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U.S. Citizenship  
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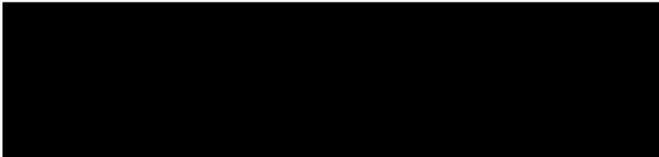
Office: NEBRASKA SERVICE CENTER

Date: JUL 05 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

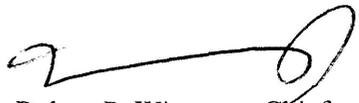
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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

The petitioner filed the immigrant visa 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 corporation organized under the laws of the State of Illinois that operates a franchise Mexican restaurant. It seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established: (1) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity; or (2) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary was employed by the foreign entity in a managerial or executive capacity, and contends that the director misinterpreted the submitted evidence and placed undue emphasis on the number of employees working for the company. With respect to the beneficiary's proposed U.S. employment, counsel asserts that the petitioner submitted credible evidence that the beneficiary would be employed as an executive, and that the U.S. petitioner's organizational structure supports such a position. Counsel submits a brief 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 addressed by the director is whether the beneficiary was employed by the foreign 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.

The petitioner filed the immigrant visa petition on January 26, 2006. The petitioner asserted that as president and owner of the foreign entity since 1992, the beneficiary served in a managerial capacity. The petitioner described the beneficiary's duties as follows:

As President, he is responsible for the company's direction with regard to the business-operating plan, budget and operating costs. He is responsible for policy in the areas of

advertising and business development, and determines company policy regarding staff areas including salary and employee performance. Furthermore, he is responsible for determining strategies for increasing revenue by analyzing opportunity costs, performing cost-benefit analysis of supply options, and analyzing market demand to determine pricing. [The beneficiary] is responsible for continued improvements in productivity, and efficient and timely utilization of personnel and product resources. He is also responsible for the development of short and long-range operating forecasts, insuring that projections are realistic in relation to human, financial and material resources, and reviewing the forecasts as necessary.

\* \* \*

In his role as President, [the beneficiary] supervises and controls the Business Administrator, who supervises the Human Resources Manager and the Chef. The Chef, in turn, supervises the Floor Supervisor and Waitstaff. [The beneficiary] supervises the work of the Business Administrator in evaluating the performance of those supervised at every level; to set policy for all staff; to determine evaluation metrics for each level; and to ensure that restaurant policy is followed in every aspect of our work.

\* \* \*

[The beneficiary's] managerial responsibility includes setting personnel policies, and to hire, promote, and terminate personnel as appropriate.

\* \* \*

As President, [the beneficiary] has direct responsibility for the day-to-[-]day operations. This authority includes responsibility for overseeing the day-to-day operation and to act on his own direction to ensure the goals of the function are met in a timely and effective manner.

His responsibilities in this position include supervising and determining salary for employees at all levels; managing operating costs; coordinating the quality control process; planning the advertising campaigns; developing and administering the business operating plan and budget requirements; generating means of increasing revenue; and investigating new business opportunities in such fields as catering, sales of prepared foods.

In a request for evidence dated March 20, 2006, the director instructed the petitioner to describe the beneficiary's duties with the foreign entity in greater detail and to supplement its description with an estimate of the percentage of time the beneficiary dedicated to each specific duty. The director also requested a detailed organizational chart for the foreign entity that corresponds with the beneficiary's period of employment abroad. The director noted that the chart should identify all employees, their job titles and include descriptions of their job duties.

In a response dated May 15, 2006, the petitioner provided the following description of the beneficiary's duties as president of the foreign entity:

- Directed and coordinated activities of Mexican entity, set up policies for all aspects of its operation. In this capacity, he was responsible for setting up short-term and long-term goals for the company to achieve, making sure that the goal was met by the end of the fiscal year, and implementing the goals when necessary. – 15%
- Directed day-to-day Mexican entity operations, directed budget and operating cost, conducted research to increase revenue by analyzing opportunity and costs, performing cost-benefit analysis of supply options, and analyzing market demand to determine pricing. In this capacity, he reviewed daily reports, made recommendations regarding food product and services. – 15%
- Determined the criteria used to evaluate the performance of all staff at every level; trained, evaluated and hired new employees. In this capacity, he established the minimum standards for conducting evaluations, promoted employees doing good work, and trained new hires according to the company standards. – 10%
- Supervised and managed the General Manager, who in turn, supervised the chefs and floor supervisors, who, in turn, supervised the waiter staff. In this capacity, he held daily meetings with the manager to discuss how to provide better customer services, maintain food quality and evaluate employee performance. – 10%
- Analyzed operation to evaluate performance of company and staff and to determine areas of cost reduction and program improvement. In this capacity, he met with chefs and waiter staff regarding the kind foods [sic] that different customers prefer and made necessary recommendations. 10%
- Coordinated the quality control process, made decision about product selection and sourcing. In this capacity, he enforced the regulations relating to food products and services. He ordered fresh food possible from the reliable local markets. – 10%
- Planned [sic] the advertising campaigns, investigated new business opportunities in such fields as catering, off-site sales, and private events. In this capacity, he presented their food products to local markets and attracted new customers by delivering handouts. – 10%
- Developed/administrated the business operating plan and budget requirements. In this capacity, he attended business conventions, compared food prices with other competitors, and attended business events to seek out ways to increase new food products, revenues, and business opportunities. – 10%
- Generated means of increasing revenue. In this capacity, he served daily promotional menu to attract new customers with different interests. – 5%.
- Conducted promotion of prepared food. In this capacity, he held sales events, provided free food samples and other promotional food product to customers. – 5%

The petitioner provided an organizational chart for the foreign entity, which indicates that the beneficiary, as president, supervised an administrator, who in turn supervised a manager and a chef. The chart shows that the chef supervises a floor supervisor, who in turn supervised two waitresses. The total number of employees, including the beneficiary, is seven.

The petitioner stated that the administrator: directly supervises all employees; ensures the schedule is fully functional; is in charge of quality control; improves productivity and efficient and timely utilization of personnel and product resources; and takes over the president's duties as necessary. The petitioner further indicated that the manager: makes sure that all employees are working to their full potential, in timely way;

supervises quality of products and customer services; and manages the chef and the floor supervisor. The petitioner stated that the floor supervisor makes sure that waiters serve all orders in a timely fashion, checks that orders are correct and verifies that all customers are satisfied. Finally, the petitioner indicated that the chef cooks all meals and "supervises all products are made to perfection."

The director denied the petition on October 26, 2006, concluding that the petitioner had failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director acknowledged the evidence submitted, but observed that the petitioner did not indicate who performed such routine duties as dishwashing, operation of the cash register, or cleaning. The director also determined the the duties of the four supervisory positions overlap. The director determined that "the evidence submitted is not persuasive that the apparently small operation warranted a truly executive position as well as an administrator, a manager and a supervisor."

On appeal, counsel asserts that the size of the foreign company should not be determinative in assessing whether the beneficiary was employed in a managerial capacity, and that the director should instead take into account the reasonable needs of the organization if considering staffing levels. Counsel reiterates the beneficiary's position description and states that the petitioner has established that the beneficiary was responsible for the overall management of the organization, was responsible for its overall direction, and served as the senior most decision maker. Counsel asserts that the foreign entity's administrator, manager and floor supervisor were responsible for the day-to-day operations, thus allowing the beneficiary as president to focus on "large scale issues related to the business's direction."

Counsel further contends that the director's determination that the foreign entity contained too many managers for a small business was incorrect. Counsel states that the director did not acknowledge that the various employees are part of a hierarchical organization, with no significant overlap between their duties. Counsel explains that there are three tiers of supervisory employees subordinate to the beneficiary and that "the specific managerial duties are delineated among the layers of management."

Finally, counsel acknowledges the director's observation that the position descriptions submitted for the subordinate employees appeared to lack such fundamental duties as dishwashing, operation of the cash register, and cleaning. Counsel asserts that the director "provides no explanation as to the connection between the omission of menial tasks performed by some employees and the beneficiary's managerial position."

Upon review, the petitioner has not established that the beneficiary was 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. § 204.5(j)(5).

While the petitioner and counsel submitted lengthy job descriptions, neither clearly addresses the specific managerial or executive job duties the beneficiary performed as president and owner of the foreign entity. For instance, in the response to the director's request for evidence, the petitioner allocates the beneficiary's time among such vague job responsibilities as "directed and coordinated activities of Mexican entity"; "was responsible for setting up short-term and long-term goals for the company"; "directed day-to-day Mexican entity operation"; "analyzed operation to evaluate performance of company and staff"; "coordinated the quality control process"; "directed budget and operating cost"; "developed/administrated the business

operating plan and budget requirements"; and "generated means of increasing revenue." These broad statements convey little understanding of what specific tasks the beneficiary performed on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

Furthermore, some of the beneficiary's duties suggested his direct involvement in the foreign entity's purchasing, marketing, promotion, advertising and financial functions. For example, the petitioner noted that the beneficiary "conducted research to increase revenue by analyzing opportunity costs, performing cost-benefit analysis of supply options, and analyzing market demand"; "enforced the regulations relating to food products and services"; "ordered fresh food possible from the reliable local markets"; "planned the advertising campaigns"; "presented food products to local markets and attracted new customers by delivering handouts"; "compared food prices with competitors"; "served daily promotional menu to attract new customers with different interest"; and "conducted promotion of prepared food." Based on the petitioner's statements, the beneficiary himself developed and implemented the company's marketing, advertising and promotional programs, and purchased food to be prepared in the restaurant. Furthermore, although the petitioner stated that the beneficiary directed "budget and operating cost" and other areas of the petitioner's finance function, the petitioner did not indicate that any of the lower-level employees were involved in performing routine tasks associated with the business's financial operations, such as banking, bookkeeping, cash management, and accounting functions.

Overall, the job description is composed of vague, conclusory assertions regarding the beneficiary's claimed managerial capacity, and statements which indicate that the beneficiary is directly responsible for a number of non-qualifying duties, rather than supervising the performance of these duties through subordinate personnel. The definitions of executive and managerial capacity have two specific requirements. 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 beneficiary evidently exercised authority over the foreign entity as its owner and president, the record is insufficient to establish that his actual duties were primarily managerial or executive in nature. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

As additional evidence of the beneficiary's purported employment as a manager or executive, counsel notes the beneficiary's managerial authority over several tiers of managerial or supervisory employees. The petitioner has not demonstrated that the beneficiary, as a personnel manager, was primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner has provided inconsistent descriptions of the foreign entity's organizational hierarchy and reporting structure. The petitioner initially stated that the beneficiary supervised the business administrator, who supervised the human resources manager and the chef. The petitioner indicated that the chef in turn supervised the floor supervisor and wait staff. The organizational chart submitted in response to the request

for evidence depicted this same structure, although it shows a "manager" instead of a "human resources manager." However, the description of the beneficiary's duties submitted in response to the request for evidence stated that the beneficiary supervised the "General Manager," who in turn supervised the chefs and floor supervisors, who then supervised the wait staff. On appeal, counsel describes a five-tier structure in which the beneficiary supervises an administrator who supervises a manager, who supervises the chefs and floor supervisor, who supervises the waitresses. 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). The petitioner's inability to provide a consistent description of the foreign entity's staffing structure raises questions regarding the credibility of the information provided. The AAO acknowledges that the beneficiary has the authority to hire and fire personnel, and may oversee one or more supervisory personnel. However, since the petitioner indicated that the beneficiary devotes approximately 20% of his time to supervisory duties, he could not be considered to be employed primarily in a managerial capacity based on these duties alone.

The AAO notes that the record is also unclear as to the date of the organizational chart submitted, specifically, whether the employees listed represent the staffing of the foreign entity at the time the beneficiary was employed abroad or its current staffing levels. While the beneficiary was granted L-1A status to work for the petitioning company in July 2004, the beneficiary stated on his Form G-325A, Biographic Information, that he has resided in the United States since January 2001. Therefore, unless the submitted chart depicts the foreign entity's 2000 staffing levels, its probative value would necessarily be limited. As there are no payroll records or other evidence submitted in support of the foreign entity's claimed staffing levels, and such evidence was not requested by the director, the AAO notes this deficiency for the record.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The AAO notes that although counsel identifies on appeal USCIS' obligation to consider the petitioner's reasonable needs in conjunction with the size of its staff, counsel does not specifically demonstrate that the claimed seven-person staff would meet the foreign entity's reasonable needs.

There is no indication in this matter that the director did not consider the reasonable needs of the organization. On the contrary, it appears the reasonable needs were considered, and the director concluded that the staffing structure described would not meet the reasonable needs of a business operating a restaurant. It is important for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The foreign entity operates a restaurant of unknown size and operating hours. As a restaurant, it reasonably requires employees to purchase food, kitchen equipment and supplies and maintain inventory of these items, to prepare and cook food, to store ingredients, to maintain the cleanliness of the kitchen, to wash dishes and cooking utensils, to serve food to customers and ensure customer satisfaction, to clear and clean tables, and to ring up customer sales on a cash register. In addition, the petitioner requires someone to perform

administrative functions related to personnel, taxes, licensing, as well as someone to handle the company's routine financial operations, such as banking, bookkeeping, paying bills, etc., and someone to advertise and promote the restaurant. The petitioner states that it employs the beneficiary as president as well as an administrator who "supervises all employees" and is "in charge of quality control," a manager who "makes sure that all employees are working to their full potential" and "supervises quality," a floor supervisor who supervises two waiters, and one chef. The job descriptions for administrator, manager and floor supervisor include duties related to personnel supervision only, so there is no evidence to support a conclusion that they assist the beneficiary with any routine purchasing, marketing, promotion, advertising, administrative or financial functions, all of which are included in the beneficiary's position description.

As noted by the director, the petitioner does not claim to employ a dishwasher, cashier, or a cleaning or maintenance staff person. On appeal, counsel acknowledges the director's observation, but states that it is irrelevant to a determination regarding the beneficiary's employment capacity. Counsel suggests that the petitioner merely omitted certain menial tasks from the subordinate employee's position descriptions, but does not further explain who performs these duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO disagrees that this evidence is irrelevant. The petitioner must establish through submission of documentary evidence that the beneficiary was relieved from performing the operational tasks of the foreign entity's business, and it must submit sufficient evidence to corroborate the claimed organizational hierarchy of the foreign entity.

Further, in addition to the absence of staff to perform these duties, the petitioner has not established how one chef is able to handle all the food preparation and cooking tasks of the foreign entity's restaurant. A restaurant that is operating at a level requiring four layers of managerial and supervisory personnel would reasonably require more than one person working in its kitchen. The petitioner has not justified any reasonable need for four layers of managerial and supervisory staff to supervise two waitresses and one chef. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. Here, the petitioner's assignment of managerial or supervisory job titles to four employees of a restaurant with seven claimed employees is simply not credible.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this

essential element of eligibility, as the petitioner's description of the beneficiary's duties falls significantly short of establishing that he performed primarily managerial or executive duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Here, the lack of staff to perform the routine duties inherent to operating a restaurant, when considered with the petitioner's representations that the beneficiary himself is responsible for purchasing, marketing, and advertising functions, prohibits a finding that he was employed in a qualifying capacity with the foreign entity.

The petitioner has not submitted evidence on appeal to overcome the director's determination with respect to this issue. Accordingly, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a managerial or executive capacity. In a letter dated December 15, 2005, the petitioner provided a description of the beneficiary's duties as president of the U.S. entity. The description was essentially identical to that provided for the beneficiary's foreign position and thus will not be repeated here. With respect to the staffing structure of the U.S. entity and the beneficiary's supervisory duties, the petitioner stated:

In his role as President, [the beneficiary] will supervise and control the General Manager, who supervises the Day Shift Manager and the Night Shift Manager. These managers, in turn, supervise the chefs and floor supervisors. The floor supervisors themselves supervise the wait staff. [The beneficiary] will supervise the work of the General Manager in evaluating the performance of those he supervises at every level; to set policy for all staff; to determine evaluation metrics for each level; and to ensure that restaurant policy is followed in every aspect of our work.

On March 20, 2006, the director issued a request for evidence and instructed the petitioner to describe the beneficiary's proposed duties in greater detail, and to supplement the description with an estimate of the percentage of time the beneficiary would devote to each specific duty. The director also requested a detailed organizational chart for the petitioning company, showing its current structure. The director requested job titles and job duties for each employee, as well as a recent schedule that clearly indicates on which days and what hours each employee works. Finally, the director requested copies of each employee's IRS Form W-2 for 2005, and a copy of the petitioner's 2005 tax return.

In response, the petitioner submitted a list of twelve duties and the percentage of time the beneficiary would devote to each duty. The duties described were very similar to those described for the beneficiary's foreign position, and therefore will not be repeated here. The petitioner indicated that the beneficiary would supervise and manage the general manager, who in turn supervised the chefs and floor supervisors, who in turn supervise the wait staff.

The petitioner submitted an organizational chart for the U.S. company, which depicts the beneficiary as "executive director" supervising the general manager. The chart shows that the general manager supervises a manager/floor supervisor and a manager. The manager is depicted as supervising a floor supervisor and four waitresses, while the manager/floor supervisor supervises two chefs and three kitchen staff. The petitioner

provided copies of 2005 IRS Forms W-2, Wage and Tax Statement for all 14 employees depicted on the organizational chart, indicated total salaries and wages of just over \$100,000, excluding wages paid to the beneficiary and the general manager as officers. As noted by the director, several of the employees' wages suggested that they may have worked on a part-time basis. For example, the two chefs received wages of \$3,600 and approximately \$9,300. The floor supervisor received only \$4,056, and according to her W-2, she received income from tips, suggesting that she performed the duties of a waitress. Two of the waitresses received \$1,500 and \$226.80, respectively. The petitioner provided a brief position description for each employee named on the organizational chart. The petitioner also provided an employee schedule for the week of April 10, 2006, which indicates that all 14 employees named on the organizational chart work on a full-time basis. The schedule shows that the restaurant is staffed from 9:00 a.m. until 9:00 p.m. daily.

The director issued a second request for evidence on May 30, 2006. The director noted that based on the Forms W-2 submitted, "several of the employees were paid very little and/or worked very few hours." The petitioner asked the petitioner to explain, and to support any explanations with documentary evidence. The director also requested a copy of the petitioner's 2005 corporate income tax return, as the petitioner had not submitted this document in response to the first request for evidence.

In a response dated July 12, 2006, counsel for the petitioner noted that "it seemed not all of the W-2s were initial [sic] submitted." The petitioner submitted a "complete set" of W-2s for 2005 for 30 employees. The petitioner also provided a copy of its 2005 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates that the petitioner paid \$263,783 in salaries and wages, had gross sales of \$844,551 and taxable income of -\$42,510.<sup>1</sup> Counsel noted that a lot of positions are temporary due to the cyclical nature of the restaurant business, and that since spring and summer months are busier than fall and winter months, "several employees worked less overall hours during the course of the year."

The petitioner also submitted a letter dated June 27, 2006, which stated:

Be advised that our company here in the United States is experiencing a recent growth, including a construction of a new Restaurant. We have temporary positions due to the nature of our business. Normally the summer months are busier than the rest of the months. We are also hiring to train them for the new Restaurant. In general, those are the main reasons why you see very little and few hours.

The petitioner re-submitted the same organizational chart provided with response to the previous request for evidence, but a new employee list, which includes 24 employees. The ten additional employees include three kitchen staff who come in before the restaurant opens to prepare food and stay late to clean up kitchen work areas, one dishwasher, five additional waitresses who either come in early or stay late to perform cleaning or setup duties, and one person who cleans floors, tables and restrooms. The petitioner re-submitted its staff schedule for the week of April 10, 2006, which included an additional page identifying the ten employees discussed above. The schedule shows that each worked four or five eight-hour shifts between the hours of 5:30 a.m. and 1:00 a.m.

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<sup>1</sup> The AAO notes that in 2004, the petitioner paid \$80,585 in salaries and wages, achieved gross sales of \$674,675, and reported taxable income of \$20,232. In 2003, the petitioner paid \$70,580 in wages, achieved gross sales of \$587,908, and had taxable income of \$366.

The director denied the petition on October 24, 2006, concluding that the petitioner had failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director questioned the credibility of the documentation submitted in response to the director's second request for evidence, noting that the ten new employees on the employee list were not listed on the organizational chart, and it is not clear why such employees were not mentioned previously. The director acknowledged the petitioner's assertion that some of the Forms W-2 were inadvertently omitted, but noted that the petitioner had not adequately explained the absence of ten employees from the organization chart, the employee list, and the employee work schedule. The director concluded that the evidence as a whole was unpersuasive, given these unexplained inconsistencies.

On appeal, counsel for the petitioner asserts that the director was incorrect to question the credibility of the submitted evidence. Counsel notes that the petitioner stated that some of the Forms W-2 were inadvertently omitted, and asserts "in this matter, the petitioner reconciled the inconsistency by stating that he forgot to submit all of the W-2s." Counsel also claims that the director incorrectly questioned the omission of certain employees on the petitioner's organizational chart, emphasizing that the petitioner explained that the nature of the business is cyclical, with less business activity during the fall and winter months, and resulting in some employees working fewer hours during the course of the year. Counsel further states:

The petitioner has explained that many of his employees are temporary and therefore would not appear on an organizational chart, work schedule or list because at the time that these items were being created, these individuals would not be employed by the petitioner. The first RFE asks the petitioner to provide the Service with a detailed organizational chart, noting "this chart should illustrate the **current structure** with the addition of the permanent proposed position for the beneficiary." The petitioner provided the organizational chart denoting all employees working at that time. The Service never asked the petitioner to present an organizational chart denoting all of the individuals employed in each capacity during the course of the year. Therefore the Service is incorrect when questioning the credibility of the submitted evidence when its' [sic] conclusion is based on documentation that was never requested.

Counsel further explains that the employee list submitted in response to the second request for evidence, which included 24 employees rather than 14 employees, included employees who were not part of the current structure at the time of filing.

Upon review, counsel's assertions are not persuasive. The petitioner has not adequately resolved the significant discrepancies noted by the director with respect to the petitioner's staffing levels. At the time of filing, the petitioner claimed to employ 16 employees but offered no evidence to document the positions they held, the duties they perform or the number of hours they work on a weekly basis. The record still contains no clear evidence of who was employed by the petitioning company as of the date of filing, January 26, 2006.

In responding to the request for evidence on May 15, 2006, the petitioner indicated that it had 14 employees, provided an organizational chart identifying their positions, an employee list indicating their duties, and an employee work schedule for the week of April 10, 2006, indicating that each employee worked five eight and a half to nine and a half hour shifts during that week, with no employees working earlier than 9:00 a.m. or later than 9:00 p.m. The Forms W-2 submitted showed that many of the petitioner's employees, including both of its chefs, did not work on a full-time basis in 2005. However, the total amount of wages and salaries

paid to the petitioner's employees, approximately \$100,000, was consistent with the petitioner's growth in sales and payroll over the previous two years, based on the information contained in the petitioner's 2003 and 2004 tax returns.

In the second request for evidence, the petitioner was asked to explain why many of its employees appeared to have worked limited hours and was instructed to provide documentary evidence in support of its explanation. The petitioner's explanation that some positions are temporary, and that some employees work fewer hours during slower business cycles, i.e. winter months, is reasonable. However, the documentation submitted by the petitioner in an attempt to clarify its staffing levels was not consistent with its claims. The petitioner presented an additional 16 Forms W-2 for 2005, and stated that it inadvertently omitted more than half of the W-2s for employees who worked for the company in 2005. The new Forms W-2 and the petitioner's Form 1120 for 2005, which was requested in the March 2006 request for evidence and not submitted, show total wages of \$263,783, a 300% increase compared to the previous year. In contrast, the petitioner's gross sales increased by approximately 20% compared to 2004. The petitioner's 2005 tax return is not signed by the petitioner and there is no evidence that it was in fact submitted to the IRS. The petitioner mentioned in its June 27, 2006 letter a recent growth, construction of a new restaurant, and the need to hire new employees to be trained for the new restaurant, but did not submit documentary evidence related to the new restaurant or indicate that these activities accounted for the extraordinary increase in employees for 2005. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel states on appeal that the new Forms W-2 and employee list were submitted in response to the director's request for an explanation concerning the employees' salaries and hours worked, thus it appears that counsel is representing the second employee list as representing the company's 2005 structure. However, the AAO notes that the evidence was not presented in this way. The petitioner clearly added ten employees to the previously provided work schedule for the week of April 10, 2006 so it was reasonable for the director to conclude that the petitioner intended to establish that it employed 24 full-time employees as of that date, not 14 as previously indicated. Most of the new employees added had duties that were slightly different from those performed by the other employees, and worked extended hours either before opening of the restaurant or after its closing, and thus extended the work day by seven hours. The record does not contain any evidence related to the business, such as a menu or copies of advertisements, which would verify the actual operating hours of the business. Nor did the petitioner submit documentary evidence which would have definitively established which employees were working for the company at the time of filing, namely, its state quarterly wage reports for the first two quarters of 2006. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165

Accordingly, counsel's assertion that the employee list submitted in response to the second request for evidence was intended to represent some other period in time, either prior to the date of filing, or contemporaneous with the date of the response in June 2006, is not persuasive and does not resolve the inconsistencies noted above. Counsel does not address the petitioner's submission of two different employee schedules for the same week. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, 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 its 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).

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*, at 591-92. 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. Based on the discussion above, the AAO concurs with the director's determination that there was sufficient reason to question the credibility of the petitioner's evidence concerning its staffing levels.

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).

Here, the petitioner's description of the beneficiary's U.S. position was essentially identical to that provided for his position with the foreign entity. As discussed above, the description was composed of conclusory assertions regarding the beneficiary's claimed managerial capacity, and statements which indicate that the beneficiary is directly responsible for several non-managerial functions, including promotion and advertising, finances and purchasing, rather than supervising the performance of these duties through subordinate personnel. The definitions of executive and managerial capacity have two specific requirements. 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).

While the beneficiary evidently exercises authority over the U.S. entity as its president, the job description submitted was insufficient to establish that the majority of his day-to-day duties would be managerial or executive. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. Counsel maintains that, at the time of filing the petition, the petitioner provided "clear and credible evidence" demonstrating that the beneficiary directed the activities of a general manager, two managers, a chef, a floor supervisor, waitresses and kitchen staff. As noted above, the petitioner did not submit any documentary evidence of its staffing levels at the time of filing, so it is unclear to what evidence counsel is referring. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also suggests that the petitioner's response to the first request for evidence, including the organizational chart, employee list, and employee work schedule depicting 14 employees, represented the petitioner's staffing levels at the time of filing, notwithstanding the fact that the employee schedule was dated approximately three months after the filing date. Regardless, as discussed above, the employee list was subsequently altered and is not probative.

The only documentary evidence submitted to corroborate the employment of the claimed subordinates are the petitioner's 2005 Forms W-2. Of these employees, the beneficiary, the general manager, the manager/floor supervisor, the manager and one waitress are the only employees whose wages were consistent with full-time or near full-time employment. Although the petitioner claims that 16 other employees worked for the U.S. company in 2005, the AAO notes that none of the employees were described as serving in the first-line supervisory positions of chef or floor supervisor. The petitioner has provided conflicting information regarding its operating hours; however, if the restaurant is really staffed between the hours of 5:30 a.m. and 1:00 a.m., the fourteen employee staff composed of five full-time and nine part-time employees is unlikely to meet the petitioner's reasonable needs. According to the job descriptions provided in the initial employee list, the petitioner did not claim to employ any cashiers, dishwashers, cleaning staff/bus boys, or employees to perform opening and closing duties. It is reasonable to assume, and has not been shown otherwise, that the petitioner's managers and supervisors would need to participate in the day-to-day operational tasks of the restaurant in order to keep the restaurant open for business. Again, the petitioner's failure to submit clear documentary evidence of the number of employees working at the time of filing, and evidence of wages paid to them, is particularly detrimental to the petitioner's claims that the beneficiary supervised a managerial staff and sufficient lower-level personnel to relieve him from participating in non-qualifying tasks.

The petitioner also did not indicate that any of the beneficiary's subordinates are responsible for purchasing food, equipment or supplies, handling the company's day-to-day finance, banking and bookkeeping tasks, handling payroll and other administrative functions or advertising and promoting the restaurant. As noted above, the petitioner's description of the beneficiary's duties, considered in the context of the totality of the record, supports a conclusion that he personally performs a number of these operational and administrative tasks, and precludes a determination that his duties are primarily managerial in nature.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO recognizes that CIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary for employment as its president. In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant 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 L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

Moreover, 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. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103.

Furthermore, 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). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant petition.

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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