

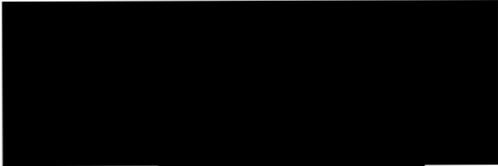


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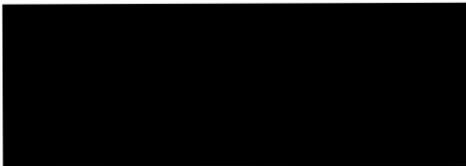
IN RE:

Petitioner:  
Beneficiary:



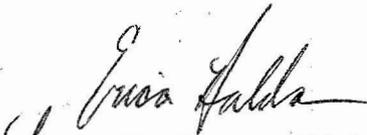
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a limited liability company organized under the laws of the State of Florida that is operating a restaurant. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition concluding that the petitioner had not demonstrated that: (1) a qualifying relationship between the foreign and United States entities existed at the time of filing the petition; or (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that an affiliate relationship exists as a result of the control exercised over the foreign and United States entities by two shareholders common to both organizations. Counsel challenges the director's finding that the beneficiary would not be employed by the United States entity in a qualifying capacity, claiming that he would possess managerial authority over two managerial workers and a professional employee. Counsel submits a brief and documentary evidence in support of the appeal.

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 this 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 first issue in this proceeding is whether a qualifying relationship existed between the foreign and United States entities at the time of filing the immigrant petition.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;

\* \* \*

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner filed the instant petition on April 4, 2005. In an appended letter, dated March 10, 2005, the petitioner addressed the existence of an affiliate relationship with the beneficiary's foreign employer, stating that two Venezuelan companies, [REDACTED] C.A. and [REDACTED] C.A., each own 25 percent of the foreign and United States entities, or a cumulative ownership of 50 percent of both organizations. The petitioner explained that the general managers of [REDACTED] C.A. and [REDACTED] C.A. are directors of the petitioning entity and the beneficiary's foreign employer, and "control the affairs" of the organizations. As evidence of the purported qualifying relationship, the petitioner submitted: (1) its articles of organization; (2) a schedule of its members and the corresponding ownership interests; (3) copies of its issued membership certificates<sup>1</sup>; and (4) translated copies of the articles of incorporation of the beneficiary's foreign employer, as well as of the companies [REDACTED] C.A., and [REDACTED].

In a May 10, 2005 notice of intent to deny, the director noted that the record contained conflicting documentary evidence as to the ownership of the petitioning entity. Specifically, the director stated that the owners identified on the membership certificates issued by the petitioner did not correspond to the owners identified on the petitioner's 2002 and 2003 income tax returns. The director asked that the petitioner address the contradictory evidence, and submit "proof of payment for [the] purchase of units of the petitioner by each member."

Counsel for the petitioner responded in a letter dated June 7, 2005 noting errors made by the petitioner's accountant on the organization's 2002 and 2003 income tax returns, which resulted in the incorrect

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<sup>1</sup> The AAO notes that the membership certificates are numbered one through seven, yet the record does not contain membership certificate number six.

identification of two of the petitioner's members.<sup>2</sup> Counsel submitted amended tax returns for these two years, noting that at the end of the year 2003 and at the time of filing, the petitioner's members were as follows:

[REDACTED]

25 percent  
25 percent  
25 percent  
25 percent

Appended membership certificates reflected two transfers from the original owners that took place in February 2002 and November 2003, which resulted in the above-noted ownership interests.<sup>3</sup>

Additional documentation previously submitted by the petitioner identified the following stockholders of the beneficiary's foreign employer:

[REDACTED]

25 percent  
25 percent  
25 percent  
25 percent

With regard to the consideration furnished for membership interests in the petitioning entity, counsel explained that the directors [REDACTED] and [REDACTED] both "family owned companies," furnished monies from their personal accounts. Counsel stated that [REDACTED] the director [REDACTED] also furnished consideration for the membership interest held by [REDACTED] which, the record reflects, was ultimately transferred to [REDACTED] in November 2003.

In a decision dated July 7, 2005, the director concluded that the petitioner had not established the existence of a qualifying relationship between the foreign and United States entities. The director again noted the conflicting evidence presented by the petitioner with regard to its ownership, and observed that the tax returns submitted by the petitioner in an attempt to clarify its purported ownership were not titled "amended." The director further noted that four shareholders, of which two were the same as the petitioner's members, owned the beneficiary's foreign employer, and that, as a result, common ownership did not exist between the foreign and United States entities. Consequently, the director denied the immigrant petition.

Counsel for the petitioner filed an appeal on August 8, 2005, claiming the existence of an affiliate relationship as a result of the control held by two shareholders common to both the United States and foreign entities, who cumulatively own 50 percent of each organization. In a subsequently submitted appellate brief, dated September 2, 2005, counsel addresses the ownership interests of the petitioner and the beneficiary's foreign employer, noting that [REDACTED] C.A. and [REDACTED] C.A. each own 25 percent of both organizations. Counsel contends that, as a result, the foreign and United States entities "are controlled by the

<sup>2</sup> Counsel explains that rather than identifying the companies [REDACTED] C.A. and [REDACTED] C.A. as members, the accountant incorrectly listed each company's director as an individual owner of the petitioning entity

<sup>3</sup> The record reflects that [REDACTED] and [REDACTED] transferred their interests in 250 units each to [REDACTED] C.A. and [REDACTED], respectively.

same two companies that own 50% of their interests." Counsel further states that the required element of a common "control" between the foreign and United States organizations is satisfied as a result of "agreements" entered into by the owners of each organization, which resulted in the petitioner and the foreign entity assigning the authority to direct and control each organization to the directors of [REDACTED] C.A. [REDACTED] C.A.<sup>4</sup> Counsel contends, as a result, that [REDACTED] and [REDACTED] C.A. control and direct the petitioner and the beneficiary's foreign employer through their directors, thereby demonstrating the existence of an affiliate relationship. Counsel cites *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982), as authority for the supposition that an affiliate relationship may exist despite a disparity between the individual owners of each organization as long as the owners common to each organization control both entities.

Counsel submits affidavits from the "director/manager" of two of the foreign entity's corporate shareholders, who attest to the control and authority over the petitioner's and foreign entity's finances held by [REDACTED] and [REDACTED] directors of [REDACTED] and [REDACTED] respectively. Counsel also submits affidavits from [REDACTED] personally, in which they attest to their right to direct and control the petitioning entity and the beneficiary's foreign employer.

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies,

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<sup>4</sup> As evidence of the "agreements," counsel references affidavits submitted by the owners of the petitioner, and invoices and checks signed by the directors of [REDACTED] and [REDACTED]

property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, the petitioner has not demonstrated that the foreign and United States entities are "owned and controlled by the same group of individuals," as required in the regulation at 8 C.F.R. § 204.5(j)(2). The record reflects that the petitioner and the beneficiary's foreign employer have two common shareholders, [REDACTED] C.A. and [REDACTED] C.A., each of who own 25 percent of both organizations. The petitioner erroneously relies on *Matter of Hughes* to support its suggestion that [REDACTED] C.A. and [REDACTED] hold and control a collective 50 percent interest in both companies, thereby creating an affiliate relationship. In order to establish "de facto" control of both entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. See *Black's Law Dictionary* 1241 (7th Ed. 1999).

Moreover, in *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal. 1990), the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. See 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case, the U.S. entity is owned by two individuals and two companies, while the foreign entity is owned by four companies, of which two are common to the members of the petitioning entity. As evidence of the purported "de facto" control held by [REDACTED] C.A. and [REDACTED] C.A. over both the petitioning and foreign entities, the petitioner provided affidavits from the directors of [REDACTED] C.A. and [REDACTED] C.A., as well as affidavits from the directors of the foreign company's other two corporate shareholders. Additionally, the petitioner presented invoices and checks signed by [REDACTED] and [REDACTED] on behalf of the petitioner and the beneficiary's foreign employer. None of the submitted documentation is sufficient to establish that [REDACTED] and [REDACTED] C.A., as a single interest, collectively control a majority of either the petitioner's or foreign entity's voting

rights. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities.

The AAO recognizes the reference in two affidavits to the foreign company's August 6, 2001 Special General Meeting of Shareholders. The petitioner presented this as evidence of the control held by [REDACTED] and [REDACTED] as the directors [REDACTED] D.A. and [REDACTED] respectively, over the beneficiary's foreign employer. The AAO observes, however, that Title Three from the minutes of the August 6, 2001 shareholder's meeting, which was referenced in the affidavits, merely states that two of the company's directors would exercise the power to "administer" the business of the company, yet does not specifically assign control to either [REDACTED] and [REDACTED]. The petitioner has not submitted any evidence of the claimed control held by [REDACTED] and [REDACTED] A. over either organization. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals.

The AAO notes that in *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981), the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management . . . ." It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.* at 633. The facts in the present matter can be distinguished from *Matter of Tessel* because no one shareholder holds a majority interest in either corporation. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

Based on the foregoing discussion, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary would be employed by the United States entity in a primarily 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) 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-

- (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.

In its March 10, 2005 letter appended to the immigrant petition, the petitioner stated that the beneficiary would occupy the position of general manager in the United States entity. The petitioner explained:

The [g]eneral [m]anager oversees the work of the [c]hef, the [f]loor [m]anager and the [a]ccountant. He has the day-to-day discretionary authority in coordinating and directing the work of the kitchen, the dining room, and administrative departments. He is the [f]ood [s]afety [m]anager responsible for ensuring that the restaurant is in compliance with all health and hygiene laws. He hires, trains, evaluates and dismisses personnel and listens to complaints. He develops plans to make the restaurant more competitive and profitable. Strong managerial skills are needed for the smooth coordination of the kitchen, dining room, take-out service and administrative components.

An attached organizational chart identified the beneficiary as the direct manager of the kitchen supervisor, floor manager, and accountant. The AAO notes that while the petitioner identified on the organizational chart the additional subordinate positions of chef, cook helper, grill cook, waitress, bus boy, cashier, and maintenance, it did not submit evidence of the employment of a subordinate staff until its response to the director's notice of intent to deny. The petitioner also submitted a brief outline of the lower-level positions, as well as Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for the years 2002 through 2004, and payroll records for the period beginning January 23, 2005 and ending January 28, 2005.

In her May 10, 2005 notice of intent to deny, the director asked that the petitioner submit a "definitive statement" describing the beneficiary's proposed position in the United States company, including: (1) the title of the position; (2) a list of the accompanying job duties; (3) the percentage of time the beneficiary would

devote to each task; and (4) the subordinate employees who would report to the beneficiary and their job titles and job duties. The director requested that the petitioner also submit an organizational chart reflecting the workers employed by the petitioning entity.

In her June 7, 2005 response, counsel for the petitioner included a statement from the petitioner outlining the following job duties to be performed by the beneficiary as its general manager:

1. Coordinate activities among the various departments – kitchen, dining and administrative sections. 15%

Synchronize the activities of the Kitchen Supervisor, Floor Manager and Accountant to ensure prompt and top quality food service to the customers. This entails among other things, coordinating the timely ordering of supplies for the Kitchen Supervisor and Floor manager with the accountant's priority of making sure expenditures balance with income. It involves prioritizing the needs of the different sections by discussing it with each head – the Kitchen Supervisor, the Floor Manager and the Accountant and arriving at a consensus for the benefit of the business as a whole.

2. Oversee Kitchen area and supervise Kitchen Supervisor: 20%

Approve orders to replenish kitchen supplies. Assist the Chef in selecting menu items and introducing new items based on past success with dishes and food items. Periodically spot check and evaluate food production and cleaning processes and machines to make sure that hygiene standards are maintained. Attend to complaints/concerns of the Kitchen Supervisor and resolve them by discussing possible alternatives and deciding on the best one that is conducive to all involved. For example, note which equipment needs to be replaced or fixed and coordinate between the Kitchen Supervisor and Accountant and Floor Manager the best time to have the equipment replaced or fixed taking into consideration the time when business is slow and money is available for such expenses.

Close the restaurant at the end of the day making sure all equipment – ovens, stoves, etc. are off and alarms are turned on.

3. Oversee Dining area and supervise Floor Manager: 20%

Evaluate with Floor Manager the customer feedback – complaints and compliments; discuss ways to improve service and process. Approve and introduce new ideas of improving the service. Oversee the running of the dining area to make sure that the Floor Manager has everything running smoothly – e.g. staffing is sufficient, customers are seated and served in a timely manner, payments are collected and new customers are attended to as they arrive and that hygiene standards are maintained. Assist the Floor Manager and make final decisions when there is a crisis at any time varying from troublesome customers to supplies not arriving on time to medical or other emergencies. Move between the dining and kitchen area especially in rush times to make sure there is proper coordination of activities. Ensure that new dining room staff are trained and oriented properly by the Floor Manager.

4. Oversee the income and expenditures of restaurant and supervise the Accountant: 20%

Discuss, prioritize and approve major expenses of hiring new employees and purchasing more equipment with the Accountant based on data and information provided by the Accountant, Floor Manager and Kitchen Supervisor.

Make sure that supplies are ordered and paid for in a timely manner and that there are sufficient funds to pay for any large expenses before approving their purchase. Make sure that taxes are prepared and filed in a timely manner.

Prepare budget with the accountant to present before the Directors of [the petitioning entity] (hereinafter, Directors). Prepare price list of new dishes and adjust prices annually based on a cost analysis provided by the Accountant making sure that a profit margin is included. Obtain approval of prices from the Directors.

Prepare and adjust pay rate for each employee with the Accountant's assistance and obtain approval of this from Directors.

Tally cash and charge receipts received and balance them against the record of sales. Deposit the day's receipts at the bank and secure them in a safe place.

5. Hire/Fire and Supervise Training of Personnel and other administrative functions: 25%  
Hire employees and supervise their training and orientation. When necessary, fire employees. Motivate employees and be attentive to complaints/concerns of employees and customers. Approve or disapprove requests for leave by Kitchen Supervisor or Floor Manager. Evaluate employees' performance periodically. Plan and launch a marketing and public relations strategy for the restaurant e.g. placing ads in the newspaper, creating flyers, offering discount meals, promoting the restaurant to businesses etc. Recruit workers or place ads for workers when necessary. Develop and propose ways of increasing business and obtain approval from Directors – e.g. introduce live band in the restaurant. Negotiate with other businesses on behalf of [the petitioner] for their services or products. Sign contracts on behalf of [the petitioner].

The petitioner submitted an organizational chart of its staffing levels at the time of filing, noting the employment of nine workers, in addition to the beneficiary, in the subordinate positions of kitchen supervisor, floor manager, accountant, chef, cook helper, grill cook, waitress, and cashier. An attached payroll journal for the period April 1, 2005 through June 30, 2005, as well as a state quarterly tax return for the quarter ending June 30, 2005 reflected the employment of the ten workers identified on the petitioner's organizational chart.

In her decision, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director noted a discrepancy in the organizational chart submitted with the initial filing and the organizational chart provided after the director's notice of intent to deny, stating that the latter chart reflected a staff of five additional employees. The director stated that the record was unclear as to the workers employed at the time of filing the petition, and concluded that the beneficiary would not be supervising managerial or professional employees. The director further concluded that the beneficiary would perform many of the functions related to the positions of cook helper, grill cook, waitress, bus boy, cashier, and bookkeeper, which the director determined were unoccupied when the immigrant petition was filed. Consequently, the director denied the petition.

On appeal, counsel for the petitioner contends that the director incorrectly concluded that the beneficiary would not be employed as a manager as a result of "inadvertent" discrepancies in the documentary evidence submitted by the petitioner and her reliance on the petitioner's initial organizational chart. Counsel explains that the first organizational chart provided by the petitioner contained only those employees "that had some management/supervisory responsibility," while the second organizational chart identified all positions occupied at the time of filing, including the lower-level positions. Counsel notes that the petitioner also mistakenly indicated that three employees had been hired after the date of filing, when in fact the petitioner had already employed them. Counsel references the petitioner's April 2005 payroll journal, noting that it confirms the employment of ten workers at the time of filing in the positions identified by the petitioner. Counsel contends that the beneficiary qualifies as a manager, as he would be supervising the work of managerial, supervisory and professional employees. Counsel challenges the director's finding that the beneficiary would be performing routine tasks of the petitioner's business, stating that "[the beneficiary] does not and has no need to do the work of the bus boys, grill cook or any other workers." Counsel further explains the functions performed by the petitioner's lower-level staff, noting that when business is slow, the waitresses perform the tasks of the bus boys, the floor manager acts as the cashier, and the kitchen supervisor assists in preparing the food. Counsel states that the petitioner's business requires a general manager "to coordinate the different sections of the restaurant," and "[to make] the day-to-day discretionary decisions of whether to reduce employees or hire more employees depending on the business[,] and what actions to take to increase business."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States 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. § 204.5(j)(5). 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).

Here, while the petitioner submitted a lengthy statement of the beneficiary's job responsibilities, it does not comport with the petitioner's claim that the beneficiary would primarily perform managerial or executive responsibilities. Rather, it would appear that the beneficiary would devote a significant portion of his time to primarily performing the day-to-day routine tasks of the restaurant. For instance, based on the petitioner's representation, the beneficiary would be responsible for such non-qualifying tasks as assisting in the development of the petitioner's menu, analyzing and revising prices, reviewing "food production and cleaning processes and machines" for compliance with safety and health standards, computing and balancing daily cash and charge receipts, making bank deposits, planning and launching the petitioner's marketing and public relations campaigns, and negotiating for the products and services used by the petitioner. The beneficiary's job description also suggests that he would be responsible for ordering supplies and ensuring timely payment. The AAO notes, however, that the petitioner indicated the kitchen supervisor would be responsible for ensuring the availability of food supplies. Regardless, it does not appear that the beneficiary would be primarily performing the high level managerial or executive responsibilities outlined in the statutory definitions of "managerial capacity" and "executive capacity." See §§ 101(a)(44)(A) and (B). 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 "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, the petitioner has not established that the company employs a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a four-year-old company that had been operating a restaurant. According to the petitioner's advertisements, the restaurant is open daily for a total of 107 hours per week. The petitioner claims that it employed ten workers, including the beneficiary, when the petition was filed. Following a review of the wages reflected in the petitioner's payroll journal for the quarter ending June 30, 2005, the period during which the instant petition was filed, the AAO observes that several of the petitioner's lower-level workers, including the cashier, two waitresses, and grill cook, were likely employed on a part-time basis. Additionally, while the petitioner identified the positions of dishwasher and bus boy on its organizational chart, these positions were not occupied when the petition was filed. Based on this evidence, it is unclear how the reasonable needs of the petitioning entity might plausibly be met by the services of the beneficiary, as well as its four full-time workers and five part-time employees.

The petitioner's suggestion that some employees, such as the kitchen supervisor and floor manager, would assume the performance of lower-level workers' routine tasks during "slow" periods is not sufficient to overcome this finding by the AAO. The petitioner has not clarified at what times this substitution in positions and job duties would occur, stating merely "when business is slow." Nor did the petitioner account for the performance of those responsibilities originally held by the kitchen supervisor and floor manager or identify who would supervise kitchen and floor operations in the restaurant when these two employees are not on duty. In fact, the periodic modifications in the positions and job duties performed by the petitioner's staff raise the additional question of whether the beneficiary would be required to assume the performance of additional lower-level non-qualifying tasks than those already referenced above. Absent an explanation as to the petitioner's staffing levels, as well as a discussion of how the petitioner accounts for the performance of its routine daily tasks, the AAO cannot conclude that the petitioner would employ the beneficiary in a primarily managerial or executive capacity.

The AAO notes an additional disparity in the petitioner's staffing levels. According to the petitioner's payroll journals, its chef and cook helper, who are identified by the petitioner as lower-level employees, receive higher wages than those paid to the kitchen supervisor, floor manager, and accountant. This raises doubt as to the representations made by the petitioner, particularly with respect to its staffing levels and the job responsibilities held by each employee. 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).

Based on the foregoing discussion, the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The petitioner submitted a June 7, 2005 letter describing the job duties associated with the beneficiary employment as manager of the foreign company. The AAO notes that except for some minor changes to the foreign entity's personnel, the job description was essentially the same as that offered for the beneficiary's position in the United States entity. As already discussed above, the beneficiary's performance of such non-managerial and non-executive routine tasks as assisting in the development of the foreign restaurant's menu, analyzing and revising prices, reviewing "food production and cleaning processes and machines" for compliance with safety and health standards, computing and balancing daily cash and charge receipts, making bank deposits, planning and launching the foreign restaurant's marketing and public relations campaigns, negotiating for the products and services used by the foreign company, and ordering supplies and ensuring timely payment of invoices suggests that the beneficiary was not employed in a primarily managerial or executive capacity. Despite the detailed organizational chart of the foreign entity, it does not appear that the beneficiary was relieved from performing non-qualifying day-to-day functions of the restaurant. The AAO again notes that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). For this additional reason, the petition will be denied.

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).

The AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed on behalf of the beneficiary. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). **Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen.** Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.