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FILE: WAC 06 114 52638 Office: CALIFORNIA SERVICE CENTER Date: **APR 10 2007**

IN RE: Petitioner:
Beneficiary:



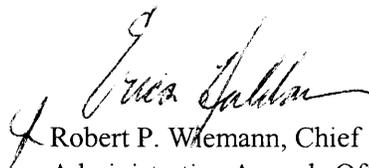
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Nevada company, states that it is engaged in the restaurant business. The petitioner claims that it is an affiliate of the subsidiary of Si Senores Retaurantes, EIRI, located in Peru. The beneficiary was initially granted L-1A status for a three-year period and the petitioner's subsequent request to extend the beneficiary's L-1A status was denied. The petitioner now seeks to employ the beneficiary in the position of chief financial manager for a two-year period.

The director denied the petition on June 14, 2006, concluding that there is insufficient evidence to demonstrate that the beneficiary will serve in a primarily managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal on July 10, 2006. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the decision is "unsubstantiated and most likely based on a critical oversight of the submitted documentation." The petitioner asserts that the position offered to the beneficiary satisfies the criteria for a position in a managerial and executive capacity. The petitioner contends that the beneficiary has a direct interest in running every aspect of the business as a "chief decision maker" for the company. The petitioner also states that the beneficiary has previously been granted L-1A status. The petitioner submits a brief and documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity by the U.S. entity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on February 27, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of chief financial manager. In a letter of support dated January 27, 2006, the beneficiary's proposed duties in the United States, and the duties of the U.S. entity's employees, are described as the following:

As Chief Financial Manager, [the beneficiary] is responsible for directing the preparation of financial reports that summarize and forecast the organization's financial position. [The beneficiary] analyzes the financial information prepared by seven different supervisory employees.... Most full-service restaurants contain a management team of a general manager (Operations Manager in [the U.S. entity]), one more assistant managers (Restaurant Manager in [the U.S. entity]), executive chefs, (Kitchen Chief at [the U.S. entity]) and shift supervisors (Dining Saloon Chief). Each position has varying degrees of responsibilities and functions.

Dining Saloon Chiefs (shift supervisors) are responsible for training and supervising the activities of the wait staff. They micro-manage the wait staff during restaurant hours by ensuring that the employees work as a team to meet restaurant standards are met [sic]. They are responsible for monitoring orders in the kitchen and solve problems with food delays. They are also responsible for monitoring the wait staff, and referring them to the Restaurant Manager for praise or criticism. Each Dining Saloon Chief is also required to submit to the Restaurant Manager financial tools of each waiter/waitress at the end of their shift.

Restaurant Manager (assistant manager) oversees the activities of the dining saloon chiefs. The restaurant manager is responsible for the adequate training and supervising of wait staff, as well as the Dining Room Chiefs. The restaurant manager must analyze, complete, or correct the financial information submitted by the Dining Saloon Chiefs before preparing daily reports that are submitted to the Operating Manager.

Operating Manager (General Manager) is responsible for the day-to-day activities of the restaurant. The operating manager is responsible for hiring and firing wait staff, chefs, and other personnel in the restaurant. The operating manager evaluates the Executive Chefs requests for supplies, suggestions for menu options, and proposes various specials or limited time specials. The operating manager oversees scheduled deliveries and plans routine services for the dining room areas. The Kitchen Chief reports directly to the Operating Manager.

Kitchen Chief (Executive Chef, Head Chef, Head Cook) is responsible for managing, and supervising 8 cooks and 3 dishwashers. The kitchen chief monitors and maintains a highly efficient kitchen by training new cooks and dishwashers, maintaining a high standard of excellent cooking, and keeping a well stocked, but not overstocked, kitchen. The kitchen

chief prepares and submits inventory requests to the Operating Manager, who reviews and revises the requests before submitting the requests to the Warehouse Manager.

Warehouse Manager is responsible for the regular maintenance and functioning of the warehouse. Once a request for inventory is submitted, the warehouse manager determines which products are stored and which products must be re-order [sic]. The warehouse manager analyzes and revises the acquisition request and submits the order to the Financial Manager.

Financial Manager (Chief Financial Manager) is responsible for approving all financial transactions of the company as reported through the various activities described above. The financial manager reviews all financial documents, from payroll to purchasing inventory, and makes recommendations or approves the requests. The financial manager analyzes the flow of cash and receipts and disbursements to meet the business's financial goals. The financial manager reviews all requests for finances support from the Marketing Director to determine the viability of any marketing schemes. Basically, the financial manager directs and supervises the financial activities of the restaurant focusing on maximizing income while reducing expenditures.

The Chief Financial Manager does not produce or manage a product of the company. The duties of providing forecasts, financial goals, analyzing reports, adjusting budgets, and preparing financial reports in combination with the duty of training all high-level managers on bookkeeping procedures, payroll, and budgeting go above and beyond simply performing tasks necessary to produce a product or provide services.

* * *

Our Chief Financial Manager has the authority to hire and fire personnel or recommend other employees who are responsible for any cash or credit financial transactions. The Chief Financial Manager does not train wait-staff on proper procedures for serving food, but the Chief Financial Manager implements policies of financial transactions and record keeping that are then conveyed to the other manager for carrying out training and management. The Chief Financial Manager is solely responsible for the day-to-day financial operations that cannot be done by a Marketing Manager, Shift Manager, General or Assistant Manager. The Chief Financial Manager is far from a front-line manager, and does in fact manage the work of professionals.

The petitioner also submitted a letter stating that the U.S. entity plans to open a second restaurant and the beneficiary will assist with this process.

The petitioner submitted an organizational chart of the U.S. entity. The chart indicated that the president of the company supervises the beneficiary as the financial manager and treasurer. The chart also indicated that the beneficiary will supervise one warehouse employee and one secretary. The chart also shows that the beneficiary will assist the president in supervising the marketing manager, the operating manager, who in turn supervises the restaurant manager, who supervises the

three dining saloon chiefs, nine waiters, and the kitchen chief who supervises 8 cooks and 3 dishwashers.

The petitioner also submitted a document outlining the beneficiary's responsibilities as Chief Financial Manager as follows:

1. Elaborating and updating of the company's Financial Plan (25% of her working time). [The beneficiary] provides the five-year forecast for income, expenses, and funding sources. She has to continuously adjust her planning to allow for the funding at various stages of the company's growth. She has to explain the rationale and assumptions used to determined [sic] the estimates. She based her assumptions on industry/historical trends.
2. Establishment of the financial goals and policies of the company. (50% of her working time). [The beneficiary] every December, provides [REDACTED] and the other member of the management team, as [REDACTED] and [REDACTED], with the main financial goal for the next year. Every week, each department manager has to provide [the beneficiary] with a report of occurrences in his department, and also with the financial requariment [sic] for his department for the next week or month. [The beneficiary] analyses the reports and decide whether to approved [sic] or not the purchase. She also provides the month by month forecasted sales and expenses for reaching the main goal for the year. Every month, she adjusts her forecasts accordingly to the actual result of the past month. Based on those results [the beneficiary] establishes the new monthly objectives, or the new policies for reaching the main goal.
3. Establishment of the Strategic Planning. (25% of her working time). Together with the Company's Financial Plan and the establishment of the financial goals and policies of the company, [the beneficiary] is responsible for determining the strategies for obtaining and using resources to achieve those goals. [The beneficiary] determines the best way to use resources. She has the power of decision to adjust the budgets or to redirection funds to different areas of the company. She decides whether the company needs to spend more money in Marketing (advertising or promotional material) or to spend more money in quality and cost control.
4. Elaboration of Financial Reports. At the end of the year, [the beneficiary] has to provide the Presidence [sic] of the corporation a complete Financial Report. It includes a complete analisys [sic] of the Balance Sheet, the Financial Statements, and a cash flow report.

On March 8, 2006, the director requested additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested: (1) a copy of the U.S. company's organizational chart indicating the current names of all executives, managers and supervisors, and the names, job titles, job duties, educational level, annual salaries/wages for all employees under the beneficiary's supervision; (2) a copy of the diplomas for the employees who have a bachelor's degree or higher, and an explanation as to how their education is related to the duties performed;

(3) a more detailed description of the beneficiary's proposed duties in the U.S., including an explanation as to who is responsible for the actual preparation of the financial reports; (4) copies of all financial reports for 2004 and 2005; and, (5) copies of the U.S. company's payroll summary, Forms W-2 and W-3 for 2005.

In its response dated May 31, 2006, the petitioner submitted a letter in response to the director's request for evidence and reiterated the proposed job duties to be performed by the beneficiary. In addition, the petitioner stated that the U.S. entity has opened a second restaurant in Las Vegas, Nevada. The petitioner re-submitted the original organizational chart for the U.S. entity. The petitioner also submitted a list of employees supervised by the beneficiary that includes the secretary/office assistant, one employee in warehouse and purchasing, one operating manager and one employee in marketing.

On June 14, 2006, the director denied the petition. The director noted that the petitioner did not respond to the request for evidence regarding the issue as to who is actually responsible for the preparation of the financial reports. The director stated "as there is no employee responsible for preparing budget, financial reports, investment of funds, managing associated risks and cash flow and execution of capital-raising strategies, these duties must be performed by the beneficiary herself." In addition, the director noted that it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day financial services for the business.

On appeal, the petitioner further explains how the position offered to the beneficiary is executive and managerial in nature and is not a first-line supervisor position. The petitioner asserts that the beneficiary is responsible for "managing the entire organization" and directly supervises three managers who are responsible for "three distinct departments of the restaurant." In addition, the petitioner states that the beneficiary has the "final say in all personnel actions based on reporting and recommendations from each of the section managers." The petitioner further states that the beneficiary "establishes all goals for the organization, ranging from sales targets to timeliness in service to service quality and customer satisfaction," and she is the "top level executive after [the president]." The petitioner also states that the beneficiary is a "chief decision maker" of the U.S. entity. In addition, the petitioner contends that CIS should not discriminate against small and medium sized companies. The petitioner also states that the beneficiary has already been approved for L-1A classification and satisfied all the requirements at that time.

On appeal, the petitioner submitted an expert opinion letter regarding the position of Chief Financial Manager; copies of the lease contract for the second restaurant; copy of the first sales tax payment for the new restaurant location; and, a copy of a temporary liquor license for the second restaurant location.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the instant matter, the job description submitted by the petitioner provides little insight into what tasks the beneficiary will perform or how the beneficiary will allocate her time among various responsibilities on various duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicated that the beneficiary will spend 25 percent of her time to "elaborating and updating of the company's Financial Plan;" and provide the "five-year forecast for income, expenses, and funding sources;" "adjust her planning to allow for the funding at various stages of the company's growth;" and "explain the rationale and assumptions used to determined [sic] the estimates." According to the evidence submitted by the petitioner, it does not appear that the U.S. company has hired any employees to handle the accounting and prepare the financial plan and reports for the company. Since the U.S. company lacks employees to handle the financial development functions, and for the beneficiary to direct and coordinate, the record raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner's finance duties such as the accounting, financial statements and reports, and forecast duties. Instead, it appears that the beneficiary is performing all aspects of the petitioner's day-to-day financial function, duties which have not been shown to be managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. 593, 604 (Comm. 1988).

The petitioner also indicated that the beneficiary will spend 50 percent of her time to the "establishment of the financial goals and policies of the company." This responsibility includes informing the president and other managers of the "main financial goal for the next year;" review and analyze the department financial reports and "decide whether to approve or not purchase;" "provides the month by month forecasted sales and expenses for reaching the main goal for the year" and "establishes the new monthly objectives, or the new policies for reaching the main goal." This description, while it describes the beneficiary's broad responsibilities, does not provide an understanding of what duties the beneficiary performs on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Again, as the beneficiary is the only employee in the petitioner's finance department, it is reasonable to assume that her duties include a number of non-managerial tasks involving accounting, financial analysis, and preparation of financial reports.

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States. The petitioner did not submit the requested job description as requested by the director. Instead, the petitioner reiterated the job duties described in the original job description. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner

was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. For this reason alone, the appeal will be dismissed.

The record shows that as of the date of filing, the petitioner asserts that the beneficiary will control and direct subordinate managerial staff. The petitioner claims that the beneficiary will supervise the warehouse employee, the office secretary, the operating manager, the restaurant manager, the marketing manager, and the restaurant staff. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the marketing, operational, administrative, warehouse and restaurant management functions of the employees of the restaurant, who will be among the beneficiary's subordinates. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner claims that the beneficiary supervises the operations manager, the restaurant manager and the marketing manager. The petitioner also indicated that the U.S. entity has a president as the top manager of the organization, however, the petitioner did not describe the duties of the president who supervises all of the employees of the restaurant. Thus it is not clear how much of the beneficiary's time is actually spent on supervising the three managers when the president is also supervising the same employees. 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)).

In addition, according to the beneficiary's original job description, it appears that the beneficiary manages the financial functions of the company and will supervise the other managers regarding their financial reports, expenses, budget and accounting. As noted by the job description, the beneficiary is responsible for "providing forecasts, financial goals, analyzing reports, adjusting budgets, and preparing financial reports in combination with the duty of training all high-level managers on bookkeeping procedures, payroll, and budgeting," and is "solely responsible for the day-to-day financial operations that cannot be done by a Marketing Manager, Shift Manager, General or Assistant Manager." However, on appeal, the petitioner

indicates that the beneficiary is the "Chief Decision Maker" and "top level executive" of the company, and "directs the management of the entire organization." Thus, on appeal, it appears that the beneficiary's duties have been elevated from managing all financial functions of the company to managing the entire organization. On appeal, 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 the 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the beneficiary's job description is too vague to establish that she would perform primarily managerial or executive duties, and appears to include non-qualifying duties associated with the petitioner's day-to-day functions. The petitioner has not provided evidence that it employs any other employees, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the financial department. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations. Based on the foregoing discussion, the petitioner has not established the beneficiary will be employed in the U.S. in a managerial or executive capacity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. As noted above, the beneficiary will supervise the finance department and assist the president in supervising the operational functions of the restaurant, however, the beneficiary lacks the subordinate level of employees to direct and perform the non-managerial functions of the finance department. In the instant matter, the petitioner has not established evidence that the beneficiary will be employed in an executive capacity with the U.S. entity.

A company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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.

Furthermore, it is appropriate for 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.*

At the time of filing, the petitioner was operating as a restaurant with a gross annual income of \$751,320.58. The U.S. company employed the beneficiary as the chief finance manager who supervises a warehouse employee and one secretary within the treasury department. In reviewing the brief job descriptions of the employees at the U.S. entity, it appears that the beneficiary's subordinates are engaged in all of the administrative and operational tasks in preparing the specific departmental reports for the business. Based on the record of proceeding, the beneficiary's job duties include a number of non-qualifying duties that would reasonably preclude her from functioning in a primarily managerial or executive role. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the only employee in charge of managing the finance operations for the business. 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.

On appeal, the petitioner submitted an opinion letter from the associate dean of Portland State University regarding whether the position of Chief Financial Manager in the restaurant industry is an executive or managerial position. The expert opinion does not establish that the decision was based on an incorrect application of law or CIS policy. Instead, the letter states an opinion that is based on a review of the petitioner's documents. Although the letter indicates that the author reviewed the applicable immigration regulations, there is no information as to whether the author is an expert in these regulations. The textbook or common understanding of business terms will not supersede the statutory definitions; the applicable definition of manager and executive are contained in the statute at sections 101(a)(44)(A) and (B) of the Act.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Since the opinion offered here is not based on the critical statutory definitions, the opinion is not found to be persuasive.

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. It is the petitioner's obligation to establish however, through independent documentary evidence that someone other than the beneficiary performs the day-to-day non-managerial and non-executive tasks of the petitioning entity. Here, the petitioner has not met this burden. Accordingly, the appeal will be dismissed.

Counsel for the petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, 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). The prior approvals do not preclude CIS

from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.