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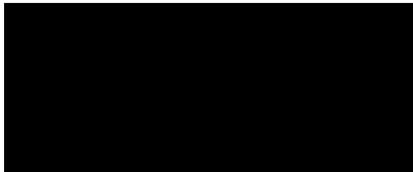
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DATE: JUN 19 2012 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, California 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 to classify the beneficiary as an L-1A 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, an Arizona limited liability company, operates casual dining restaurants. It claims to be a subsidiary of Grupo Pacifico Norte S.A. de C.V., located in Tijuana, Mexico. The petitioner has employed the beneficiary since May 2008 and seeks to extend his L-1A status so that he may continue to serve in the position of "Senior Project Manager (Operational Manager)."

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity. In denying the petition, the director determined that the beneficiary would primarily perform the duties of a first-line supervisor of non-professional employees, duties which are not classified as managerial or executive under the applicable statutory definitions.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the director erroneously disregarded evidence demonstrating that the beneficiary allocates 80 percent of his time to management duties. Counsel also provides clarification as to the number and types of employees the beneficiary supervises. Counsel submits a brief, but no further documentary evidence, in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. Discussion

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

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;
- (ii) 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.

A. Facts and Procedural History

The petitioner filed the *Petition for a Nonimmigrant Worker (Form I-129)* on April 29, 2010. On the Form I-129, the petitioner stated that it has 30 employees in the United States and gross annual income of approximately \$1.7 million.

In a letter dated April 6, 2010, the petitioner stated that the beneficiary is employed in a managerial capacity as "General Manager of Operations" and "will remain responsible for developing and implementing the company business plan in the United States." Specifically, the petitioner stated that the beneficiary "will keep managing the carry out [*sic*] production, sales and marketing of produce, including preparing production and distribution plan for the periods established by the firm, internal organization of the office in fulfillment with the [company] policies." The petitioner indicated that the beneficiary is the "general manager of our Tucson, AZ office," and that he will perform the following duties:

- Elaborate the business operation's manual that will take part on the documents that will form the franchise packet.
- Supervises and controls the work of other store managers [*sic*] of the organization
- Establishes polices [*sic*] and functions of the company
- Has the authority to hire and fire or suggest those actions to the store managers
- Directs day to day operation of the activity or functions of the employees
- Correct functioning of each point, making sure they have staff, office paperwork, change and all things necessary for the proper functioning of each point.
- Guaranteeing the product good quality, hygiene and good image and Service of the point he is in charge of, through:
 - Diary and careful supervision of the point, visiting every day all of them.
 - Diary and careful supervision of the product good quality.
 - Collect complaints and suggestions from the clients, through store managers giving this information to process and give an answer to have valid report General management on a weekly basis in order to be further processed.
 - Provide, at least once a week, a "guide for supervision" report for each of the point he is in charge of and give it to General management, on a weekly basis for evaluation.
 - Provide, at least once a month, a meeting with his assistant in order to find out any deficiency or to improve quality, hygiene, image and service in his points. Elaborate a report of those meetings which will be sent to general management.
- Checking the ware storage of each point, writing up a weekly inventory; should he found [*sic*] any lack he will proceed following the Company policies.
- Updating the index of productivity for each point. He will monthly report these indexes with his assistants; should he found [*sic*] any problem that could damage the production he will take action.

The petitioner also provided a copy of its employment agreement with the beneficiary, and attached Exhibit A to the agreement, which outlines his duties as "Operational Manager," which include:

- Direct and coordinate activities of businesses or departments concerned with the services provided pricing, sales or distribution of products.
- Manage staff, preparing work schedules and assigning specific duties.
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement . . .
- Determine staffing requirements, and interview, hire and train new employees

- Monitor customers and vendors to ensure that they efficiently and effectively are providing and being provided with a good service
- Direct and coordinate organization's financial and budget activities . . .
- Determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand.

The petitioner submitted a copy of its Arizona state quarterly wage report for the first quarter of 2010. The petitioner reported that it employed between 26 and 29 employees during the quarter and paid total wages of \$105,833.

The director issued a request for additional evidence on May 10, 2010. With respect to the beneficiary's employment capacity in the United States, the director requested: (1) a more detailed description of the beneficiary's job duties, including the percentage of time he spends in each of the specific duties listed; (2) the total number of employees at the U.S. location where the beneficiary will be employed; (3) a detailed organizational chart for the U.S. company establishing its managerial hierarchy and staffing levels; (4) names, job titles, job duties, educational level and annual salaries/wages for all employees under the beneficiary's supervision; (5) the source of remuneration for all persons named on the organizational chart, along with start and end dates of employment and full-time/part-time status; and (5) copies of the company's payroll summary, Forms W-2 and W-3 relating to the beneficiary's subordinate employees.

In response to the RFE, the petitioner indicated that the beneficiary holds the position of store manager of one of its two restaurant locations, which has 13 employees.

The petitioner indicated that in this role, the beneficiary spends 80 percent of his time ensuring that the store achieves the productivity goal established by the company business plan and fulfilling "QHIS" (Quality, Hygiene, Image and Service) requirements. Specifically, the petitioner described the beneficiary's duties as follows:

1. The correct functioning of the store, assuring that it has the personnel, supplies, documents and monetary change, etc. necessary to operate.
2. Guarantee quality of products and supplies, Quality Hygiene, Image and Service of each branch in customer satisfaction through:
 - a. Daily and scrupulous supervision of [QHIS]
 - b. To supervise in a daily basis the quality of supplies (special marinated chicken, grilled chicken, salsas, sides, etc.)
 - c. Gather information about complaints or suggestions from customers, turning in this information in a weekly basis to general management. . .
 - d. To obtain once a week, the report established as the supervision guide for the store, which will be turned in for general evaluation
 - e. Establish once a month a work meeting with associates to detect deficiencies and to exchange information of improvements to QHIS
3. The existence of products and cash, for which he will have to make inventory reports on a weekly basis which will be turned in to general management and in case of finding something wrong it will proceed according to the enterprise politics.
4. Maintain the information up to date so it recognizes the productivity index of the store. Elaborate monthly meetings with associates and general management to give information

about each index. To find negligences [sic] that affect productivity and to take corrective actions.

The petitioner indicated that the beneficiary allocates the remaining 20 percent of his time to "Established Documents," described as: (1) Supervision Guide (weekly); (2) Branch situation report (weekly); (3) Maintenance Solicitude (as needed); (4) Rough draft of monthly meetings with associates (monthly); (5) Inventory revision reports (weekly); (6) Utilities payment control of branch (monthly); (7) Administrative Acts (as needed); and (8) monthly evaluation of QHIS and store productivity. The petitioner indicated that the beneficiary prepares all of these reports for review by the general manager.

The petitioner submitted an organizational chart for the restaurant location to which the beneficiary is assigned, which includes job titles, hire dates, hourly wages, and brief job descriptions for all employees. The chart depicts the beneficiary in the position of store manager since June 1, 2008, responsible to "administrate the store's operation, paying special attention to the quality and recipes of the main product" as well as checking on health and safety regulations and increasing monthly sales.

The chart depicts one assistant manager whose role is to "make sure that every employee is doing their job right when the manager is not present and help with office chores." The chart also identifies three cooks, two assistant cooks, four cashiers and two grillers. The organizational chart indicates that the beneficiary directly supervises all lower-level employees; the assistant manager is not depicted as a supervisory-level position. The petitioner also provided a separate chart listing the employees, their start dates, position titles, full or part-time status, hourly wages and educational levels. According to that chart all of the employees, with the exception of the beneficiary, are high school graduates and 11 of the 12 subordinates, including the assistant manager, earn \$7.25 or \$7.50 per hour. The chart also indicates that the assistant manager is "training."

The organizational chart also depicts an unnamed office accounting advisor and office legal advisor as "external." The petitioner did not provide further information or evidence regarding these external contractors. Finally, the petitioner provided copies of 2009 IRS Forms W-2, Wage and Tax Statement, for the beneficiary and six of his subordinates. The petitioner indicated that it hired four of the remaining employees in the first quarter of 2010, and two employees in May 2010. The AAO notes that the record contains no evidence of wages paid to the two employees claimed to be hired on March 1, 2010 (both assistant cooks), and the petitioner did not explain why these individuals are not reported on the state quarterly wage report for the first quarter of 2010.

The director denied the petition on June 16, 2010, concluding that the petitioner failed to establish that the beneficiary has been or would be employed in a qualifying managerial or executive capacity. In denying the petition, the director found that the petitioner's description of the beneficiary's duties was vague, failed to establish what the beneficiary will do on a day-to-day basis, and appears to include non-managerial duties associated with providing a product or service. The director further noted that the beneficiary would be directly supervising all lower-level staff, none of which had been shown to be employed in a supervisory, managerial or professional capacity. The director acknowledged that one of the beneficiary's subordinates has the title "assistant manager," but found insufficient evidence to establish that this employee actually works full-time or supervises subordinate employees. Overall, the director concluded that the beneficiary is functioning as a first-line supervisor to non-professional employees, and that there is insufficient evidence to establish that he would be relieved from performing non-qualifying duties associated with operating the restaurant.

On appeal, counsel for the petitioner asserts that the petitioner did not, in fact, provide a vague description of the beneficiary's day-to-day duties. Counsel contends that the petitioner stated the duties in detail in the beneficiary's employment agreement and in response to the RFE, when it established that the beneficiary allocates 80 percent of his time to management functions and 20 percent of his time to office work. Counsel asserts that the director failed to properly review all evidence provided regarding the beneficiary's duties.

Counsel also discusses the petitioner's organizational structure. Counsel confirms that the assistant manager is in training and does not perform supervisory duties and that the external accounting and legal advisors should not be considered the beneficiary's subordinates. Finally, while acknowledging that none of the beneficiary's subordinates are managers, supervisors or professionals, counsel contends that the beneficiary, as the only manager of a small company, "is not forced to hire only professionals for the purpose of his restaurant business." Counsel asserts that the petitioner has met its burden to establish that the beneficiary's duties are primarily managerial or executive in nature.

B. Discussion

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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(1)(3)(ii). The petitioner 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.* Furthermore, beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The AAO notes that the petitioner has not consistently identified the beneficiary's job title or duties within the U.S. company. At the time of filing the petition, the petitioner indicated the beneficiary's job title as "Senior Project Manager," "General Manager of Operations" and "Operational Manager." In response to the RFE, the petitioner and counsel referred to the beneficiary as a "Store Manager" and provided a revised position description which suggests that his position is actually not as senior as initially indicated. For example, the position description provided in the petitioner's letter dated April 6, 2010 indicated that the beneficiary "supervises and controls the work of other store managers of the organization," and suggested that he would have oversight of multiple restaurant locations while being aided by an assistant. The position description provided in response to the RFE clearly indicates that the scope of his authority would be limited to that of store manager of the petitioner's restaurant located at [REDACTED] Tucson, Arizona, rather than involving oversight of multiple locations. On appeal, counsel asserts that USCIS should look to the "operational manager" job description appended to the beneficiary's employment contract, a description that bears little resemblance to the "store manager" description submitted in response to the RFE. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The only organizational chart provided in the record depicts the beneficiary as a store manager, and the AAO will rely on this position description for the purpose of determining whether the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The petitioner indicates that the beneficiary will allocate 80 percent of his time to: ensuring "the correct functioning of the store"; guaranteeing "quality of products and supplies"; supervising quality, hygiene, image and services by directly supervising store associates; ensuring "the existence of products and cash"; and maintaining records and information for reports. The remaining 20 percent of the beneficiary's time is allocated to preparing reports for the petitioner's general manager. These reports include reports on maintenance costs, inventory, utilities payments, administration and store productivity and compliance with quality, health and service standards. Based on this description, the AAO concurs with the director's determination that the beneficiary's duties are primarily administrative tasks such as collecting and recording information for reports and preparing reports, operational tasks such as ordering supplies, inspecting food, and monitoring the store's inventory, and first-line supervisory oversight over the store's cooks, grillers, cashiers and assistant manager-in-training.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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 supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. While the AAO does not doubt that the beneficiary exercises a heightened level of authority in comparison to the cashiers, cooks and grillers employed by the petitioner's restaurant, the record does not establish that he performs primarily managerial or executive duties by closely overseeing the day-to-day operations of the petitioner's store, performing all of its administrative functions, and supervising non-professional employees.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Here, the petitioner concedes that none of the beneficiary's subordinates, which include grillers, cooks and cashiers, are managers, professionals or supervisors.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must clearly describe the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R.

§ 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The beneficiary serves as the manager of one of the petitioner's restaurants and primarily spends his time either supervising non-professional staff or performing all operational and administrative duties not directly related to cooking and serving food, operating a cash register, and cleaning. The record does not support a finding that the beneficiary's actual duties are primarily managerial in nature. 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).

Finally, the petitioner has not supported a claim that the beneficiary is employed primarily in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The petitioner's description of the "store manager" position makes no reference to the beneficiary's authority to establish broad goals and policies, but rather indicates that he is directly involved in the close supervision of the day-to-day operations of the restaurant and responsible for performing all record keeping and administrative tasks associated with operating the business. The evidence of record fails to demonstrate that the beneficiary would be employed in an executive capacity.

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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS 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 petitioner operates a casual dining restaurant specializing in grilled chicken. The petitioner claims to employ thirteen (13) employees, including the beneficiary as store manager, an assistant manager in training, four cashiers, and seven kitchen staff. The petitioner has not documented its employment of two assistant cooks purportedly hired in March 2010, and it claims that it hired two of its four cashiers in May 2010, subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the

nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Therefore, with respect to the restaurant location where the beneficiary works, the petitioner has documented its employment of a general manager, a part-time assistant manager-in-training, three full-time cooks, two cashiers (one of which earns only \$2,000 per quarter), one full-time griller, and one part-time griller.

While the beneficiary's subordinates may be responsible for cooking and serving the food to customers, the petitioner has not established who, other than the beneficiary, would be available to supervise the hourly workers and perform all other non-managerial tasks associated with the operation of the business. Furthermore, because the petitioner did not fully document its claimed staffing level, it is unclear whether the documented employees (two grillers, three cooks, two cashiers and one trainee) would fully relieve the beneficiary from participation in cooking functions and customer transactions. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

The beneficiary will not be considered to be employed in a managerial capacity simply because he has been given a managerial job title and placed at a senior level in the petitioner's organizational chart. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Therefore, the petitioner has failed to establish that the beneficiary will perform primarily managerial or executive duties under the extended petition. The petitioner has not submitted additional evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

III. Prior Approval and Conclusion

The AAO acknowledges that USCIS previously approved an L-1A petition authorizing the beneficiary's employment with the petitioner. 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, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

While USCIS previously approved a petition granting the beneficiary L-1A status, the prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). For example, if USCIS determines that there was material error, changed circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference.

If the previous nonimmigrant petition was approved based on the same inconsistent and unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approval by denying the present request to extend the beneficiary's status. As discussed above, the petitioner initially represented the beneficiary as having a higher level of authority within its organization with oversight responsibility over multiple restaurants and later identified his position as that of a store manager, a position which appears to consist of primarily administrative tasks and first-line supervision of cooks and cashiers.

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 USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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

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.