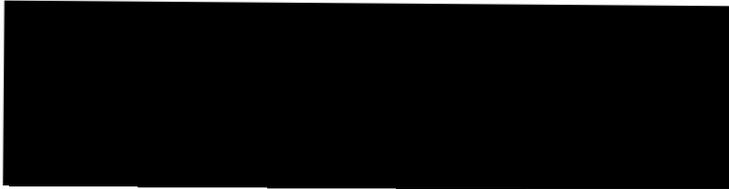


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File: EAC 07 067 51233 Office: VERMONT SERVICE CENTER Date: JUL 29 2008

IN RE: Petitioner:
Beneficiary:



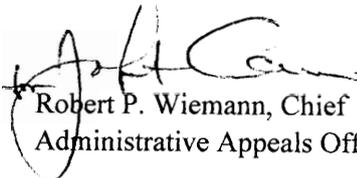
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 executive chef 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 a bakery and delicatessen. It states that it is a subsidiary of Panaderia Pasteleria Bella Vista, C.A., located in Maracaibo, Venezuela. The beneficiary has been employed by the petitioner in L-1A status since 2002 and the petitioner now seeks to extend his status 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, the petitioner asserts that the beneficiary has been working for the U.S. company “as an Executive” since 2002, and emphasizes that the beneficiary was previously granted two extensions of his L-1A status for the offered position of executive chef. The petitioner suggests that the language used by the director in denying the petition was subjective, and not based on the proper application of the regulations to the facts of the case. Citing to *Mars Jewelers Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988), the petitioner states that the regulations were not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise. The petitioner submits a brief 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(1)(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 (1)(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 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 January 9, 2007. The petitioner operates a retail bakery and delicatessen and also provides wholesale and catering services to restaurants, hotels and resorts. In a letter dated January 5, 2007, the petitioner indicated that the beneficiary performs the following "essential functions" as executive chef:

1. Controls labor cost by properly scheduling staff, improving productivity and reviewing daily punch report.
2. Verifies that kitchen staff follow all recipes and portion servings correctly and according to trend and menu specifications.
3. Ensures food quality by maintaining the highest standards of personal hygiene, proper food handling techniques, and a clean, well-maintained physical plant.
4. Places food and supply orders as directed.
5. Receives products and verifies invoice pricing, quantity, and that the products meets Palm specifications.
6. Assists in training employees to company standards, policy and procedure.
7. Sets excellent customer service and work examples.
8. Actively participates as member of management team.
9. Works a minimum of 5 days and 3 nights per week.
10. Manages staffing levels and performs line checks throughout the shift.
11. Maintains inventory systems.
12. Posts invoices daily on Restaurant Magic System.
13. Takes active role in developing and implementing daily specials to Palm standards.
14. Protects and maintains all company supplies and assets according to company policies.
15. Obtains and maintains up to date ServSafe and Foodservice Management Professional (FMP) certifications.
16. Ensure that all receipts, food preparations, and plate presentations meet The Palm's specifications and commitment to quality. Maintain a safe, orderly and sanitized kitchen.

The petitioner further indicated that the beneficiary is responsible for the following duties:

Budgeting, Cost Control and Planning

The Executive Chef is responsible for preparing budgets, analyzing and improving G&A to budget actuals, forecasting demand, and controlling labor and food costs, product and vendor selection and supply procurement.

The Executive Chef is responsible for preparing menus for [the petitioner] with an emphasis on quality, quantity, setup, timing, service, and execution of large-volume cooking, guest relations, the sequence of service, and ensuring that professional standards are met for dining room personnel.

Sanitation and Safety – the Executive Chef is responsible for the prevention of food-borne illness through proper handling of potentially hazardous foods, HACCP procedures, kitchen safety, facility sanitation, and safe food preparation, storing and safe reheating.

On July 23, 2007, the director issued a request for additional evidence. The director requested, *inter alia*, additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director requested: (1) a comprehensive description of the beneficiary's duties with an explanation as to how the duties are managerial or executive in nature; (2) a list of the U.S. employees by name and job title, accompanied by a description of each employee's duties and a breakdown of the number of hours the employees devote to each duty on a weekly basis; (3) copies of the petitioner's IRS Forms 941, Employer's Quarterly Wage Report, for all four quarters of 2006; (4) copies of all IRS Forms W-2 and Forms 1099 issued by the petitioner in 2005 and 2006; and (5) copies of the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for 2005 and 2006.

In response, the petitioner submitted a letter dated August 28, 2007, and the requested supporting documentation. The petitioner submitted an eight-page document entitled "Description of Beneficiary's Duties." The petitioner reiterated the same "essential functions" listed above, and added that the beneficiary would perform duties related to human resources, including "recruiting, selecting, hiring, training, developing, disciplining, evaluating and terminating all foodservice employees. The petitioner indicated that the position involves "human resource planning" and "developing an operations plan for the foodservice component" of the petitioner's business.

The petitioner also cited to the regulatory definition of managerial capacity at 8 C.F.R. 214.2(l)(ii)(B) and stated that the beneficiary meets the criteria because he manages the company's kitchen operation, sets policies and procedures to manage the kitchen, and supervises the bakery, pastry, ice cream, specialty food, and catering departments. The petitioner further stated that the beneficiary has the authority to hire employees and supervises and controls the work of subordinate personnel identified as a bakery department manager, pastry manager, bakery assistant, helpers, ice cream department manager, ice cream technician, and specialty food manager. Finally, the petitioner stated that the beneficiary exercises discretion over day-to-day operations, as he "will set assignments to every employee and manager under his supervision," supervise their work, oversee shifts, schedule employees, and provide employee training.

In addition, the petitioner indicated that the beneficiary meets the regulatory criteria for executive capacity set forth at 8 C.F.R. § 214.2(l)(ii)(C), in that he "has established goals and policies, exercised discretionary decision-making authority and received supervision only by the Board of Directors in the Parent Company." The petitioner stated that "the majority of the Beneficiary's time is spent on duties relating to the policy or operational management of the Petitioner."

The petitioner submitted an organizational chart dated July 31, 2007, which indicates that the beneficiary, as executive chef, reports to the petitioner's general manager, who in turn reports to the vice president/chief executive officer. The beneficiary is depicted as supervising a total of ten employees, including the bakery manager, the big pastry department manager, a pastry department employee, a specialty food department manager, an ice cream department manager, an ice cream technician, a "bread section" employee, a bakery

assistant and two bakery helpers. The chart also depicts a new projects division manager, a production manager, a technical support employee, an administration department employee, and a cash flow and billing employee, for a total of 18 employees.

The petitioner submitted an employee list which provides the names, job titles, and job duties for 14 employees. Notably, the ice cream department manager and one of the pastry department employees were not included on the list. The petitioner provided brief position descriptions for the remainder of the employees who are claimed to work under the beneficiary's supervision, as well as position descriptions for other employees listed on the organizational chart. All of the beneficiary's subordinates, with the exception of the "bakery helpers" are claimed to supervise the work of other staff in their respective departments, even those employees, such as the "bread section employee" and the specialty food department employee who are depicted as the sole employees in their departments. The bakery helpers are the only employees who are described as being directly involved in producing the petitioner's products. The petitioner also provided a "working hours schedule" listing the work schedules of the 18 employees identified on the organizational chart.

Finally, the petitioner submitted the requested documentation of wages paid to its employees, including copies of its Forms 941 for all four quarters of 2006 and the first quarter of 2007. The petitioner also provided copies of its Florida Forms UCT-6, Employer's Quarterly Report, for 2006. In the fourth quarter of 2006, the quarter immediately preceding the filing of the instant petition, the petitioner reported a total of seven employees, including the production manager, the general manager, the bread section employee, the specialty food employee, one bakery assistant, one bakery helper, and the ice cream technician. Six of the seven employees earned wages consistent with full-time employment. In the first quarter of 2007, the petitioner reported a total of six employees. The petitioner did not submit evidence that it utilizes the services of any contract employees.

The petitioner did submit copies of its IRS Forms W-2, Wage and Tax Statements, for 2005 and 2006. The majority of the employees listed on the organizational chart were employed by the petitioner during one or both of these years. However, the bakery manager, a pastry department employee, and the ice cream department manager, who are among the beneficiary's subordinates, last worked for the company in 2005, while two employees claimed to currently work under his supervision were not reported on the Forms UCT-6 after the second quarter of 2006.

The petitioner did not address the obvious discrepancy between its organizational chart and employee work schedule, which list 18 employees, and its quarterly wage reports indicating that the company employed only six to seven employees at the time of filing. It is evident that the remaining employees on the organizational chart were not hired subsequent to the filing of the petition, as many of them were employed by the petitioner in 2005 and during the first half of 2006. 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). Without such evidence to resolve this discrepancy, the organizational chart submitted in response to the request for evidence appears to be deliberately misleading. 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. at 591.

The director denied the petition on October 17, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition. The director determined that the petitioner had not established that the beneficiary would be supervising a subordinate staff of managers, supervisors or professionals, or that he would function at a senior level within the organizational hierarchy, other than in position title. The director further observed that that the beneficiary's proffered salary of \$41,600 is "incongruous with that of an employee who is actually managing other bona fide managers and professionals." The director noted that the petitioner had listed "a number of duties that would normally be required of or associated with a manager or executive," but that "this service is not convinced that the beneficiary will actually be carrying out these duties." The director concluded that the beneficiary would be engaged in the non-managerial, day-to-day duties of the business, rather than performing the listed duties.

On appeal, the petitioner states that it "strongly disagrees" with the director's decision. The petitioner emphasizes that the beneficiary has worked for the U.S. company in L-1A status as its executive chef since 2002, and that it "cannot consider that the Service has erroneously approved previous petitions on behalf of the beneficiary." The petitioner notes that the company continues to improve its performance every year and therefore it does not understand the director's finding that the company cannot support the beneficiary in a managerial or executive position at this time.

The petitioner further contends that the director abused his discretion, made a subjective determination, and did not base his decision on the regulations. The petitioner asserts that the director placed undue emphasis on the size of the petitioning company, while the regulations impose no such restrictions on the size of the petitioning company. Citing *Mars Jewelers Inc. v. INS*, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988), the petitioner asserts that a manager or executive need not supervise a large number of persons or a large enterprise. The petitioner asserts that the beneficiary supervises professionals who relieve him from the day-to-day operations of the business. The petitioner re-iterates the lengthy position description submitted in response to the request for evidence, and requests that the AAO conduct a review of the record in its entirety.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity under the extended petition. However, upon review of the director's decision, the AAO finds that the reasons given for the denial are conclusory with few specific references to the evidence entered into the record. The AAO also notes that the director's conclusion that the beneficiary's proffered salary is "incongruous" with that of an employee who is managing managers or professionals is not supported by the statute and regulations, which contain no salary requirements for L-1 beneficiaries. Accordingly, the director's comment in this regard is withdrawn.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the

federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Therefore, the AAO will address the petitioner's evidence and eligibility herein.

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 has consistently provided a list of 16 "essential functions" performed by the beneficiary in his role as executive chef of the petitioner's bakery and delicatessen. A review of these "essential functions" suggests that the beneficiary performs a combination of first-line supervisory and operational tasks, rather than performing primarily managerial or executive duties. However, preliminarily, the AAO notes that there are three separate references in the beneficiary's job description to "The Palm," an unrelated employer. The reference to this unrelated employer in the beneficiary's job description raises questions regarding the origin of the job description and whether the information provided represents an accurate account of the beneficiary's actual job duties. 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. at 591.

Nevertheless, the list of "essential tasks" includes a number of operational and administrative tasks that have not been shown to be managerial or executive in nature. For example, the beneficiary is responsible for placing food and supply orders "as directed," receiving products, verifying invoice pricing, quantity and quality, maintaining inventory systems, posting invoices daily into the "Restaurant Magic System," and developing daily specials. These duties suggest that the beneficiary is directly involved in performing purchasing and inventory duties that do not rise to the level of managerial or executive capacity. Furthermore, the beneficiary is described as performing many duties that would normally be attributed to a first-line supervisor, rather than a managerial or executive employee. For example, the petitioner stated that the beneficiary is responsible for scheduling staff, reviewing the "daily punch report," verifying that kitchen staff follow all recipes, assisting in training employees, performing line checks, and "setting customer service and work examples." The remainder of the tasks included in the list of "essential functions," such as maintaining personal hygiene, proper food handling techniques, and a clean kitchen, could apply to any employee working in the food service industry. Although the petitioner stated that the beneficiary "actively participates as [a] member of [the] management team," it offered no clarification as to what specific managerial or executive duties this responsibility would encompass. 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).

Therefore, to the extent that the list of "essential functions" represents the beneficiary's actual duties, it is reasonable to conclude that the beneficiary's duties are not primarily managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualifying duties is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

When instructed to submit a comprehensive description of the beneficiary's duties, the petitioner re-iterated the list of "essential functions" and added that the beneficiary's responsibilities include: hiring and firing the personnel who work under his supervision; exercising discretion over the petitioner's day-to-day operations; setting policies and procedures to manage the petitioner's kitchen operations; supervising five departments within the petitioner's kitchen; establishing goals and policies; exercising discretionary decision-making authority; and receiving supervision only from the board of directors of the parent company. The petitioner concluded by stating that "the majority of the beneficiary's time is spent on duties relating to the policy or operational management of the Petitioner." All of these newly-described duties paraphrased the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act. 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.). Furthermore, many of these broad claims are contradicted by other evidence in the record. Based on the petitioner's organizational chart alone, it is evident that the beneficiary does not report to the parent company's board of directors. The organizational chart shows that the beneficiary reports to a general manager, that the general manager reports to a vice president, and that the vice president reports to the U.S. company's president. A review of the organizational chart and the petitioner's evidence regarding its staffing levels also belies the claim that the petitioner's kitchen is organized into five departments. Again, 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. at 591.

Overall, the petitioner's descriptions of the beneficiary's duties, although lengthy, fall significantly short of establishing that the beneficiary would perform primarily managerial or executive duties.

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.

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 preparing the petitioner's products, rather than acting as supervisors themselves. Although the petitioner claimed in response to the request for evidence that the beneficiary manages the petitioner's bakery, pastry, ice cream specialty food and catering "departments," as well as the managers of four of these departments, the petitioner has not documented that it actually

employed the claimed subordinate managers at the time the petition was filed, nor does it even have a catering department listed on its organizational chart. Furthermore, as noted above, the petitioner has documented the employment of only five of the ten employees identified on the petitioner's organizational chart as the beneficiary's subordinates. These employees include the "bread section" employee, the "specialty food" employee, an ice cream technician, a bakery assistant, and a bakery helper, who appears to be employed on a part-time basis. Although the petitioner indicates that four of these five employees perform supervisory duties, it is reasonable to conclude that they all in fact participate in baking products for sale to the petitioner's wholesale and retail customers. The petitioner's claim that the bakery helper position is the only position in the company involved in hands-on baking tasks is simply not credible, given the petitioner's staffing levels and the scope of its business. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner was an 11-year-old company operating a bakery and delicatessen. The petitioner claims to serve retail customers, as well as wholesale customers including local markets, hotels and resorts. The petitioner has claimed to employ between 10 and 18 employees, but has documented the employment of only six to seven employees as of the date of filing. The petitioner does not claim to employ any cashiers, servers, sales people, or delivery drivers, although it is reasonable to expect that such employees would be required to operate the business. 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 six to seven staff members whose employment has been documented.

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.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), 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. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow

the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In *Mars Jewelers, Inc.*, the court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with the statute, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Our holding is based on the conclusion that the beneficiary is not primarily performing managerial or executive duties; our decision does not rest on the size of the petitioning entity.

Finally, the AAO acknowledges counsel's assertion that the director erred in denying the instant petition for an extension of the beneficiary's status when CIS previously approved two extensions of the beneficiary's L-1A status 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). It must be emphasized that each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

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

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions filed by the petitioner for similar positions, 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).

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.

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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.