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U.S. Citizenship  
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Services

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File: EAC 07 090 52796 Office: VERMONT SERVICE CENTER Date: **OCT 03 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 petition for a nonimmigrant visa. 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 president 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 is a California corporation authorized to conduct business in Washington, D.C. The petitioner, which claims to operate an Indian restaurant, states that it is an affiliate of Subhash & Co., located in New Delhi, India. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States 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 the director erred in determining that the beneficiary would not be employed in an executive capacity. Counsel asserts that the director placed undue emphasis on the number and type of employees working for the petitioning company, without considering the petitioner's reasonable needs. Counsel emphasizes that the beneficiary's subordinates need not be managers, executives or professionals in order for the beneficiary to be employed in a primarily executive capacity. Counsel states that the petitioner established that the beneficiary's subordinates perform all the duties needed to run a restaurant on a day-to-day basis, thus relieving the beneficiary from involvement in non-qualifying duties. 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 12, 2007. In a letter dated January 15, 2007, the petitioner described the beneficiary's duties as president of the U.S. company as follows:

[The beneficiary] will continue to be responsible for all executive level decisions of the business and will accordingly continue to attend to the establishment of the business, its direction, guidance, coordination and development. He will continue to be responsible for our policies, strategies and philosophy for implementation by managerial and supervisory employees.

More specifically, [the beneficiary], as President, will continue to ensure that the Department Managers and/or Supervisors implement [the beneficiary's] executive level decisions, policies, strategies and business philosophy. He will furthermore be the individual responsible for establishing guidelines and direction for the promotion/development of our business.

[The beneficiary] will continue to give instruction and direction to the Managers and the latter will in turn instruct, manage and guide supervisors. [The beneficiary] will continue to be responsible for setting all guidelines and parameters which the various departments of the business will conduct their operations and all directives and policies in the various

departments will be in the sole discretion of [the beneficiary]. He will continue to be responsible for the direction, guidance, coordination, philosophy and development of our business.

The petitioner also provided the following "more detailed explanation" of the beneficiary's duties and functions:

1. Control and management of managers in the operational aspects of the projects of the business including the giving of instructions, advice and guidance to employees and more specifically managerial/supervisory employees.
2. Consultation for proposed purchase and operation of further Restaurant and/or Food Industry businesses.
3. The selection of all projects and topics/subjects in which the petitioner may become involved in and these selections will be in the sole discretion of the beneficiary
4. Formulating policy and strategy for the business as well as its business philosophy including the type and nature of Food Industry projects to be bid on with specific reference to the cultural, economic and social aspects of each project including demographic considerations
5. Deciding on long range plans of the business and how they will be analyzed with specific concentration on acquisition of further restaurants
6. The determination of progress towards goals of the business after perusal of data provided
7. Determine accounting methods and instruct relevant parties in the implementation thereof. These accounting issues include upkeep of books of record to be attended to by the Manager
8. Preside over all meetings of senior staff regarding the progress in the business and their direction
9. Responsible for overall direction, management and evaluation of the business projects and their impact on the local Indian community with regard to places where eating at restaurants will also induce a sense of Indian culture and traditions
10. Attend to the hiring/firing of upper Management staff and directing them in their duties and evaluating their performance and having the sole authority to do so.
11. Rendering final decision in all project/topic issues and other disputes. This includes the authority to cancel, amend or otherwise alter the direction and strategy of any particular project or topic.

The petitioner asserted that the beneficiary's executive duties "are clearly defined as set out above" and emphasized "there is no ambiguity or lack of clarity or vagueness about these duties."

In a letter dated January 15, 2007, counsel for the petitioner provided the following information regarding the beneficiary's claimed subordinate employees:

Suriya Sharma – Manager: This is the Manager of the Restaurant business. His duties are the day to day running and management of the Restaurant. He will instruct the supervisor in the specific daily chores of the employees in the operation of the restaurant including provisions/meal preparation. He will further attend to preparing the financial records and books including the restaurant budget and related financial issues. He will order supplies and provisions[.]

Rahul Arora – Supervisor: This is the Restaurant Supervisor. He takes direction and instruction for the Manager regarding the preparation of food, equipment cleaning, table preparation and thereafter instructs the cooks in the business in these matters. The supervisor oversees the food preparation and cooking by the cooks and the cleaning of the equipment. Furthermore the supervisors [sic] is responsible for seeing to it that the premises are kept clean.

Mai Bano, Michael D'Costa, Mario Meja – Cooks: They take instruction and orders from the supervisor. They attend to the daily preparation, cleaning and cooking of food as well as maintenance of sanitary conditions in the kitchen and the equipment.

Counsel stated that the beneficiary is not involved in the day-to-day operations of the petitioner's business, in view of the number of employees and the duties performed by them. The petitioner submitted an organizational chart depicting the above-named employees, as well as an external accounting and bookkeeping firm.

In support of the petition, the petitioner provided a payroll journal for the period ending December 31, 2006, which the AAO assumes is for the month of December 2006. During this period, the beneficiary earned \$30,000, the manager earned \$490, the supervisor earned \$1,275, and the cooks earned \$1,275, \$800 and \$490, respectively.

The director issued a request for additional evidence on February 22, 2007. The director requested an organizational chart depicting the petitioner's current employees, and complete position descriptions for the beneficiary's proposed subordinates in the United States, including a breakdown of the number of hours devoted to each of the subordinate's job duties on a weekly basis. The director also requested evidence that the beneficiary's subordinates are managers or professionals, including educational credentials.

Counsel for the petitioner responded to the director's request on February 28, 2007, but emphasized that the evidence submitted with the petitioner clearly established the executive capacity of the beneficiary, the day-to-day duties performed by his subordinates, and the beneficiary's status as the highest-level employee in the company's organizational hierarchy. Counsel further noted that it is not necessary for the petitioner to establish that the beneficiary will manage professionals in order to establish his employment in an executive capacity, as the petitioner's restaurant business does not require professional workers.

Counsel emphasized that the beneficiary's title of "president" is generally associated with that of a chief executive officer of an entity and noted that the beneficiary's duties are "clearly executive in nature" and do

not entail the day-to-day functions of the operation of the restaurant. Counsel provided a "detailed amplified explanation of beneficiary's executive duties," which expanded slightly upon the previously provided list of duties and included the beneficiary's responsibility for "attending upon the Affiliate business in India with specific reference to the import of food items/spices and flatware to the USA entity and further to distribute these products to other entities in the USA." As the position description is part of the record, it will not be repeated entirely here. Counsel again asserted that the petitioner submitted evidence of subordinate staff sufficient to carry out the day-to-day operations of the business under the beneficiary's direction. Counsel asserted that the director should also take into account the petitioner's use of an independent accounting firm, and emphasized that the statute was not intended to limit executives or managers to persons who supervise a large number of persons.

Counsel further stated:

The beneficiary is currently in India where he is involved in negotiations/discussions for the import of [flatware, Tandoor stoves and spices]. This also demonstrates that the beneficiary does not attend to day to day functions in the business as the business in the USA is operating in the absence of the beneficiary. The day to day duties in the USA business are therefore clearly carried out by its current managerial/supervisory staff and employees as well as independent financial contractor.

The beneficiary's duties involve travel to India as well as other negotiations/meetings in the USA in furtherance of the petitioner's business. These are not day to day duties but are the true functions of an executive in a business such as that operated by the petitioner.

Counsel also provided the requested position descriptions for the beneficiary's subordinate employees, all of whom were claimed to work forty hours per week.

The director denied the petition on March 14, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the petitioner had failed to establish that the beneficiary would supervise a subordinate staff of managerial, supervisory or professional employees, or that he would manage or direct an essential function of the organization. The director determined that the petitioner's "small, new restaurant does not appear to require a bona fide manager or executive who would perform the tasks [the petitioner] listed on a fulltime basis." The director found that the beneficiary would likely be engaged in the day-to-day operations of the restaurant.

On appeal, counsel for the petitioner disputes the director's determination that the beneficiary would not be employed in an executive capacity, and the director's position that the business is not complex enough to need an executive. Counsel asserts that pursuant to changes made to the statute by the Immigration Act of 1990, USCIS is specifically barred from making a determination on the beneficiary's employment capacity based solely on the number of employees supervised. Counsel states that the petitioner "clearly described and evidenced the organizational hierarchy of the company," and the existence of a subordinate staff who would perform the actual services of the company. Counsel asserts that there may be times when the beneficiary

would be required to perform some non-managerial tasks based on the petitioner's needs, but that such duties "are done on a minimal basis" and require a small percentage of the beneficiary's time.

Counsel cites an unpublished AAO decision and *National Hand Tool Corp. v. Pasquarrell*, 889 F.2d 1475, n. 5 (5<sup>th</sup> Cir. 1989), to stand for the proposition that the statute was not intended to limit managers or executives to persons who supervise a large number of persons, and that even a sole employee may qualify as a manager or executive where a business is complex. Counsel further notes that the statutory definition for executive capacity does not make any reference to the supervision of other employees, especially subordinate managers. Counsel concludes that "if the L beneficiary is involved more in directing the organization, then she is acting in an executive capacity."

Counsel further suggests that "for [the director] to construe that the Beneficiary's listed job duties do not equate to the management of an essential function within the organization, when the Beneficiary clearly makes high-level decisions concerning the operation and success of the business, is unfathomable." Counsel claims that the beneficiary's primary duties are "making decisions at the executive level and having them implemented." Counsel asserts that there is "abundant support" in case law for the proposition that it is unnecessary for "functional" managers/executives to be employees of large organizations, again, referring to unpublished AAO decisions.

Counsel provides a new position description for the beneficiary, which will not be repeated in its entirety here. Notably, counsel refers to the beneficiary's responsibility to "coordinate functions among departments and sites," and to "coordinate activities of business involved with buying and selling investment products and financial services." The petitioning organization does not buy and sell investment products and financial services, nor does it have different "departments and sites," so the position description has limited probative value. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel notes that the position description submitted in support of the instant petition is identical to that provided in support of the beneficiary's previously approved L-1A petition. Counsel expresses confusion as to how the director could determine that the beneficiary no longer serves in an executive capacity, given that he "now controls four employees."

Counsel further indicates that the beneficiary "spends a great deal of his time at the overseas entity in an effort to manage personnel there and to continue to develop and implement plans to promote the growth" of both companies. Counsel notes that it would be impossible for the beneficiary to conduct the day-to-day operations of the U.S. company, based on the amount of time he spends overseas. Counsel contends that it was clearly documented that the beneficiary's subordinate employees attend to the petitioner's day-to-day operations. The petitioner submits a copy of the beneficiary's current passport in support of counsel's assertion that the beneficiary is frequently absent from the United States.

In addition, counsel objects to the director's conclusion that he "believes" that the beneficiary is not acting in a managerial or executive capacity, but is attending to the day-to-day operations of the restaurant, stating that

such statement "holds no legal or factual basis." Counsel reiterates that the petitioner provided evidence that the beneficiary's subordinates in fact perform all the duties needed to properly operate the restaurant. Counsel also disputes the director's finding that the petitioning company is not sufficiently "complex" to be inappropriate, as the director did not "allege or infer any facts to support such a finding."

Upon review, counsel's assertions are not persuasive. However, as a preliminary point, the AAO notes that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the AAO agrees that the reasons given for the denial are conclusory with few specific references to the evidence entered into the record. As the AAO's review is conducted on a *de novo* basis the AAO will herein address the petitioner's evidence & eligibility. *See 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 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.* When seeking to extend a petition involving a "new office," the petitioner is required to provide a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C).

Despite counsel's repeated insistence that the beneficiary's position description clearly establishes his eligibility as an executive as defined in the statute, and the petitioner's statement that "there is no ambiguity or lack of clarity or vagueness about" the proposed duties, the AAO observes that the provided position descriptions fall significantly short of meeting the petitioner's obligation to clearly describe the position offered. The petitioner's initial statements that the beneficiary will be responsible for "management of managers in the operational aspects of the projects of the business," "selection of all projects and topics/subjects in which the petitioner may become involved," "overall direction, management and evaluation of the business projects," "determination of progress towards goals of the business," and "rendering final decision in all project/topic issues," provide little insight into what tasks the beneficiary will perform on a day-to-day basis. It is unclear to what "projects," "topics," and "subjects" the petitioner is referring, particularly considered in light of the nature of the petitioner's business. 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).

The petitioner further stated that the beneficiary is responsible for "all executive level decisions of the business," establishing and enforcing "policies, strategies and philosophy," establishing "guidelines and direction for the promotion/development" of the business, and exercising discretion for "setting all guidelines and parameters within which the business will conduct its operations and all directives, strategy and policies."

Counsel added that the beneficiary's duties are "extremely complex, sophisticated and intricate" and noted that the beneficiary "directs the management of the organization," "establishes goals and policies," and "exercises wide discretionary decision making." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Neither the petitioner nor counsel identified any specific tasks to be performed by the beneficiary as part of his responsibility for the overall management of the business, nor were the beneficiary's policies, strategies, "guidelines," or "philosophy" explained or defined. The petitioner's reference to its "department managers" and "supervisors" and counsel's initial statements that the beneficiary would manage a general manager who would in turn manage the "managers/supervisors of the different departments in the business," are questionable, given the petitioner's claim that it employs one manager and one supervisor, and an organizational chart depicting no distinct departments within the company's structure. Neither the petitioner nor counsel provided an explanation for these statements in light of the petitioner's actual organizational structure. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner offered some additional details in response to the director's request for evidence, noting that the beneficiary is engaged in "consultations" with potential sellers of additional restaurants, but no supporting evidence to substantiate these duties, such as a list of properties being researched, or evidence of communications between the beneficiary and the sellers, has been provided. 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)). The AAO notes that the bill of sale for the petitioner's restaurant was executed not by the beneficiary but by the petitioner's "supervisor," who signed the document as "purchaser" on behalf of the U.S. company, and whose name also appears on the petitioner's bank statements as the account representative. This evidence raises questions as to the extent of the beneficiary's involvement in the company's expansion and acquisition activities.

The petitioner also indicated that the beneficiary's duties included "attending upon the Affiliate business in India with specific reference to the import of food items/spices and flatware to the U.S. entity." Again, there is no evidence that the petitioning entity has begun to import goods from its affiliate in India or that it currently has the facilities or staff to accommodate such an expansion of its business operations. If the petitioner is representing that it is currently engaged in import and distribution of its affiliate's goods, it has not been established that the petitioner has employees to relieve the beneficiary from non-qualifying duties associated with this area of the business. The AAO further notes that the bill of lading submitted as evidence of imports to the United States identifies the consignee as "Mr. Rahul Arora" of "A&A, Inc.," with an address in Vienna, Virginia. Mr. Arora is also identified as the petitioner's supervisor and his connection to this apparently unrelated company has not been explained.

Overall, the petitioner's descriptions of the beneficiary's duties, although lengthy, do not include the required level of specificity, or provide a clear indication as to what the beneficiary does within the context of the petitioner's business. The AAO cannot be expected to accept a vague job description and speculate as to the related managerial or executive job duties.

Furthermore, a determination as to what duties the beneficiary typically performs on behalf of the petitioning entity is complicated by evidence in the record suggesting that the beneficiary is not regularly in the United States at all. The beneficiary's initial period of L-1A classification commenced on March 30, 2006. The petitioner notes that the beneficiary did not obtain his L-1A visa stamp from the U.S. Consulate in New Delhi until August 10, 2006, but no explanation has been provided for this considerable delay. Furthermore, a review of the beneficiary's passport shows that since the approval of the "new office" petition, the beneficiary made one entry to the United States in B-2 status on May 4, 2006, and three entries in L-1A status, on October 8, 2006, on December 30, 2006, and on January 28, 2007, with his most recent departure in early February 2007. The petitioner indicates that the petitioner's restaurant commenced operations in December 2006. Overall, the record suggests that the beneficiary has spent only weeks or even mere days in the United States since the petitioner commenced business operations, raising further questions regarding the validity of the position descriptions submitted, which imply the beneficiary's presence in the United States to hold "weekly meetings," to "direct inservice [sic] training of staff," and otherwise supervise the company's employees. Counsel's statement on appeal that the petitioner submitted the identical position description in support of the previous "new office" petition raises questions as to whether the duties listed are speculative, rather than describing the beneficiary's actual role in the company as of the date the extension petition was filed. The regulations specifically require a statement of the duties the beneficiary performed during the first year of operations, and the duties he will perform under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C). The petitioner's resubmission of the beneficiary's proposed duties as of February 2006 does not satisfy this regulatory requirement. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel argues on appeal that the director inappropriately considered the size and nature of the petitioning company in determining whether the beneficiary would serve as a manager or executive under the extended petition. Counsel's argument is not persuasive. 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from

primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year old company claimed to be operating a newly opened restaurant. The petitioner claims to employ the beneficiary as president, a manager, a supervisor, and three cooks. The only evidence of wages paid to employees is a payroll report for the month of December 2006, which suggests that the manager and one of the cooks were employed on a part-time basis. Nevertheless, the petitioner claims that all of its employees work on a full-time basis. On appeal, counsel references the beneficiary's supervision of four, rather than five, lower-level employees. Thus, the petitioner's exact staffing levels and full-time status of the petitioner's employees as of February 2007 have not been established. 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 AAO notes that, based on the petitioner's representations, the company has hired staff to prepare and cook food and maintain cleanliness in the kitchen and restaurant, to supervise these activities, and to order supplies, maintain inventory, and monitor the company's finances. The petitioner does not indicate that any of its employees are actually responsible for handling customer transactions, such as taking and filling orders for food or operating a cash register, and it is unclear how a restaurant offering counter service operates without such staff. The petitioner also claims to offer delivery services, but does not employ a driver. Therefore, contrary to counsel's assertions, the record does not establish that every day-to-day function of the business is handled by the company's existing staff, nor is there any evidence that the petitioner intends to hire additional employees.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, a manager, a supervisor, and three cooks, particularly if some of these employees are employed on a part-time basis. While the beneficiary's absence from the United States during most of the previous year would normally preclude a determination that he is engaged in the day-to-day operations of the business, the petitioner must establish that the beneficiary's duties under the extended petition will be primarily managerial or executive capacity. If he is going to be employed by the U.S. petitioner on a full-time basis under the extended petition as indicated on the Form I-129, the petitioner must establish that it has sufficient staff to perform the routine tasks associated with operating the restaurant. The petitioner has not met this burden.

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.

While the AAO does not doubt that that the beneficiary exercises discretionary authority over the U.S. company as its president and sole shareholder, the petitioner has not established that he would devote the majority of his time to duties which can be considered executive or managerial in nature. Based on the current

record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, whether the beneficiary would be performing first-line supervisory or other non-qualifying duties within the restaurant under the extended petition, or whether the beneficiary even intends to work for the petitioning company in the United States on a regular basis. The petitioner and counsel repeatedly claim that the beneficiary performs only executive duties. However, the record contains no additional independent evidence or explanation establishing that the beneficiary is truly working primarily as an executive, other than in position title. Merely claiming that the beneficiary is an executive is insufficient to establish eligibility. 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. at 165.

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-day 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.*

While the position description submitted includes duties which could be considered executive in nature, 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. As discussed above, the record suggests that the beneficiary's involvement with the U.S. company had been limited up to the time the petition was filed. If the beneficiary's intent was to participate in the U.S. company's operations on a full-time basis under the extended petition, then it has not been established that the company requires his services in an executive capacity, as it does not currently employ workers to perform all of the routine tasks associated with operating a restaurant.

On appeal, counsel argues that the director erred by finding that the beneficiary does not direct an "essential function" of the U.S. company, and asserts that he clearly makes high-level decisions concerning the operation of the business. 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 detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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)). Counsel's general argument that the beneficiary manages all of the company's functions is insufficient in the absence of the required detailed job description and evidence that the beneficiary primarily performs managerial or executive 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). In this matter, the petitioner has not provided evidence that the beneficiary manages or directs an essential function.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5<sup>th</sup> Cir. 1989) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell*. It is noted that the case cited by counsel relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa petition. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the case cited by counsel is distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO will address counsel's assertion that the director erred in denying the petitioner's petition for an extension of the beneficiary's status when CIS previously approved a petition based on similar facts. A prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. See 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. See 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as *prima facie* evidence that eligibility has been established in the present proceedings.

The fact that the beneficiary is claimed to manage or direct a business as its president and sole shareholder, 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 has not substantiated its claim that the beneficiary's duties are primarily in an executive capacity.

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

Although not addressed by the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status as required by 8 C.F.R. § 214.2(l)(14)(B), or evidence of the financial status of the U.S. company as required by 8 C.F.R. § 214.2(l)(14)(E). The beneficiary's initial period of L-1A classification was valid from March 30, 2006 until February 15, 2007. The petitioner claims that its restaurant opened in December 2006, just two months prior to the filing of the instant petition. Counsel asserts that the beneficiary received his L-1A visa on August 10, 2006, and indicates that the petitioner was involved in negotiations for the purchase of its restaurant from August until November 2006. However, as noted above, no explanation has been provided for the four-month delay between the approval of the beneficiary's petition, and the issuance of his visa, and there is no reason to believe that this delay was due to circumstances that were beyond the beneficiary's control. Based on a review of his passport, the AAO notes that the beneficiary applied for visitor visas to several countries and traveled fairly extensively, including a visit to the United States in B-2 status in May 2006, before applying for his L-1A visa. Furthermore, the record shows that the beneficiary did not enter the United States for an additional two months after his visa was issued, and he appears to have made only a few brief entries between October 2006 and January 2007. The long delay in the petitioner's commencement of operations will not be excused as reasonable.

Furthermore, the petitioner offered only minimal evidence of the U.S. company's business activities or financial status. The petitioner submitted its bank statements for the months of October and November 2006, showing an ending balance of \$230.78, and a payroll journal for the month of December 2006. Although the settlement agreement for the restaurant purchased by the petitioner indicates issuance of a security deposit in the amount of \$7,425 to the seller in November 2006, the petitioner's bank statements reflect no such withdrawal. The petitioner has not submitted financial statements, 2006 income tax returns, quarterly wage reports, more recent bank statements, invoices, purchase orders or other evidence to establish the petitioner's financial status and business activities as of the date of filing. For these additional reasons, 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 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 at 1043.

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.