U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 99 139 50687 Office: Vermont Service Center Date: JAN 8 2001

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)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary temporarily in the United States as chief executive officer of its new office. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, or that the United States operation, within one year, would support a managerial or executive position.

On appeal, counsel argues that the evidence submitted by the petitioner was not viewed properly by the Service, and that the beneficiary is and has always been employed in an executive/managerial capacity.

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.

8 C.F.R. 214.2 (l)(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;
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> 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
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> 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 (l)(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 United States company was established in 1999 and states that it is an affiliate of [redacted], located in Venezuela. The petitioner seeks to employ the beneficiary for one year at a weekly salary of $500.

In his decision, the director concluded that the U.S. company could not support a managerial or executive position within one year of its operation because of the nature of its business and the size of the company. The director further concluded that the petitioner had not established that the beneficiary's day to day activities would be primarily managerial or executive in nature.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in the proposed position in the United States in a primarily managerial or executive capacity, and whether the United States operation would support such a position within one year.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"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:

> "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;
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> ii. establishes the goals and policies of the organization, component, or function;
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> 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 record contains a description of the beneficiary's duties in the proposed position in the United States as follows:

> [The beneficiary] will have responsibility to oversee the operations of the restaurant, including hiring cooks, wait staff, counter help, busboys and dishwashers, supervising the purchase of food stuffs, coordinating the finances of the corporation with the bookkeeper and outside accountants for the corporation, and generally being responsible for the overall operations of the restaurant. Attached to this letter as an addendum is a list of all proposed employees in the United States, including the beneficiary, including the number of hours to be devoted to the job duties on a weekly basis.

The record contains the following list of employees:

1 Manager/Director	40-50 hours
5 Cooks	40 hours
1 Dishwasher	40 hours
4 Wait Staff	40 Dishwasher

On appeal, counsel argues that:

> Representations made in the petition indicate that proposed beneficiary will be the chief executive officer. He will be responsible for all business decisions regarding the operations of the company. The Service Officer who made this decision "presumes" that the beneficiary will be merely a front line supervisor. Who does the adjudicator "presume" will make executive decisions regarding this business operation? The shareholders of this corporation have given the beneficiary wide latitude in making all necessary discretionary decisions regarding this corporation and to direct its operation.

Counsel further argues that the beneficiary will be an executive rather than a manager because "there is no one above him to make decisions concerning this company."

Despite counsel's contentions, the additional information provided on appeal is not sufficient in overcoming the objections of the director. Counsel's merely restating portions of the Service's definition of a manager and executive is not sufficient in demonstrating the beneficiary's managerial and executive responsibilities. As stated by the director, the description of the beneficiary's duties is too general and vague and does not convey any understanding of exactly what the beneficiary will be doing on a daily basis. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will be primarily executive or managerial in nature. The petitioner has provided no comprehensive description of the beneficiary's duties to establish this.

Further, although it is stated that the beneficiary will supervise five cooks, one dishwasher, and four wait staff, it has not been sufficiently demonstrated that these employees are subordinates who will relieve the beneficiary from performing nonqualifying duties. The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Based on the evidence submitted, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity, or that the U.S. company will support such a position within one year of operation. For this reason, the petition may not be approved.

Another issue in this proceeding, not raised by the director, is whether the beneficiary has been employed abroad in a primarily executive or managerial capacity. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.