an explanation of the beneficiary's responsibilities and does not address the true managerial or executive job duties associated with the position. For instance, the petitioner does not explain what daily managerial and executive job duties the beneficiary was required to perform in implementing and maintaining the hotel's culinary goals and policies or in assessing its culinary needs. In addition, it is unclear what managerial actions the beneficiary took in managing the "administration," or even what personnel is considered to be "administration." 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.*

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[1] The AAO notes that the director partially based his decision on a description of the beneficiary's job duties in the United States entity. The record contains a letter, dated September 2, 2003, from the petitioner's director of human resources, wherein the company's director outlined the "overseas" job duties of the beneficiary. Based on counsel's September 11, 2003 letter and the beneficiary's affidavit submitted on appeal, in which the beneficiary noted the unavailability of a detailed job description of his foreign employment, the job duties listed by the petitioner's director in her September 2, 2003 letter are actually associated with the beneficiary's employment in the United States.

Co., Ltd. v. Sava, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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).

The record is further inconsistent in describing the true position occupied by the beneficiary during his overseas employment. The petitioner noted in documentation submitted in response to the director's request for evidence, including the petitioner's prior nonimmigrant petition and the June 14, 2000 letter from the petitioner's director of organizational development, that the beneficiary was employed as the "culinary manager" of the foreign entity. However, the record contains documentary evidence, specifically a May 30, 2000 certification referred to by counsel on appeal and a corporate article titled "Cuisine fit for a 'Queen'" and submitted by the petitioner in response to the director' request for evidence, of the beneficiary's employment as the "Arabic Chef" of the foreign entity. In the May 30, 2000 certification, the foreign entity's assistant director of human resources states:

> We hereby certify that [the beneficiary] Lebanese national, holder passport number: 1171449 is employed by [the foreign entity] in the capacity of Arabic Chef in our Culinary Division since November 5th, 1998 until present.

The article "Cuisine fit for a 'Queen'" also refers to the beneficiary as the foreign entity's "Arabic Chef," and praises the beneficiary for his preparation of "two very special meals" for "high ranking members of our Company." The author of the article explained how the beneficiary "had prepared a traditional Lebanese meal to tempt their tastebuds after the long flight."

The foreign entity's repeated reference to the beneficiary's employment as "Arabic Chef" raises suspicion as to the true position held by the beneficiary in the overseas company. As the company's Arabic chef, the beneficiary would clearly have been responsible for the non-qualifying task of food preparation for the company's culinary division. The beneficiary would therefore not have been employed in a primarily managerial or executive capacity as claimed by the petitioner. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (concluding 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).

As neither the petitioner nor counsel has offered clarification as to the apparent discrepancies in the beneficiary's employment, the AAO cannot conclude that the beneficiary occupied the position of manager while employed abroad. The AAO notes that counsel even referenced the May 30, 2000 certification in his brief on appeal yet provided no further explanation of the inconsistency. Contrary to counsel's claim on appeal, the certification clearly fails to support the claim that the beneficiary was employed as the foreign entity's "Culinary Manager." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Counsel repeatedly notes on appeal that the beneficiary's foreign employment was already reviewed and deemed to be in a qualifying capacity as a result of the previously filed L-1A blanket petition. The AAO

notes that if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the United States consular officer. 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 597. 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).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary has been employed by the United States entity in a primarily managerial or executive capacity. The record is equally inconsistent in addressing the true position occupied by the beneficiary in the petitioning organization. The various job titles assigned to the beneficiary in documentation throughout the record includes "Hotel Manager – Culinary," "Middle Eastern Chef," "Executive Chef," and "Executive Sous Chef." The petitioner does not address the different titles assigned to the beneficiary or clarify how, if at all, the beneficiary's job duties vary according to his position. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Additionally, the petitioner's director of human resources noted in her September 2, 2003 letter submitted in response to the director's request for evidence that the beneficiary would manage a subordinate staff consisting of three head cooks and five line cooks. On appeal, however, counsel explains that the beneficiary's position as "Executive Soue Chef" involves the supervision of six managerial-level chefs, 60 cooks and 16 externs. On appeal, 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 the 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As a result of the discrepancies in the beneficiary's position in the United States entity, the AAO cannot determine whether the beneficiary is employed by the petitioner in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.