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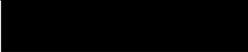
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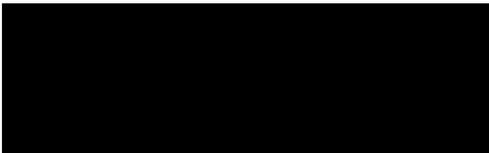
Petitioner:



Beneficiary:

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the Commonwealth of Puerto Rico that is engaged in the operation of a restaurant and gift shop. The petitioner seeks to employ the beneficiary as its manager, food and beverage.

The director denied the petition on May 30, 2006. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company.

On appeal, counsel for the petitioner asserts that the director failed to consider all relevant evidence offered in support of the petition, specifically in relation to the petitioner's staffing levels, and also placed inappropriate emphasis on the beneficiary's salary as an indicator of whether he would be employed in a qualifying capacity. Counsel asserts that the beneficiary manages three separate departments of the petitioning company, each of which provides an "essential function." Counsel further contends that the director failed to consider the beneficiary's degree of discretionary authority over the functions he manages, and disputes the director's suggestion that the beneficiary would be a mere first-line supervisor. Counsel submits a brief and additional evidence in support of the appeal.

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.

¹ The instant appeal was timely filed on July 3, 2006, but was initially improperly rejected by the director as untimely filed. The director subsequently re-opened the matter and forwarded the appeal to the AAO on or about March 15, 2007.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. See 8 C.F.R. § 204.5(j)(5).

The issue in this matter is whether the petitioner established that the beneficiary would be employed in a managerial capacity with the United States entity. The petitioner does not claim that the beneficiary would be employed in an executive capacity.

- (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 immigrant petition was filed on July 15, 2005. The petitioner stated on Form I-140 that the beneficiary would be employed as manager, food and beverage, "in charge of costs control and purchases." The petitioner described its business as a "restaurant and clothesline" with 120 employees. In a letter dated June 10, 2005, the petitioner described the beneficiary's proposed duties as follows:

[The beneficiary] will have overall responsibility for the destiny of the U.S. Corporation. Specifically, he will be in charge of the following: cost control of food and beverages; control of the restaurant's purchases; inspection of quality and hygiene of foods and beverages according to the norms and procedures of [the petitioner's parent company]; Supervision of the warehouse, kitchen and bar; maintain the standards of quality of the products as

determined by [the parent company]; monthly reports to the Operations Department of [the parent company].

The director issued a request for additional evidence on January 19, 2006, in part, advising the petitioner that the evidence submitted did not adequately establish that the beneficiary's duties would be primarily managerial or executive in nature. The director requested that the petitioner submit the following additional evidence and information: (1) a detailed description of the beneficiary's duties to include a breakdown of the number of hours devoted to each of the listed duties on a weekly basis; (2) additional evidence showing the management and personnel structure of the U.S. company; (3) the number of subordinate supervisors working under the beneficiary's management; (4) the job titles and job duties of the employees managed; (5) the amount of time allotted to managerial duties and the amount allotted to non-managerial duties; (6) the degree of discretionary authority the beneficiary has over day-to-day operations; (7) copies of the U.S. company's 2004 IRS Forms W-2 and W-3; (8) copies of IRS Forms 941 for the second and third quarters of 2005; and (8) evidence documenting the number of contractors utilized and the duties they perform, if applicable.

In a letter dated April 7, 2006, the petitioner provided the following description of the beneficiary's duties as Manager, Food and Beverage:

- Cost control of food and beverages;
- Control of the restaurant's purchases;
- Inspection of quality and hygiene of foods and beverages according to the norms and procedures of [the parent company];
- Supervision of the warehouse, kitchen and bar;
- Maintenance of the standards of quality of the products as determined by [the parent company];
- Investigate and resolve complaints regarding food quality, service, or accommodations;
- Schedule and receive food and beverage deliveries, checking delivery contents in order to verify product quality and quantity;
- Monitor food preparation methods, portion sizes, and garnishing and presentation of food in order to ensure that food is prepared and presented in an acceptable manner;
- Monitor budgets and payroll records, and review financial transactions in order to ensure that expenditures are authorized and budgeted;
- Schedule staff hours and assign duties;
- Monitor compliance with health and fire regulations regarding food preparation and serving, and building maintenance in lodging and dining facilities;
- Coordinate assignments of cooking personnel in order to ensure economical use of food and timely preparation;
- Keep records required by government agencies regarding sanitation, and food subsidies when appropriate;
- Establish standards for personnel performance and customer service;
- Monthly reports to [the] Operations Department of [the parent company].

The petitioner estimated that the beneficiary, during a typical 45 to 65 hour workweek, spends approximately 60% of his time in supervision duties; 20% of his time ensuring that quality standards, personnel standards,

hygiene standards, kitchen and bar operations standards are met; 10% of his time in kitchen and bar inventory control, logs, quality control and requisitions; 5% of his time in preparation of reports; and 5% of his time coordinating kitchen and bar operations.

The petitioner stated that there would be no subordinate supervisors working under the beneficiary's management, but noted that he does supervise a total of 29 employees, including 15 bar employees, 11 kitchen employees, and three warehouse employees. The petitioner stated that the beneficiary spends 100% of his time performing managerial duties and has "100% discretionary authority in day-to-day operations."

The petitioner also included in its response at exhibit 31, an additional position description which explains the beneficiary's "general goals" as follows:

- Manages and supervises the kitchen and storage areas, ensuring that proper procedures are followed. Supervises operations in the kitchen when food is being prepared. Keeps food costs within projected targets. Strives for maximum efficiency from personnel.
- Supervise all areas of the Bar, keeping within the guidelines of [the petitioner's operating system], as well as the recipe book. To make every effort to ensure that the real cost of drinks is as near to the theoretical cost of the Bar as possible. Contact suppliers to stock the Bar. Makes sure that the guests receive an excellent service at the bar.
- Coordinates and participates in Service activities, makes sure that all activities take place on time and according to the needs specified in [the petitioner's operating system], is cordial with guests and participates in Entertainment activities.

The beneficiary's specific responsibilities are further described as the following:

- Arrives on time in a clean pressed uniform. . .
- Makes sure that the tasks in both Kitchen and Store Room Opening and Closing checklists are undertaken.
- Ensures that the activities in the Bar Opening and Closing Checklist are performed and obeyed.
- Checks inventories weekly.
- Fills out requisitions to replace any shortage of stock.
- Contacts suppliers in order to order supplies needed for the Bar and Kitchen Operation.
- Receives goods from the Stock Room.
- Checks the Stock Room orders.
- Supervises quality control of incoming merchandise.
- Checks that merchandise is received, labeled and stored correctly.
- Supervises the distribution of merchandise to destination areas.
- Writes on the Daily Storage Room Board the food which needs to be thawed out.
- Makes daily briefings and holds bimonthly departmental meetings to inform of any outstanding issues of the Bar and Kitchen, feedback on goals results, and inform about daily promotions.
- Checks that the station settings in all areas are according to the Station set up.
- Is certified in the Servsafe program.

- Notes all pending matters in the Communication Log.
- Supervises all kitchen operations, making sure that [the petitioner's] recipes are followed.
- Ensure that the drinks prepared are made according to the recipes authorized. . . .
- Makes sure that Hygiene Standards are met.
- Reports any defects noted in the Kitchen and Storage areas in the Maintenance Log.
- Checks employee's lists.
- Arranges for and supervises training for Kitchen employees.
- Prepares recipes for special occasions and holidays.
- Makes sure that established quality standards are kept.
- Times the preparation of the dishes.
- Checks temperatures in freezer compartments.
- Checks price comparisons.
- Makes the bar schedule, according to the requirements of the Operation.
- Supervises and assigns odd jobs to his/her personnel.
- Backs up the Bartenders when they, for some reason, are not at their post.
- Masters the MICROS System.
- Supervises and coordinates the Bar operation.
- Controls tips and their daily distribution amongst the personnel.
- Keeps the amount of glassware within the Par Stock.
- Keeps ashtrays and the bar clean at all times.
- Ensures that the FIFO (First In First Out) system is adhered to in the stocking and cleaning of the beer compartment and storeroom.
- Coordinates and participates in the biweekly inventories.
- Controls the Bar Cost.
- Maintains strict control on the Par Stock of articles and supplies.
- Trains his/her team on the [petitioner's operating system and standards.]

The petitioner provided a document titled "Bar Introduction" which outlines the petitioners' bar procedures, as well as the company's standard job descriptions for the positions of bartender, bar back, mopetera, line cook, sous chef, prep cook, steward, and warehouse.

As requested by the director, the petitioner submitted copies of its Forms W-2PR, Withholding Statement, for 2005, showing payments to a total of 13 payroll employees, as well as its Form 941 for the third quarter of 2005, indicating 12 employees. The petitioner provided evidence that it paid in excess of \$730,000 to contract employees hired through Business Pro Hirers, Inc. ("BPH".) According to a letter from BPH, as of March 2006, the petitioner employed 76 contract workers, including kitchen, bar and warehouse employees. The petitioner provided an employee list indicating a total staff of 98 employees.

The director denied the petition on May 30, 2006, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that although the petitioner claimed to employ 120 people, including up to 31 people subordinate to the beneficiary, the petitioner's records show only 12 employees working for the company as of the date the petition was filed. The director further noted that the salaries paid to the petitioner's employees, including the beneficiary, were "not commensurate with a full-time managerial or executive position in a major

metropolitan market." The director commented that the beneficiary's salary does not "put him at the second highest of compensation."

The director acknowledged the positions subordinate to the beneficiary's position, but determined that "none of these positions appear to be either managerial or executive or professional in nature," and that such positions involved the "mundane duties of the restaurant." In addition the director found that the petitioner's statements regarding the beneficiary's duties "identify general managerial functions" and "do not specify exactly what duties the beneficiary will be performing which are bona fide as a manager or executive." The director concluded that "it seems probable that [the beneficiary] will be primarily engaged in the performance of non-qualifying duties" for the purposes of this immigrant visa classification.

On appeal, counsel for the petitioner asserts that the director made an erroneous correlation between the number of employees listed on the petitioner's Forms 941 and W-2, and the number of employees supervised by the beneficiary. Counsel emphasizes that the petitioner submitted evidence that it currently utilizes 76 contract employees and paid contract workers over \$730,000 in 2005. Counsel asserts that the director would not have denied the petition based on the issue of the petitioner's staffing levels if he had reviewed all of the submitted evidence. Counsel also stresses that pursuant to section 101(a)(44)(C) of the Act, the number of people the company employs is not an indicator of whether the beneficiary will be performing in a managerial capacity.

Counsel nevertheless clarifies that the beneficiary supervises 29 employees including 15 bar employees, 3 warehouse employees, 11 kitchen employees and the sub chef.² Counsel notes that the director objected to the nature of the positions supervised by the beneficiary, as the employees are not managerial or professional. Counsel contends that the director failed to consider whether the beneficiary qualifies as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. In this regard, the petitioner states:

[The beneficiary] supervises and is in total control of the destinies of three (3) separate departments of the organization, which in turn these departments provide an essential function within the organization. . . . There should be no doubt that the departments of kitchen, bar, and warehouse provide essential functions to a restaurant.

* * *

The beneficiary will be performing in a managerial capacity, as defined by statute, because he will be in charge of managing a department, subdivision, function, or component of the organization, and he will manage an essential function within the organization. The beneficiary's duties . . . include cost control, control of purchases, supervising of three departments, investigate and resolve complaints, schedule and receive deliveries, monitor budgets and payroll records, review financial transactions, schedule staff hours, assign duties, coordinate assignments, establish standards for personnel performance, and provide monthly reports to the operations department of the parent company in Mexico. Within the power of

² The AAO notes that counsel has indicated 30, rather than 29 employees, working under the beneficiary's supervision.

the beneficiary regarding the establishment of standards for personnel performance, lays his authority to recommend the hiring and firing of personnel, and of other personnel actions, which is in turn another ingredient of the definition of the term 'managerial capacity' per statute.

Counsel further asserts that the director "commits a grave error" by not acknowledging the petitioner's statement that the beneficiary has "100% of discretionary authority in the day-to-day operations." Counsel asserts that this authority further establishes the beneficiary's employment in a managerial capacity pursuant to section 101(a)(44)(A)(iv) of the Act.

In addition, counsel contends that the beneficiary supervises the executive chef and the sub chef, positions which are supervisory within the petitioner's organization. Counsel further states that within the petitioner's bar operations, the beneficiary supervises a head bartender. Counsel states that this employee supervises the other bar employees and is "the one called to perform the day-to-day duties of the restaurant."

Counsel also addresses the director's findings regarding the beneficiary's salary, noting that the amount paid to him is consistent with average salaries for his occupation in San Juan, Puerto Rico as compiled by the U.S. Department of Labor. Counsel also notes that the beneficiary's salary is the fourth highest among the petitioner's payroll and contract employees, and does not include the additional \$15,000 the beneficiary receives in benefits annually.

Upon review of the record, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Here, the petitioner has consistently indicated that the beneficiary would be employed in a managerial capacity pursuant to section 101(a)(44)(A) of the Act.

The petitioner initially submitted a brief, general outline of the beneficiary's position that failed to establish that his duties would be primarily managerial in nature. The petitioner did not describe the specific tasks associated with the beneficiary's "control" of purchasing and cost control matters, and it was not clear based on this description whether he would actually be purchasing food and beverages for the restaurant, or managing these tasks through subordinate staff. The petitioner's statement that the beneficiary would have "overall responsibility for the destiny of the U.S. Corporation" was not explained, and the petitioner did not identify the degree of discretionary authority and the actual managerial duties associated with the beneficiary's responsibility for "supervision of the warehouse, kitchen and bar" or the tasks the beneficiary would perform to "maintain the standards of quality." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the director's request for a more detailed position description, the petitioner provided two separate lists of duties, as recited above. Overall, the descriptions suggest that the beneficiary divides his time among supervisory, operational and administrative tasks associated with the kitchen and bar operations of the petitioner's restaurant. The beneficiary's responsibilities for checking inventory, filling out requisitions to take care of stock shortages, scheduling and receiving food and beverage deliveries, checking delivery contents in order to verify product quality and quantity, and contacting suppliers to order supplies suggest that the beneficiary is actually responsible for making food and beverage purchases, rather than "controlling" purchases as indicated by the petitioner, and these duties have not been shown to be managerial in nature. Similarly, the petitioner has not explained how the beneficiary's responsibilities for receiving goods from the stock room, checking stock room orders, keeping sanitation records, monitoring portion sizes and garnishes, checking the labeling and storage of merchandise, identifying which food needs to be thawed, timing preparation times, checking food storage temperatures, emptying ashtrays, backing up bartenders, noting pending matters in a "communication Log," and reporting defects in a "maintenance log," and participating in "service" and "entertainment" activities rise to the level of "managerial capacity" as contemplated in the statutory definitions.

The remainder of the beneficiary's duties, as indicated in the detailed list of duties submitted in response to the request for evidence, are suggestive of an employee with the authority of a first-line supervisor. The beneficiary is required to monitor routine duties performed by the contracted bar, kitchen and storeroom staff, ensure that their workstations are set up properly, oversee bar and kitchen staff to ensure that they are following standard recipes, ensure that hygiene and quality standards are met, make work schedules for bar employees, assign special or odd jobs, arrange for and supervise training, distribute tips, and providing training in the restaurant's procedures. The beneficiary's responsibility for hiring and firing employees or recommending these and other personnel actions is not clearly indicated among his stated job duties and will not be considered inherent to his responsibility for ensuring "personnel standards." The beneficiary appears to have authority to control kitchen and bar costs within an established budget and is charged with minimizing waste and maximizing efficiency, but it has not been established that his authority extends to establishing a budget for the departments he is claimed to manage. The record as a whole does not support the petitioner's assertions that the beneficiary spends 100% of his time performing managerial duties or that he has "100% discretionary authority in day-to-day operations." The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989).

The petitioner was specifically instructed to provide a detailed list of duties and to indicate the number of hours the beneficiary devotes to each duty on a weekly basis. The petitioner indicated that the beneficiary devotes 60% of his time to "supervision duties" and an additional 20% of his time "ensuring that quality standards, personnel standards, hygiene standards, kitchen and bar operations standards are met," duties that would necessarily involve the supervision of kitchen and bar employees. Notwithstanding the petitioner's claims that the beneficiary is not a first-line supervisor, the evidence submitted suggests that he spends up to 80 percent of his time supervising kitchen and bar 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).

Preliminarily, the AAO notes that the petitioner has established that the majority of its employees are contracted through a separate company and the perceived discrepancy between the number of payroll employees and the number of employees reported by the petitioner on Form I-129 was an error or misunderstanding on the part of the director. The record establishes that the petitioner regularly employs approximately 100 people.

When asked by the director to identify the number of subordinate supervisors managed by the beneficiary, the petitioner specifically stated there would be no subordinate supervisors working under the beneficiary's management, but noted that he does supervise a total of 29 employees, including 15 bar employees, 11 kitchen employees, and three warehouse employees. Yet, counsel asserts on appeal that the beneficiary supervises subordinate supervisors, including an executive chef, a sub-chef, and a head bartender, who are responsible for the day-to-day supervision of kitchen and bar employees and perform "the day-to-day duties of the restaurant." Counsel does not explain why the petitioner previously stated that the beneficiary does not supervise any subordinate supervisors. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, counsel made these claims regarding the beneficiary's supervision of subordinate supervisors only after the director determined that the beneficiary would not be supervising a subordinate staff of managerial, supervisory or professional personnel. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The AAO has no reason to doubt the petitioner's previous statement that the beneficiary will not be managing subordinate supervisors. The petitioner does not claim that the staff of 29 kitchen, bar and warehouse staff supervised by the beneficiary includes any managerial or professional employees. Accordingly, the record shows that the beneficiary devotes 60 to 80 percent of his time acting as a first-line supervisor to non-professional employees, and such supervisory tasks are not managerial in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualifying duties is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties).

The AAO further notes that according to the position descriptions for line cook, sous chef, prep cook, steward and warehouse, these employees report to the "kitchen manager," not to the manager, food and beverage. The petitioner has not indicated that the beneficiary manages the kitchen manager or identified this position on its

organizational chart, thus raising questions regarding his authority over the kitchen staff. In addition, the position description for the head bartender, which is submitted for the first time on appeal, includes many duties that are identical to those performed by the beneficiary. 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. at 591-92.

Counsel asserts that the beneficiary "supervises and is in total control of the destinies of three (3) separate departments of the organization, which in turn these departments provide an essential function within the organization." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes 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. § 204.5(j)(5). 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.

While the AAO acknowledges that the beneficiary is charged with supervising the activities of the bar, kitchen and storeroom while on duty, as discussed above, the beneficiary's duties do not rise to the level of managerial capacity. The petitioner has not established that the beneficiary's position can be considered to be at a senior level within the company's organizational hierarchy. The petitioner's statement that the beneficiary has "100% discretion" and "is in total control of the destinies" of three departments is not supported by the record. 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). The petitioner has not established that the beneficiary's duties are primarily managerial in nature.

Although the appeal will be dismissed, the AAO will withdraw the director's comments with respect to the beneficiary's salary as an indicator of whether he is employed in a managerial capacity. The director should refrain from holding the petitioner to his unsupported opinion of what constitutes an appropriate salary for a managerial employee, and instead focus on applying the statute and regulations, which contain no salary requirements.

The AAO acknowledges that USCIS previously approved an L-1A petition filed by the petitioner on behalf of this beneficiary. It must be noted that many I-140 immigrant petitions are denied after CIS 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 CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A 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).

It must be emphasized that each nonimmigrant and immigrant petition filing is a separate record of proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). 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 nonimmigrant petition approval and denying the instant immigrant petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved 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 petitioner has not submitted evidence on appeal to overcome the director's determination with respect to this issue. Accordingly, the appeal will be dismissed.

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.