

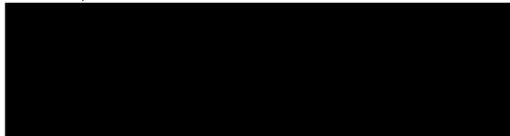


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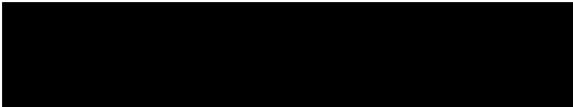
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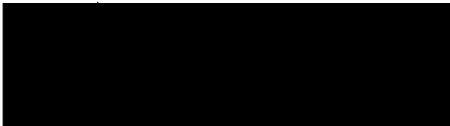


FILE: EAC 07 009 52268 Office: VERMONT SERVICE CENTER Date: **DEC 21 2007**

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:



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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its store manager 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 Florida corporation, operates three franchised retail bakeries. The petitioner states that it is an affiliate of Azucar y Canela, J.J., S.A. de C.V., located in Mexico City, Mexico. The beneficiary has been employed by the petitioner in L-1A status since 2004 and the petitioner now seeks to extend his status for two years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that beneficiary qualifies as a manager under all four criteria set forth at section 101(a)(44)(A) of the Act, in that he manages a department of the petitioning company, supervises and controls the work of supervisory personnel, has the authority to hire and fire staff, and exercises discretion over the day-to-day operations of one of the petitioner's stores. With respect to the beneficiary's employment with the foreign entity, counsel emphasizes that the beneficiary was previously granted L-1A status, and thus his employment capacity with the foreign company has already been analyzed. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, 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) 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 first issue to be addressed is whether the petitioner established that the beneficiary would be employed in a primarily managerial capacity under the extended petition. The petitioner does not claim that the beneficiary would be employed in an 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.

The petitioner filed the nonimmigrant visa petition on October 12, 2006. In a letter dated October 3, 2006, the petitioner described the beneficiary's duties as follows:

As Store Manager, [the beneficiary] will plan, develop, establish and implement policies and objectives in accordance with the business strategy developed by the controlling shareholders. He will manage and coordinate the day-to-day operations of the Store's business to ensure that all operational and financial goals and objectives are met within the established goals. [The beneficiary] will manage and coordinate the activities of all staff and ensure that they observe and abide by the health and safety measures as established by the Florida Department of Health. In addition, [the beneficiary] will exercise administrative

responsibilities in connection with the hiring and training of all personnel, including assistant managers, cashiers, sales assistants and bakers. [The beneficiary] will also review daily activity reports, control inventory, prepare employee schedules and payroll and control expenditures. [The beneficiary] will ensure that the Company adheres to the operational terms and conditions of the franchise agreement, in connection with advertising, presentation, quality and promotional products.

The petitioner submitted an organizational chart identifying the beneficiary as one of three store managers in the petitioning company, with responsibility for supervising 12 employees, who were not identified by name or job title. The chart shows that the store managers report to a general manager, who, in turn, reports to the company president.

In an attachment to the organizational chart, the petitioner provided the following position description for the company's three store managers:

- Coordinate and manage the day-to-day operations of the store's business. Hire and train store's personnel, including assistant managers, cashiers, sales assistants and bakers.
- Control inventory and expenditures.
- Investigate and resolve customer's complaints about good quality or service.
- Prepare activity reports, and employee schedules.
- Keep records of hours and wages of employees.
- Make sure that accounts with suppliers are paid on a regular basis.
- Ensure that the Company adheres to the operational terms and conditions of the franchise agreement, in connection with advertising, presentation, quality and promotional products.

The petitioner indicated that each store has assistant managers who receive and check the content of deliveries, supervise the working area, oversee baked goods preparation and cooking to examine quality and quantity, and "place orders as requested by store manager." Finally, the "crew members" were described as receiving and processing customer orders, collecting money, preparing and cooking baked goods, and keeping the store's working area clean.

On November 24, 2006, the director issued a request for additional evidence in which he instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's duties with an explanation as to how his duties will be managerial or executive in nature; (2) a list of full-time U.S. employees, including their names, job titles, job duties, and a breakdown of the number of hours devoted to their job duties on a weekly basis; (3) payroll records for the months of September and October 2006; and (4) copies of IRS Form 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2006.

In a response received on February 15, 2007, the petitioner provided the following description of the beneficiary's duties:

1. Coordinate and manage the day-to-day operations of the store.

2. Hire and fire store's employees.
3. Assign duties and responsibilities.
4. Assign the requisite training of store's personnel.
5. Determine salaries, promotions and payments of bonuses for company workers.
6. Ensure that the Company adheres to the operational terms and conditions of the franchise agreement in connection with advertising, presentation, quality and promotional products.
7. Mediate and resolve personnel conflicts.
8. Establish sales and promotions and seasonal marketing strategies.
9. Negotiate with the lessor in reference to premises related issues.
10. Analyze weekly sales and sales per ticket in order to establish which product is selling best.
11. Monitor budget and review financial transactions to ensure that expenses are within budgetary limitations. Determine inventory levels based on sales in order to maximize profits and reduce costs.
12. Investigate and resolve customers' complaints that can not be resolved by Assistant Managers.
13. Keep in the store's files records of hours and wages of employees, and forward for accounting processing. Oversee that payments to suppliers are made in a timely basis and that all bills fall within budget guidelines.
14. Analyze and keep track of other Mall store's sales strategies and promotions in order to determine if changes in strategies and promotions would be advisable.
15. Meet with General Manager on a weekly basis, or more often as required to analyze sales, budget and review marketing and sales strategies.

The petitioner provided an organizational chart depicting the beneficiary's supervision of two assistant managers, who in turn each supervise one crew supervisor and "crew members." The petitioner explained that its employees work in two shifts, from 8:00 a.m. to 3:00 p.m. and from 3:00 p.m. to 10:30 p.m., while the store is open to the public for 78 hours weekly. The petitioner provided position descriptions for each of the subordinate positions. With respect to the assistant manager position, the petitioner indicated the following duties:

1. Open and close store
2. Hire and fire crew members, previous consultation with Store Manager.
3. Train workers in baked goods preparation, quality of service and sanitation and safety procedures.
4. Observe and evaluate crew members and crew supervisor in order to ensure quality of service and assign their duties based on the best performance of each employee.
5. Schedule and assign crew members' and crew supervisor's duties for each week.
6. Prepare report of worked hours of each employee to Store Manager.
7. Solve conflicts between crew members.
8. Resolve customer' complaints regarding food quality and service.
9. Inspect supplies equipment and working area to ensure efficient customer service.
10. Ensure that health and safety standards are met.

11. Coordinate pest control services and waste removal. Oversee that deep cleaning is performed according to standards.
12. Place purchasing orders on a weekly basis.
13. Receive and check the contents of deliveries evaluating quality of products.
14. Establish and enforce procedures against thefts and wastages.
15. Compile and balance cash receipts at the end of each shift, and report to store manager.
16. Record sales data in computer and perform systems back-ups.

The petitioner stated that the beneficiary, the assistant managers and the crew supervisors are full-time employees, while crew members work on a part-time basis. The petitioner stated that "due to the nature of the business it is impossible to provide an accurate breakdown of hours devoted to each of the employees' job duties on a weekly basis."

The petitioner provided the requested payroll records for all employees for the months of September and October 2006. During the month in which the petition was filed, October 2006, the assistant managers assigned to the beneficiary's store worked between 31 and 39 hours per week, while the crew supervisors worked between 21 and 31 hours. The remaining workers, who are assumed to be crew members, generally worked less than 20 hours per week. Based on the payroll records submitted, the assistant managers and crew supervisors receive hourly wages of \$7.00 while the crew members earn \$6.50 per hour.

The director denied the petition on March 16, 2007, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director determined that the beneficiary would not be supervising managerial, supervisory or professional subordinates. The director acknowledged that the beneficiary's subordinates were identified as "managers," but was not persuaded that there are several levels of authority within the organization. The director noted that the petitioner had failed to provide the requested breakdown of each employee's job duties on a weekly basis, and further found that the petitioner had not adequately described the beneficiary's job duties, noting that the duties were described in "abstract form," and failed to identify his specific duties within the petitioner's current staffing arrangement.

The director further found that the organizational chart submitted identified six employees with managerial or executive job titles, and questioned whether the petitioner had sufficient staff to provide the sales of the business. The director found insufficient evidence to establish that the beneficiary would be relieved from participating in non-managerial functions of the business.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity, as he manages a department of the petitioning organization, supervises two tiers of supervisory employees (the assistant managers and crew supervisors), has the authority to hire and fire employees within the store he manages, and exercises discretion over the day-to-day operations of the business.

Counsel objects to the director's contention that the petitioner described the beneficiary's duties in an abstract manner, submitting that the petitioner's description was "comprehensive and context specific." Counsel emphasizes that the regulations do not require an hourly or weekly breakdown of an employee's job duties,

and notes that since the beneficiary's duties vary, "the petitioner chose not to submit an arbitrary and unreal breakdown."

In addition, counsel asserts that the director erred by determining that the petitioner's managers and assistant managers are not "real business managers." Counsel argues that the director had no basis for concluding that the petitioner simply attached these job titles to employees who actually provide the sales and services of the organization. Counsel notes that the petitioner's staffing structure must adhere to franchise agreement requirements, which clearly delineate management positions, and stresses that "all 'Cinnabon' managers must attend training sessions and perform actual managerial duties."

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed by the petitioner 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. § 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 petitioner's initial description of the beneficiary's duties suggested that the beneficiary performs a combination of managerial, supervisory and administrative tasks, rather than primarily performing the high-level duties associated with the statutory definition of managerial capacity. The claimed managerial duties were described in only vague, general terms that conveyed little understanding of what specific qualifying tasks the beneficiary performs on a day-to-day basis. For example, the petitioner indicated that the beneficiary will "plan, develop, establish and implement policies and objectives," "manage and coordinate the day-to-day operations," "ensure that all operational and financial goals and objectives are met," and ensure that the company adheres to the terms and conditions of its franchise agreement. The petitioner did not identify the typical duties associated with any of these broad responsibilities. 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 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, as initially described, suggested his direct involvement in the petitioner's inventory, administrative, financial and first-line supervisory functions. The petitioner indicated that the beneficiary is responsible for the training of all personnel, including the crew members, controlling inventory, controlling expenditures, preparing activity reports and employee schedules, preparing payroll, keeping hour and wage records, resolving customer complaints, and "making sure" that supplier accounts are paid. These tasks, while essential to the operation of the business, have not been demonstrated to be managerial or executive in nature.

While the petitioner submitted lengthier position descriptions for the beneficiary and his subordinates in response to the director's request for evidence, the AAO notes that the petitioner attributed several duties

previously included in the beneficiary's position description to the assistant manager. The petitioner's description of the beneficiary's subordinate's positions, as described in the initial filing, did not indicate that lower-level personnel would relieve the beneficiary from directly-performing the above-referenced non-qualifying tasks. Notably, the assistant manager's duties, as initially described, were limited to overseeing the preparation of baked goods, supervising the work area, receiving deliveries, and placing orders based on the store manager's instructions. In response to the director's request for evidence, the petitioner indicated that the assistant manager trains all employees, hires and fires crew members, schedules and assigns duties to crew supervisors and crew members, maintains wage and hour records and resolves customer complaints. All of these duties were specifically attributed to the beneficiary at the time of filing, and were not included in the assistant manager's job description. 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).

In addition, the petitioner's initial organizational chart and its original description of its staffing structure did not include the position of crew supervisor, which was added when the petitioner responded to the request for evidence. The petitioner provided no explanation for the changes in the beneficiary's duties, the assistant manager's duties, or the changes in its organizational structure. 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, its associated job responsibilities, or the responsibilities of the beneficiary's subordinate employees. 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 USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Overall, given the lack of explanation for the changes to the position descriptions and organizational structure made subsequent to the date of filing, the AAO will place greater probative weight on the initial position descriptions provided for the beneficiary and his subordinates and the original organizational chart.

As discussed above, the initial position description including a mix of qualifying and non-qualifying duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative, operational or first-line supervisory duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also be "principally" or "chiefly" performing managerial or executive duties. Contrary to counsel's contention that there is no regulation requiring a percentage of time devoted to each of the beneficiary's duties, USCIS must determine that the beneficiary is primarily engaged in a managerial or

executive capacity. To make such a determination it is necessary to require a detailed description of the beneficiary's duties and the time the beneficiary devotes to these duties. It is especially relevant when several of the beneficiary's daily tasks, such as training bakers and cashiers, resolving retail customers' complaints, and controlling inventory, do not fall directly under traditional managerial or executive duties as defined in the statute. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice* 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO acknowledges the petitioner's claim that it is impossible to provide a breakdown of how the beneficiary allocates his time among his duties because his duties vary from week to week. However, the AAO is not persuaded that the tasks involved in managing a franchise retail store are so varied that it is impossible to even provide a reasonable estimate of how the beneficiary spends his time. 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)).

Here, while the beneficiary evidently exercises authority over one of the petitioner's retail stores under the direction of the general manager and president, the record is insufficient to establish that his actual duties were primarily managerial 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 two tiers of supervisory employees. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. As noted above, the petitioner has provided inconsistent descriptions of the petitioner's organizational hierarchy and reporting structure. The petitioner initially stated that the beneficiary supervises 12 employees and identified them simply as "assistant managers" and "crew members." The assistant manager position, as initially described, was limited to purchasing goods requested by the store manager, receiving deliveries, overseeing the "work area" and supervising the preparation of baked goods. While the assistant manager was apparently responsible for overseeing food preparation activities and the cleanliness of the work area, the duties did not extend to overseeing sales transactions, assigning duties to and training subordinates, scheduling employees, or other tasks normally performed by an employee who is primarily a first-line supervisor. Most of these duties were attributed to the beneficiary. Therefore, the petitioner has not clearly established the level of authority exercised by its "assistant managers."

While the petitioner added an additional tier of "crew supervisors" when responding to the request for evidence, the record shows that these employees received the same wages as the petitioner's "assistant managers," who both received wages that were only nominally higher than those of the crew members, specifically, an additional \$0.50 per hour. When examining the managerial or executive capacity of a beneficiary, USCIS 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. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner does not claim to employ professional employees.

In the present matter, the totality of the record does not support a conclusion that the beneficiary primarily supervises managerial or supervisory employees. Instead, the record demonstrates that the beneficiary's subordinates primarily perform the actual day-to-day tasks of operating the petitioner's retail store, rather than acting as supervisors themselves. Furthermore, even if the beneficiary does devote some time to overseeing supervisory employees, the petitioner has not established that this is his primary function, given his responsibilities for non-qualifying financial and administrative tasks associated with operating a retail store.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner operates a retail bakery that is open to the public for 78 hours weekly, and staffed for an additional 21 hours per week for opening and closing duties. The petitioner claims that its assistant managers and crew supervisors, who are claimed to relieve the beneficiary from directly supervising crew members, are all employed on a full-time basis. However, during the month in which the petition was filed, the assistant managers worked slightly less than full time, and sometimes just 31-32 hours, while the "crew supervisors" consistently worked less than 30 hours per week. Thus, while the petitioner claims to employ one assistant manager and one crew manager per shift, these employees clearly do not work seven shifts per week, and may not even work five days per week. The petitioner has not accounted for sufficient subordinate personnel to perform the non-qualifying tasks associated with these positions on a full-time basis. Therefore, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary would be responsible for fulfilling duties typically performed by the assistant manager and crew supervisors when these personnel are not on duty.

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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO acknowledges counsel's argument that the director erroneously implied that the beneficiary and his subordinates are not "real business managers," and his claim that the director was "dismissive" and evidenced a "lack of appreciation for the management personnel of an internationally renowned franchise." Counsel

states that pursuant to the terms of the petitioner's franchise agreement, "management positions are clearly delineated and all franchises must adhere to a specific structure," while all managers "must attend training sessions and perform actual managerial duties." However, if the petitioner's organizational structure and the duties of its employees are all so clearly delineated by the terms of its franchise agreement, it is unclear why the petitioner has not provided a consistent account of its employees' duties or its management structure. Counsel has not offered documentary evidence of the "actual managerial duties" or personnel structure as set forth in the franchise agreement to support her claims, and the AAO can find no such provisions in the agreement submitted in support of the petition. 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 Obaighena*, 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). Again, the fact that the beneficiary manages a business 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).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial capacity. For this reason, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner noted in its letter dated October 3, 2006 that the beneficiary had been employed as a store manager for the foreign entity prior to his transfer to the United States, but did not provide a description of his duties.

In the request for evidence issued on November 24, 2006, the director requested a description of the typical managerial responsibilities performed by the beneficiary abroad, information regarding the job titles and duties of his subordinates, his level of discretionary authority with the foreign entity, and the amount of time the beneficiary devoted to managerial versus non-managerial duties.

In response, the petitioner submitted an affidavit from its president, who stated that the beneficiary's duties included: hiring and firing store employees; assigning duties and responsibilities for company workers; assigning training to personnel; determining salaries, promotions and payment of bonuses; mediating and resolving personnel conflicts; performing sales analysis and making decisions regarding inventory levels and purchasing costs; establishing sales, promotions and marketing campaigns; making marketing and advertising decisions; and negotiating with the foreign entity's lessor.

The petitioner stated that the beneficiary supervised two assistant managers, two supervisors and five crew members, and submitted position descriptions that were identical to those provided for the U.S. employees.

The director denied the petition, concluding that the petitioner failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the

position appeared to be identical to his current U.S. position, and emphasized that such position had not been shown to involve primarily managerial duties, or management of managerial or supervisory personnel.

On appeal, counsel emphasized that the instant petition was filed to request an extension of the beneficiary's L-1A status, thus the service has previously analyzed the beneficiary's employment with the foreign entity and concluded that it was in a qualifying capacity. Counsel asserts that the petitioner complied with the director's request by submitting an affidavit describing the beneficiary's managerial duties, and the director had no basis for "attacking the credibility of the affidavit."

Upon review, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

As noted by the director, the beneficiary's foreign and U.S. positions appear to be essentially identical, therefore, many of the deficiencies noted above also apply to the petitioner's description of the beneficiary's duties. Contrary to counsel's statements, the director did not "attack the credibility" of the petitioner's president, but did reasonably question whether the "assistant managers" and "supervisors" were performing in positions that were truly managerial or supervisory in nature. The AAO notes that, based on the petitioner's representations, the foreign entity employed five managers and supervisors to oversee the work of only five crew members. If the foreign entity's crew members, like their U.S. counterparts, worked on part-time schedules, it is clear that the "supervisors" would actually be providing the sales and services of the company on a regular basis. Counsel has not submitted evidence on appeal to overcome the director's decision. Rather, counsel suggests that USCIS already determined that the beneficiary was employed abroad in a managerial capacity and thus the director erred by revisiting the issue.

The AAO recognizes that USCIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary for employment as its store manager. It must be emphasized that each nonimmigrant 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 approval does not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, if the previous nonimmigrant petition was 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). The AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present request for an extension of the beneficiary's status.

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).

Beyond the decision of the director, the AAO notes a discrepancy in the record which raises questions as to whether the petitioner has maintained a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims to be an affiliate of the foreign entity based on common ownership by the same four individuals, with each individual owning a 25 percent interest in both entities. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K)(2) (defining "affiliate" as "one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." However, the U.S. company's 2004 IRS Form 1120, U.S. Corporation Income Tax Return, indicates at Schedule K, Line 5, that Arie Derzavich owns 50 percent of the company's stock, and at Schedule K, Line 10, that the company has only three shareholders. 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). If Mr. Derzavich now owns a 50 percent interest in the U.S. company while the foreign entity continues to be owned by four individuals with no majority shareholder, then the two companies no longer have an affiliate relationship as that term is defined in the regulations.

Furthermore, the petitioner has submitted copies of its stock certificates number one, two, six and seven, which ostensibly show that the four claimed individual shareholders, each owned 25 shares in the company when it was established in June 1999. The petitioner has not provided a copy of its stock ledger or otherwise accounted for stock certificates number three, four or five. Based on these discrepancies and deficiencies, the evidence of record does not demonstrate that there is a qualifying relationship between the U.S. and foreign entities. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.