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U.S. Citizenship and Immigration Services

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[redacted]

FEB 28 2005

FILE: WAC 02 141 50094 Office: CALIFORNIA SERVICE CENTER Date:

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)

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 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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 and claims to be a restaurant specializing in Korean cuisine and in the trading business. The petitioner claims that the U.S. entity is a subsidiary of Manna Dunsan, located in Daejon, Korea. The petitioner declares nine employees. The petitioner seeks to employ the beneficiary temporarily in the United States as operations manager for a period of three years, at a yearly salary of $36,000. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity.

On appeal, counsel disagrees with the director's determination and asserts that the evidence submitted does establish that the beneficiary's duties will be primarily managerial or executive in nature.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states 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 (I)(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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

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.

The petitioner stated in the petition that the beneficiary would be responsible for managing all financial aspects of the business. The petitioner also stated that the beneficiary would be responsible for directing and managing the kitchen and service departments, and supervising and coordinating activities of independent parking attendants.

In a letter of support, dated March 13, 2001, the petitioner described the beneficiary's duties as:

> Responsible for hiring, training staff, supervise the purchase of food and supplies [sic]; managing division's managerial personnel, kitchen department and service department; supervise and coordinate activities of independent parking attendants; and managing all financial aspects of business [sic]. He will report directly to the President.

The petitioner submitted an organizational chart depicting the U.S. entity's hierarchy. This chart demonstrated that the beneficiary, as operations manager, would direct independent parking attendants, kitchen staff, and front service departments. The beneficiary's duties were described as planning, scheduling, hiring, training, and controlling the daily operation of the U.S. entity. The petitioner provided a description of the subordinates' duties as follows:

> INDEPENDENT PARKING ATTENDANTS:
>
> Valet Parking
>
> KITCHEN DEPARTMENT:

Jin Hee Park /Head Chef – Responsible for control of kitchen personnel, daily special menu, kitchen inventory, and hiring

Kang In Lee/Chef – Serves as a cook and assistant head chef.

FRONT SRVICE DEPARTMENT

Sung Im Oh/Floor Manager – Responsible for reservations, public relations, waiter schedule, customer service, and supervises waiters

Mee Hwa Ahn/Floor Manager – Responsible for reservations, assigning stations, and customer service

Bok J Lee/Head Waitress – Responsible for serving and table set-up

Jin Sun Kim/Waitress – Responsible for serving and table set-up

Jin Ho Shon/Waiter – Responsible for serving and table set-up

Hye Min Chung/Waitress – Responsible for serving and table set-up

The director determined that additional evidence was needed by the petitioner in order for him to fully examine the beneficiary's eligibility for L-1A status. The director requested as follows:

> . . . Submit a more detailed description of the beneficiary's duties in the U.S. Be specific. List the education and employment qualifications for the position in the U.S. Company. Include evidence that the beneficiary meets the petitioner's qualifications and, if required, that the beneficiary has the ability to speak, read, and write English. Indicated exactly whom the beneficiary directs including their job title and position description. List all employees under the beneficiary's direction. Also, indicate [the] percentage of time spent in each of the listed duties.

In response to the director's request for additional evidence, counsel for the petitioner describes the beneficiary's proposed duties as being the same as duties performed by the beneficiary for the foreign entity. Counsel lists the duties as follows:

Confer with executives for planning, budgeting and banking.....15%
Meeting with departments' managers for planning and
Discussing, analyzing service improvement 15%
Reviewing and examining daily reports of A/R, A/P,
Reviewing and examining bank statements,
Reviewing advertisement activities and costs.....25%
Reviewing and analyzing reports of inventories and purchasing orders;
Approve pre-purchasing orders.....10%
Reviewing employment records and prepare commendation/reprimands
Hire and fire employees and other managing staff.....15%
Reviewing and oversee preparation of payroll.....10%

Direct customer relations procedures.....10%

The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be employed primarily in a managerial or executive capacity. The director stated that there had been no evidence submitted to show that there was a subordinate staff that could relieve the beneficiary from performing the day-to-day operations of the U.S. entity. The director also stated that the record demonstrated that a preponderance of the beneficiary's duties would consist of providing the services of the business. The director noted that there was no indication in the record that the beneficiary would exercise significant authority over generalized policy or that the beneficiary's duties would be primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's decision and asserts that the evidence demonstrates that the beneficiary will primarily perform managerial duties as an operations manager. Counsel also states that the beneficiary manages the entire organization, not just a function, subdivision, or component of the U.S. entity. Counsel reiterated the beneficiary's proposed duties. Counsel further contends the beneficiary's job duties, as described, fulfill all requirements of the regulations. Counsel asserts:

> The Operations Manager "...manages the organization...supervises and controls the work of other managerial employees...(IE: 2 restaurant managers –kitchen and front house); has the authority to hire, fire, or. ...other personnel actions...Exercises discretion over the day-to-day operations of the activity of function which the employee has the authority...."

The record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. When examining the managerial or executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). In this matter, the petitioner contends that the beneficiary is employed by the U.S. entity in a managerial capacity, in that he manages the organization, supervises and controls the work of other managerial employees, and exercises discretion over the day-to-day operations of the functions of the organization. However, a review of the record demonstrates that the beneficiary primarily performs the day-to-day functions of the organization and supervises non-managerial, non-professional employees. Consequently, there is insufficient evidence to show that the beneficiary will perform the high level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing day-to-day functions of the organization.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include: "discussing, analyzing service improvement...reviewing and examining advertising activities and costs... customer relations . . ." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

Further, there is insufficient detail regarding the actual duties of the assignment to overcome the director's concerns. The petitioner claims that the beneficiary directs and manages all the financial aspects of the petitioner's business and its' overall business operations, however, there has been no evidence submitted to demonstrate that any of its employees, other than the beneficiary, are responsible for carrying out the duties associated with the functions. In the instant matter, the organizational chart for the U.S. entity depicts a head chef, a chef, two floor managers, a headwaiter, two waitresses, and a waiter, all under the direction of the beneficiary. There is no evidence to show that there is an administrative, sales, or accounting department that is able to perform non-managerial functions of the organization sufficient to relieve the beneficiary from performing such tasks. Thus, either the beneficiary himself is performing the financial, administrative, sales, or marketing functions or he does not actually manage the functions as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It appears from the record that the beneficiary is and will be performing the functions of the organization rather than managing the same. The AAO notes that 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 of Scientology International, supra.* In this matter, the petitioner claims to employ nine individuals.

Although the petitioner asserts that the beneficiary is managing a subordinate staff, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In that there is no independent documentary evidence to substantiate the petitioner's claim that the subordinates who report to the beneficiary are performing in a professional capacity, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to prepare food, park automobiles, make reservations, or supervise waiters and waitresses.

In review, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. It appears from the record that the beneficiary has been and will

be primarily performing the day-to-day functions of the business and supervising non-professional employees.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.