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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 28 2010

IN RE: Petitioner:
Beneficiary: [redacted]

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

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. After granting a motion to reopen and reconsider and upholding the denial, the petition was certified to the AAO for review. The director's decision will be affirmed and the petition will be denied.

The petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The U.S. petitioner, a limited liability company organized in the State of Nevada, is described as an Italian restaurant. The restaurant seeks to employ the beneficiary as its food service manager. The petitioner claims that it is the affiliate of [redacted] located in Genoa, Italy.

The director denied the petition, determining that the petitioner had failed to establish that: (1) the petitioner and the organization which employed the beneficiary in Italy were qualifying organizations; (2) the beneficiary would be employed in a primarily managerial or executive position in the United States; and (3) the beneficiary had been employed in a primarily managerial or executive position abroad.

Counsel for the petitioner filed a motion to reconsider, alleging that the director's denial of the petitioner was arbitrary, capricious, and disregarded the law. Counsel contended that a full review of the record would demonstrate that the petitioner had fully complied with all evidentiary requirements. After granting the motion, the director upheld the previously-entered denial and certified the matter to the AAO for review.

After reviewing the record, the AAO issued a request for additional evidence on January 18, 2006. The petitioner, thorough counsel, responded to this request on March 31, 2006 but refused to submit the requested evidence. In a rambling and confused brief, counsel stated that "[t]he information has already been furnished to the AAO again and again" through other nonimmigrant L-1A petitions filed by the petitioner. Counsel specifically pointed to the L-1A petitions of other employees, including [redacted] and [redacted]. Counsel stated that these L-1A petitions were reviewed and reaffirmed by the Director, California Service Center, and that they should be part of the record. After proclaiming '[redacted]' counsel concluded by stating that "[a]s a matter of equity, fact and law the question before the AAO is moot."

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who

> seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Prior to addressing the issues, the AAO must emphasize that the critical facts to be examined are those that were in existence at the time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998); *see also,* 8 C.F.R. § 103.2(b)(2).

I. Qualifying Relationship

The first issue in the present matter is whether the petitioner maintains a qualifying relationship with the foreign employer. Specifically, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(C) provides that the petition must be accompanied by a statement which demonstrates that the prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas.

The regulation at 8 C.F.R. § 204.5(j)(2) defines the term "subsidiary" as:

> [A] firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In addition, the regulation at 8 C.F.R. § 204.5(j)(2) defines the term "affiliate" as:

> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(B) 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, or

(C) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

The petition references a number of different corporations, partnerships, groups, and restaurants without clearly establishing their relationship. Specifically, the petition includes references to [redacted]

In a letter dated June 24, 2004, the petitioner explained that the beneficiary had been employed in Italy since 2001 by [redacted], a component of [redacted] In the initial petition, the petitioner claimed that the U.S. petitioner and [redacted] are affiliates and thereby maintained a qualifying relationship.

The U.S. petitioner is a limited liability company which operates Italian-style restaurants in the United States. The petitioner currently operates a restaurant known as [redacted] in a casino in Las Vegas, Nevada.

The petitioner's June 24, 2004 letter attempted to explain the nature of the qualifying relationship between the U.S. petitioner and [redacted] Specifically, the petitioner indicated that [redacted] entered into a Management Services Agreement through its alleged subsidiary, [redacted] with the U.S. petitioner. The petitioner submitted a copy of this agreement as well as a Licensing Agreement between the U.S. petitioner and [redacted] which permits the U.S. petitioner to make exclusive use of the mark [redacted] The Management Services Agreement indicated that [redacted] Marketing, in exchange for providing management services to the U.S. petitioner, received restrictive shares of stock equal to a 5% ownership interest in the U.S. petitioner. The Management Services Agreement between the U.S. petitioner and [redacted] further provides that [redacted] will ensure that the restaurant operated by the U.S. petitioner, [redacted] delivers effective, efficient, and quality food services.

The director found the initial evidence submitted with the petition to be insufficient to qualify the petitioner for the benefit sought, and consequently issued a request for evidence on March 24, 2005. In the request, the director required the petitioner to submit evidence that definitively established that a qualifying relationship

exists between the parties. The director requested the U.S. company's stock certificates, stock ledger, a copy of the U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts, and a copy of the foreign entity's annual report that listed all affiliates, subsidiaries, branch offices and percentage of ownership. The director also requested evidence that the foreign entity had in fact paid for its interest in the United States entity. Specifically, the director requested copies of the original wire transfers as well as any other documentation, such as canceled checks or deposit receipts demonstrating the exchange of funds, to support the claimed ownership. In addition, the director requested an explanation regarding any funds not originating with the foreign company, including the names of all account holders and their affiliation with the foreign company.

On June 2, 2005, counsel for the petitioner submitted several documents in response to the director's request. Upon review, it is noted that counsel resubmitted the management agreement and the licensing agreement included with the initial petition, and also submitted a declaration from [redacted] prepared on [redacted] stationery and executed on February 25, 2002, which states that these four persons are "the shareholders of the two companies which own [redacted] in Genoa (ITALY) and [redacted] Las Vegas (NEVADA) . . . ." No evidence pertaining to the purchase of the U.S. entity was submitted, nor did counsel or the petitioner address the reason for the omission of this requested evidence.

The director denied the petition on June 23, 2005. In the denial, the director did not recognize the [redacted] claimed indirect ownership interest of the petitioner through [redacted] The director merely concluded that, pursuant to *Matter of Treasure Craft of California*, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 14 I&N Dec. 190 (Reg. Comm. 1972). The director compared the differing lists of members and owners and concluded, without further analysis, that the petitioner had failed to establish that a qualifying relationship existed between the petitioning company and [redacted]

The petitioner, through counsel, filed a motion to reopen and reconsider, alleging that the director's denial of the petition was arbitrary, capricious, and disregarded the law. Counsel contended that a full review of the record would demonstrate that the petitioner had fully complied with all evidentiary requirements, and provided no new or additional evidence to refute the director's finding with respect to this issue. The director did not address the qualifying relationship between the entities except to refer to the beneficiary's foreign employer as the petitioner's "joint venture partner."

The director reviewed the record, and noted that, based on the evidence provided, the foreign entity at best owned 5% of the petitioner. Based on this conclusion, the director noted that the relevant factor to examine was control, since the foreign entity owned less than 50% of the petitioner. Noting that the operating agreement, which was the only agreement showing the relationship between the petitioner and the foreign entity, did not show that the foreign entity owned or controlled the petitioner, the director affirmed the previous finding that a qualifying relationship had not been demonstrated.

Upon receipt of the director's certified decision, the AAO issued a detailed request for further evidence on January 18, 2006. The AAO requested the following documentation from the petitioner:

- A complete copy of the petitioner's Operating Agreement.
- Copies of all stock certificates issued.
- A complete copy of the petitioner's Form 1065, U.S. Return of Partnership Income for 2002, 2003, and 2004. You must include copies of all schedules and attachments, including copies of all issued Schedules K-1.

The AAO also requested clarification on whether the [redacted] restaurant is the parent entity or a subsidiary of the [redacted] In addition, the AAO asked the petitioner to submit documentary evidence to clearly outline the relationship between [redacted] and [redacted] The petitioner was also asked to state the organization type for each entity and to submit documentation establishing the ownership structure of each organization. Additionally, the AAO requested that the petitioner disclose and submit evidence of all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entities in question.

Finally, noting that the petitioner claimed that [redacted] is a "subsidiary" of [redacted] the petitioner was asked to submit evidence definitively establishing that [redacted] owns and controls [redacted] Again, the AAO asked the petitioner to state the organization type for the entity and to submit documentation establishing the ownership structure of the organization, as well as disclose and submit evidence of all agreements relating to the voting of shares, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entities in question.

Counsel submitted a response dated March 31, 2006. Counsel, in lieu of addressing the specific questions posed by the AAO, claimed that the current proceeding constituted a "travesty of justice" and that the case was an example of "selective enforcement" by the service. Counsel restated the procedural history of the instant petition as well as other petitions filed by the petitioner in this matter, but refused to address the specific questions included in the request for evidence. Counsel once again states that [redacted] was a joint venture between New York restaurant owners and the [redacted] but fails to articulate or provide any evidence supporting this claim. Furthermore, no additional documentary evidence in support of the qualifying relationship was submitted.

The critical relationship that must be established is that between the U.S. petitioner and the beneficiary's overseas employer. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology*, 19 I&N Dec. at 595.

Upon review of the record of proceeding, the petitioner has not established that it has the required qualifying relationship with the Italian entity.

In this case, the petitioner must demonstrate a qualifying relationship between the beneficiary's foreign employer in Italy, [redacted] and [redacted] in Las Vegas, Nevada. The petitioner claims that the two entities are "affiliates" under the regulations. Counsel for the petitioner provided documentary evidence outlining the shareholder interests in the U.S. and foreign entities, and has supplemented this evidence with explanatory statements and supporting documentation that discuss the nature of the relationship and agreements between the entities.

Specifically, with regard to the U.S. petitioner, counsel has submitted the minutes of the Meeting of Members for the petitioner dated February 4, 2003, and a List of Members and Percentages, identified as "Exhibit A" of its Operating Agreement. Both documents list the same nine shareholders and their percentage of ownership. No membership certificates, ledgers, or evidence of consideration rendered for these interests have been provided. Despite the AAO's specific request, the petitioner did not submit organizational documents or its Operating Agreement.

With regard to the foreign entity, the petitioner submitted a declaration by [redacted] dated February 25, 2002, which states that they are the shareholders who own [redacted] in Italy as well as [redacted] in the United States. The petitioner also submitted a document, in Italian, entitled '[redacted] which lists the names and monetary investments of seven alleged shareholders and appears to represent the ownership interests of the foreign parent company. This document is accompanied by an abbreviated and uncertified English translation. *See* 8 C.F.R. § 103.2(b)(3).

Finally, counsel submitted a copy of a Management Services Agreement between the U.S. petitioner and [redacted] executed on "November 2000" (with no day specified), as well as a copy of a Licensing Agreement between the U.S. petitioner and [redacted] dated November 21, 2000.

The above-noted documentation is insufficient to demonstrate that the foreign entity, [redacted] and the U.S. entity, [redacted] are owned by the same parent or the same group of individuals, as required to establish an affiliate relationship under the regulations. *See* 8 C.F.R. § 204.5. Additionally, the submitted evidence does not establish the foreign entity's ownership of the petitioner, thereby establishing a parent-subsidiary relationship, despite the management and licensing agreements submitted as evidence of its control of the petitioner. Furthermore, the AAO notes that despite the specific requests of the director and the AAO, counsel and the petitioner have refused to submit requested documentation, such as wire transfers, Articles of Incorporation, and complete, certified translations. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Additionally, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

With the initial petition and again in response to the director's request for evidence, counsel submitted a statement of the ownership interests in the U.S. petitioner, identified as "Exhibit A" of its Operating

Agreement.[1] Specifically, this document indicates that the U.S. petitioner's members and their percentages of ownership are as follows:

Name	Percentages
[redacted]	45%
	15%
	10%
	5%
	5%
	5%
	5%
	5%
	5%

According to this statement, [redacted] the claimed subsidiary of [redacted] owns a five percent portion of the petitioner.

With regard to the ownership of either [redacted] or the [redacted] the petitioner submitted a document entitled [redacted] which counsel asserts is "similar" to articles of incorporation in the United States. This document is accompanied by abbreviated, incomplete, and uncertified translations which appear to indicate that the foreign entity is owned as follows:

Name	Amount invested (in Lire)
[redacted]	2.000.000
	2.000.000

[1] In response to the RFE, counsel objects to the AAO's request for additional documentation and asserts that the issues have been previously decided in the petitions adjudicated by the California Service Center. Counsel argues that *res judicata* applies and urges the AAO to review the other petitions. The principal of *res judicata* does not apply in visa petition proceedings. The very fact that nonimmigrant visas can be revoked pursuant to 8 C.F.R. § 214.2(l)(9) suggests that the approval of a nonimmigrant visa is not an unalterable, unreviewable decision subject to *res judicata*. Decisions subject to *res judicata* may not be revisited or reopened at all.

The AAO has reviewed other petitions filed by the petitioner and finds that at least one petition [redacted] contains conflicting documents that raises serious concerns about the integrity and reliability of the evidence. The director approved one L-1A petition that contains an amended or altered version of "Exhibit A" of the Operating Agreement. While the document is identical in all respects to the "Exhibit A" in the current petition with one exception: it contains additional text indicating that [redacted] Marketing Overseas Limited maintains a 5% interest "with veto power." The phrase "with veto power" is typed in a different font than the original document and appears to be an alteration. Based on this material discrepancy, the director may reasonably review the petitioner's other petitions for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).

[redacted]

3.200.000
3.200.000
3.200.000
3.200.000
3.200.000

Contrary to this claim of seven owners, counsel also submitted a declaration from [redacted] prepared on [redacted] stationery and executed on February 25, 2002, which states that these four persons are "the shareholders of the two companies which own [redacted] in Genoa (ITALY) and [redacted] in Las Vegas (NEVADA) . . . ." The petitioner provided no clarification with regard to the two companies mentioned in the statement.

Based upon the above information, the petitioner has failed to establish that an affiliate relationship exists between the petitioner and [redacted] the named foreign entity. By definition, "affiliate" means one of two subsidiaries both of which are owned and controlled by the same parent or individual, or 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. *See* 8 C.F.R. § 204.5(j)(2). By virtue of the multiple and diverse owners listed above, as well as the uncertainty of the documentation provided, it is clear that the U.S petitioner and [redacted] are not one of two subsidiaries owned and controlled by the same parent or individual. Furthermore, since there are no common individuals with the same ownership percentages and control on either of these lists, it cannot be concluded that the petitioner and [redacted] are entities that are owned and controlled by the same group of individuals.

The proper question before the AAO, therefore, is whether the petitioner is the subsidiary of [redacted] the named foreign entity through which the petitioner claims to have a qualifying relationship. The regulation at 8 C.F.R. § 204.5(j)(2) defines subsidiary as:

> a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

By virtue of the [redacted] five percent ownership interest in the petitioner, eligibility hinges on the last phrase of the definition. The AAO must determine whether [redacted] through its claimed subsidiary [redacted] indirectly owns less than half of the petitioner but in fact controls the petitioner so that a subsidiary relationship is established.

In part due to the imprecise nature of the director's request for evidence and the resulting denial, the petitioner did not submit sufficient evidence to establish the claimed qualifying relationship prior to adjudication in this matter. The record remains confused regarding the purportedly related companies and their ownership.

First, the document entitled [redacted] allegedly the equivalent of the foreign entity's Articles of Incorporation, is not translated. [redacted] appears to be the corporate name of [redacted] based on a partially translated 2004 Italian tax form that was submitted in response to the director's request for evidence. Furthermore, there is no evidence in the record to verify the ownership of [redacted] and its alleged subsidiary, [redacted] with whom the petitioner claims to have a qualifying relationship.

It should be noted that the petitioner, by virtue of the request for evidence issued by the AAO on January 18, 2006, was afforded an opportunity to clarify the relevance of this document and the manner in which it pertains to the organizational structure of the companies identified herein. As previously stated, the petitioner, through counsel, patently refused to provide such clarification. The AAO, therefore, cannot determine whether a parent-subsidiary relationship exists between [redacted] and the petitioner. Furthermore, because the petitioner failed to submit a certified translation of this document, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Second, despite counsel's repeated assertions that the qualifying relationship exists, the assertions of counsel will not satisfy the petitioner's burden of proof. Counsel states that the U.S. petitioner is owned by the [redacted] and further declares that [redacted] has been given authority to make all executive decisions regarding the U.S. petitioner. However, no documentation supporting these claims has been provided. More important is the alleged ownership structure of the foreign entity and its eventual relationship with the petitioner. Counsel asserts that [redacted] was the beneficiary's foreign employer. Counsel then asserts that [redacted] is a part of [redacted] Next, counsel asserts that [redacted] is a subsidiary of [redacted] and that [redacted] in fact controls the petitioner as evidenced by the management and licensing agreements submitted. Thus, counsel concludes that [redacted] indirectly owns and controls the U.S. petitioner through [redacted] and that [redacted] is the final link in the chain of ownership and control. However, without documentary evidence to support the claim, the 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).

As discussed above, there is no corporate documentation showing the ownership of [redacted] the entity which the petitioner identifies as the foreign qualifying organization in this matter. In addition, there is no documentation showing the relationship between the beneficiary's alleged foreign employer, [redacted] with [redacted] Furthermore, there is no documentation with regard to the ownership of [redacted] Although the petitioner claims that [redacted] is the subsidiary of [redacted] Group, the petitioner has submitted no documentation evidencing that [redacted] is in fact its parent. While indirect ownership is recognized for purposes of determining a qualifying subsidiary relationship under 8 C.F.R. § 204.5(j)(2) such ownership cannot be assumed without documentary evidence supporting the claim. Since the ownership of [redacted] is crucial for purposes of this examination, the omission of any evidence pertaining to this company precludes the AAO from determining that a qualifying parent-subsidiary relationship exists. 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)).

Finally, it is noted for the record that the Management Services Agreement and the Licensing Agreement do not establish a qualifying relationship between the two entities. The record indicates that the beneficiary will be employed in the United States as a representative of a foreign entity that has a contractual agreement with a company in the United States. However, a qualifying relationship must be based on ownership and control; a contractual relationship will not establish a qualifying relationship. *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual").

The Management Services Agreement between the foreign organization and the petitioning U.S. corporation can be terminated as opposed to one in which the foreign organization and a domestic organization are permanently tied together and not limited to a single, specific venture. In addition, the Licensing Agreement between the parties can similarly be terminated as provided in Section 7(a) of the agreement, which provides that the "Licensee may terminate the agreement at any time by providing the Licensor with 30 days notice or without notice upon a breach of this Agreement by Licensor." Consequently, it cannot be determined that the foreign parent company obtained ownership and control of the U.S. petitioner based on this agreement. As previously discussed, the record contains no evidence such as stock certificates, by-laws, or articles of incorporation for both entities that would indicate an existing qualifying relationship between the petitioning entity and the U.S. organization. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the foregoing discussion, the petitioner has failed to demonstrate that a qualifying relationship exists between the petitioner and the alleged foreign parent, as required by the regulation at 8 C.F.R. § 204.5(j)(2). For this reason, the petition may not be approved.

II. Managerial and Executive Capacity

The second and third bases for the denial present two related, but distinct, issues: (1) whether the beneficiary would be employed in a primarily managerial or executive capacity in the United States; and (2) whether the beneficiary had been employed in a primarily managerial or executive capacity abroad.

The regulation at 8 C.F.R. § 204.5(j)(2) 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.

The regulation at 8 C.F.R. § 204.5(j)(2) 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.

Moreover, 8 C.F.R. § 204.5(j)(4)(i) further determines managerial capacity to include:

> 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.

A. Duties in the United States

With regard to the beneficiary's position in the United States, the petitioner claimed that he will act as the restaurant's food services manager. The petitioner described his proposed duties as follows:

> [The beneficiary's] duties will include planning, directing and coordinating activities of [redacted] in its service of fine food and beverages.

Noting that the description of duties was vague, the director requested additional information pertaining to the beneficiary's position in the United States in the request for evidence issued on March 24, 2005. The director requested additional evidence regarding the nature of the beneficiary's proposed duties, as well as the position titles and duties of his subordinate employees.

In response, the petitioner, through counsel, resubmitted the same description of duties the director had previously deemed insufficient. In addition, the petitioner failed to address the director's queries regarding the beneficiary's subordinate employees. Finally, the petitioner submitted, without explanation, a new letter dated May 17, 2005 in which the petitioner stated that the beneficiary is currently employed as "dining room manager and wine sommelier" not as food services manager, as previously stated. 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). Nevertheless, the petitioner's May 2005 letter includes a description of this position that is identical to the position description for the beneficiary's last position abroad, which, as discussed further below, has not been shown to be primarily managerial or executive in nature.

The director denied the petition, finding that the vague description of duties and the petitioner's failure to supplement the record rendered it impossible to conclude that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director noted that despite the specific requests for details regarding the backgrounds and duties of the beneficiary's subordinates, the petitioner had failed to submit such evidence.

On motion, counsel contends that the required evidence is contained in the record, and that a thorough review of the record would demonstrate to the examiner that the beneficiary would in fact be employed in a qualifying capacity. Counsel again alleges that the denial was arbitrary and capricious, but fails to articulate any specific errors of the director, and fails to submit the previously-requested documentation. Instead, counsel submitted letters from Dr. [redacted] Professor of Marketing, University of Nevada, Las Vegas, and Dr. [redacted] Visiting Professor from the University of Nevada, Las Vegas, Harrah School of Hotel Management. Dr. [redacted] and Dr. [redacted] state that the beneficiary's position in Italy and his proposed position in the United States constitute, in their professional opinions, managerial positions. Upon review of the director's decision to uphold the denial and certify the decision to the AAO for review, issued on November 4, 2005, it is noted that this issue was not addressed.

Upon review of the record, the AAO concurs with the director's initial finding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner has not demonstrated that the beneficiary will be employed in a managerial or executive capacity in the United States. In support of the beneficiary's intended duties, the petitioner provided a brief description of the beneficiary's duties, and claimed that he would serve as food services manager.

This evidence is insufficient for two reasons. First, the one-sentence job description the petitioner provided fails to identify with specificity the exact duties of the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Second, the petitioner relies on bare assertions that the beneficiary will function as a manager and/or an executive. However, 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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Despite being afforded the opportunity to provide additional details regarding the beneficiary's duties, the petitioner's organizational structure and the beneficiary's role therein through the director's request for evidence, the petitioner failed to provide any additional evidence other than a vague and incomplete organizational chart that failed to identify with any specificity the number and types of employees the beneficiary would supervise. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). At the same time, the petitioner introduced evidence indicating that the beneficiary's actual position in the United States is that of a dining room manager and sommelier rather than as a food services manager as indicated at the time of filing.

With respect to the opinion letters from two professors at the University of Nebraska, the AAO notes that, as a matter of discretion, USCIS may accept expert opinion testimony.[2] However, USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

Dr. [redacted] states that he has been asked to review "some of the information" in the beneficiary's file, but he does not specify on what information or documentation his opinion is based. He also acknowledges that he is not familiar with "the complex legal issues involved in immigration cases." Dr. [redacted] bases her opinion on the petitioner's brief job description and on her existing knowledge of the "usual" duties of restaurant managers. While both Dr. [redacted] and Dr. [redacted] draw conclusions regarding the managerial nature of the beneficiary's duties,

[2] Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. Black's Law Dictionary 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. *Id.* (defining "written testimony"); *see also id* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

the AAO will not accept this evidence in lieu of the beneficiary's actual job description for the position of food services manager within the petitioner's organization, which is required by regulation and was specifically requested by the director prior to the adjudication of the petition. Here, the two letters submitted are deficient and cannot be deemed probative evidence that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner, therefore, has failed to demonstrate that the beneficiary will be employed in the United States in a managerial or executive capacity. For this additional reason, the petition may not be approved.

B. Duties in Italy

The final issue is whether the beneficiary's position abroad was one which was primarily managerial or executive in nature.

Specifically, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B) provides that, if the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or another legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity.

The petitioner claimed that while abroad, the beneficiary worked as both the dining room manager and as a sommelier. His duties as dining room manager were identified as:

- Scheduling of all the dining room employees (captain, waiter, busser, runner, floater)
- Hiring and firing of the personnel
- Training of the personnel
- Stock control for china, silverware, linens and napkins
- Enforce regulations (Health Department, OSHA)
- Booking of parties
- Overview of the menu in cooperation with the executive chef
- Overview of the pricing in cooperation with the general manager

As sommelier, the petitioner stated that his duties included:

- Introducing our wine menu to customers
- Promote special wines
- Executive decision on the wine menu and pricing
- Inventory tasting on location and non
- Wine seminars to educate our employees

In the request for evidence issued on March 24, 2005, the director requested additional details regarding the beneficiary's position abroad, including an organizational chart demonstrating the hierarchical structure of the foreign entity and the beneficiary's position therein, as well as evidence regarding the nature of the beneficiary's duties and the position titles and duties of his subordinate employees.

In response, the petitioner submitted an organizational chart, demonstrating that the beneficiary, as dining room manager, oversaw numerous employees, including waiters, a head waiter, an assistant sommelier, dishwashers, floaters, and persons occupying the positions identified as "commis," who were designated to set up and clean tables. A brief description of the duties of these persons was provided.

The director denied the petition, finding that the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity. On motion, counsel contended that the required evidence is contained in the record, and that a thorough review of the record would demonstrate to the examiner that the beneficiary was in fact be employed in a qualifying capacity. Counsel again alleges that the denial was arbitrary and capricious, but fails to articulate with regard to the errors of the director, and fails to submit the previously-requested documentation. The previously-identified letters from Dr. [redacted] and Dr. [redacted] were also submitted in support of the claim that the beneficiary was a professional employee and, as previously stated, were not addressed by the director with regard to this issue. For the reasons discussed above, the AAO do not find this evidence probative of the beneficiary's employment in a primarily managerial or executive capacity. Furthermore, both letters appear to address only the beneficiary's U.S. employment and mention the beneficiary's employment with the foreign entity in only a cursory manner.

Although the issue of managerial and executive capacity was not addressed by the AAO in the request for evidence issued on January 18, 2006, the AAO nevertheless concurs with the director's initial finding that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

First, the description of duties and by virtue of his position titles (i.e., dining room manager and sommelier), it is clear that the beneficiary was engaged in day-to-day tasks not normally reserved for managerial or executive personnel. An employee who "primarily" performs the tasks necessary to produce a product or to provide services 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Therefore, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "stock control", "booking of parties," "inventory tasting," and "introducing wines to customers" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The actual duties themselves 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).

Secondly, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are professional. *See* 8 C.F.R. § 204.5(j)(4)(i).

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

In the instant case, the petitioner has not established that a bachelor's degree is actually necessary, for example, to perform the service functions of, for example, the waiters, dishwashers, and floaters. As a result, it appears that the beneficiary was acting merely as a first-line supervisor, not a managerial employee. 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, therefore, has failed to demonstrate that the beneficiary was employed abroad in a managerial or executive capacity. For this additional reason, the petition may not be approved.

III. Prior L-1A Approvals and Conclusion

Counsel for the petitioner notes that U.S. Citizenship and Immigration Services (USCIS) approved other petitions that had been previously filed by the petitioner on behalf of the beneficiary. It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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).

Finally, the petitioner's reference to the past approvals of the beneficiary's status as an L-1A intracompany transferee is not relevant to this proceeding. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See e.g, Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin*

Brothers Co. Ltd. v. Sava, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The 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. at 597.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 it 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).

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 petition is denied.