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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE WAC 02 076 51631 Office: CALIFORNIA SERVICE CENTER Date: APR 04 2005

IN RE: Petitioner: [redacted]
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)

IN 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 nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant specializing in Indian cuisine. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its Executive Manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary was previously granted L-1 status and that all of the beneficiary's duties are managerial.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

The United States petitioner was incorporated in 1998 and states that it is an affiliate of Indian Palace Pvt. Ltd Gmbh, located in Germany. The petitioner indicated 10 employees on the Form I-129 and listed approximately $1,273,755 in gross revenues. The initial petition was approved and was valid from February 12, 1999 until January 01, 2000, in order to open the new office. The second petition was extended and was valid from January 1, 2000 until January 1, 2002. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of $60,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a 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;

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 January 29, 2002 the director issued a request for additional evidence to demonstrate that the beneficiary will be engaged in primarily managerial or executive job duties. The director requested, in pertinent part, a U.S. business organizational chart and a list of all U.S. employees. Additionally, the director requested a detailed description of the beneficiary's duties in the U.S. which included an indication of the percentage of time spent in each of the listed duties.

On April 25, 2002, the director received a response to the request for evidence from the petitioner. The response included a list of employees with their position titles, social security numbers and immigration status. The petitioner did not provide the beginning and ending dates of employment for each employee as requested by the director. The petitioner submitted a list of all employees from the date of establishment of the business to the present date. Counsel explained that list included persons who are not currently employed by the petitioner. The petitioner provided payroll records for the tax years 1999, 2000, and 2001.

Counsel for the petitioner provided an additional description of the beneficiary's duties. Counsel explained "as a majority shareholder, [the beneficiary] has a great obligation to ensure the growth and direction of the entire operation. He establishes related goals and policies and most of all is responsible for the profitability of the operation. He is responsible for the budgets as budgets ultimately determine profitability."

Neither the petitioner nor counsel provided the requested detailed description of the beneficiary's duties in the U.S. which included an indication of the percentage of time spent in each of the listed duties. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In his decision, the director stated the petitioner has provided no comprehensive description of the beneficiary's daily activities that shows that the beneficiary will be engaged in managing or directing the management of a function, department, subdivision or component of the company. The director determined that the record does not contain persuasive evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, counsel states "[i]f [the beneficiary] is not granted the L-1 extension he will suffer extreme hardship as with the granting of previous extensions by [CIS], [the beneficiary] has continuously invested in the Newark operation." However, extreme hardship is not a regulatory standard by which L-1 visa petitions are adjudicated. CIS is not required to approve a petition simply because previous petitions may have been erroneously granted for the same beneficiary. The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were 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 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).

On appeal, counsel asserts that CIS made the decision in error and the beneficiary has absolute authority over the generalized policy of the petitioner. Counsel explains that the petitioner "may lack the well-defined management hierarchy of larger companies and is not divided into divisions, departments and subdivisions. Nevertheless [the beneficiary] as the owner and sole investor in this enterprise manages and oversees the day-to-day operations of the [petitioner]."

Counsel states "as a restaurant is a small enterprise its structure cannot be compared to a multinational corporation." Counsel cites National Hand Tool Corp. v. Pasquarell, 889 F.2d 1472, n.5 (5th Cir. 1989) and Mars Jewelers, Inc. v. INS, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988). Counsel further refers to an unpublished decision in which it was held that the beneficiary met the requirements of serving in a managerial and executive capacity even though he was the sole employee of the petitioning organization. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the above-cited cases. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel asserts that all of the beneficiary's duties are managerial. Counsel contends "[the beneficiary] has absolute latitude in all business decisions, as he is President as well as the majority shareholder of the company." It is noted that the petitioner never effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. Regardless, the petitioner must establish that the beneficiary is acting primarily in an executive capacity or in a managerial capacity by providing evidence that the beneficiary's duties meet each of the four elements of one of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On appeal, counsel states that the beneficiary "establishes the company's corporate goals and policies." Counsel did not enumerate any goals or policies and is restating language describing duties of an executive under section 101 (a) (44) (B) of the Act. 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).

Counsel cites another unpublished decision and seems to assert that the beneficiary is a functional manager. Counsel states "[f]urther in evaluating the duties of [the beneficiary] it is evident 8 C.F.R. 214.2(1)(ii)(B) [sic] was drafted to include [m]anagers like [the beneficiary] who have managerial control and authority over all the functions and operations of the business." However, counsel did not clearly identify the essential function that the beneficiary allegedly manages.

Additionally, counsel submits a percentage breakdown of the beneficiary's daily duties. The AAO notes that this information was requested earlier by the director and the director was not provided this information. Counsel states that 60 percent of the beneficiary's daily duties consist of:

a) Supervision of the entire restaurant including kitchen and dining.
b) Meeting with his managers and servers to discuss the expectations for the day. If banquets are held on any given day, emphasizes tasks that need to performed and quality that must be maintained for the event.
c) Determines quality of food served to ensure quality control. Confers with Food Services Manager and rectifies problems that are discussed by Food Services Manager.
d) Confers with Chefs to determine food served on a day-to-day basis meets standards set by restaurant.

Counsel explains that 40 percent of the beneficiary's duties consist of:

a) Oversees staffing including hiring of new employees and firing of non-performers.
b) Budgets and profitability of the restaurant.
c) Financial aspects of the business including new investments and expansion.
d) Strategic planning for long-term growth.
e) Strategic planning to ensure restaurant is premier restaurant serving Indian cuisine and to eliminate competition.

On review, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner is a restaurant specializing in Indian cuisine. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or

executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties will be directly performing the services of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not identified an essential function that the beneficiary manages. The description of the beneficiary's primary duties indicates that they are not in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In addition, the petitioner indicates that the beneficiary is the sole owner of both the U.S. and foreign company. If this fact is established, it remains to determine that the beneficiary's services are for a temporary period. 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. In addition, the fact that the sole owner of the original foreign corporation is the beneficiary of this petition raises the question of whether the foreign organization currently is and will still be doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For all these additional reasons, this petition may not be approved.

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.