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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 04 2009**  
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IN RE: Petitioner: [REDACTED]  
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)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The petitioner, a global hospitality company, seeks to employ the beneficiary as an assistant restaurant manager at its hotel located in Miami, Florida. Accordingly, 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 director denied the petition, concluding that the petitioner had not established that the beneficiary was employed by the foreign entity, or will be employed by the United States entity, in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner contends that the petition was improperly denied. The petitioner asserts that the beneficiary's duties both abroad and in the United States are entirely managerial and that he is and was responsible for the day-to-day operations of the hotel restaurants in question beyond the level of a first-line supervisor. The petitioner submits additional evidence in support of these assertions.

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 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 first issue in the present matter is whether the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on May 31, 2007. In a letter dated February 21, 2007 filed with the Form I-140, the petitioner stated that the beneficiary entered the United States in L1-A status in September 2002 to assume the position of Assistant Restaurant Manager at the petitioner's Miami Airport Marriott Hotel. The petitioner stated that the beneficiary reports to the restaurant manager and oversees 38 employees, including 2 supervisory employees and 36 hourly associates. The petitioner's description of the beneficiary's position includes the following responsibilities:

- Assists with the recruitment, interviewing and hiring of restaurant team members, supervises on-going training and conducts training when appropriate
- Coaches and counsels associates regarding performance on an on-going basis and handles associate progressive disciplinary procedures as required
- Oversees the performance appraisal process, giving feedback as needed
- Communicates performance expectations and monitors progress
- Develops business goals and creates appropriate development plans and champions an ongoing departmental associate recognition program
- Interacts with guest to obtain feedback on product quality and service levels to effectively manage and direct the response and handling of guest problems and complains and reviews guest satisfaction results with associates
- Assists with reviewing operating statements, budget worksheets and payroll progress reports, as well as helping to prepare weekly and period end profit and loss critiques
- Assists with the management of payroll administration
- Assists in the development of the department's capital expenditure goals
- Utilizes the Labor Management System to schedule business and demands and tracks associates' time and attendance
- Works with the chef to manage menus
- Assists with the development and implementation of incentive programs for staff
- Assists in monitoring actual and projected sales for the restaurant outlet, reviews meal period covers, room capture rations and average check to ensure revenue goals are met or exceeded
- May assist in weekly strategy forecast meetings to anticipate service and staffing needs
- Attends scheduled projection meetings to anticipate long term planning needs
- Maintains procedures for food and beverage portion and waste control

- Assists with overseeing the booking and management of restaurants parties, special events and room service hospitality suites
- Communicates to restaurant team members the operating and maintenance procedures of all departmental equipment
- Coordinates with the Engineering department to manage an effective restaurant repair and maintenance program
- Trains supervisors and associates in accident prevention and ensures all associates understand loss prevention policies

The petitioner submitted two organizational charts entitled "Food and Beverage" which appear to be related to the beneficiary's U.S. position as the beneficiary is identified as assistant manager on one of the charts. Based on the chart, the beneficiary is one of two assistant managers who report to the restaurant manager, who in turn reports to the Director of Food & Beverage. Below the assistant managers are a "supervisor" and a "room service coordinator."

On April 22, 2008, the director issued a request for further evidence (RFE). The petitioner was instructed to describe the beneficiary's duties in the U.S. in greater details stating the specific day-to-day tasks involved with the completion of each duty and the percentage of time the beneficiary dedicates to each duty. The director also requested a detailed organizational chart for the U.S. company, with the names of all departments and teams, specifically the names of the beneficiary's superiors and the employees under his supervision. The petitioner was also requested to provide detailed job descriptions for the beneficiary's immediate supervisors and subordinate employees.

In a letter dated June 2, 2008 responding to the RFE, counsel for the petitioner stated that the beneficiary was promoted to the position of restaurant manager effective November 2006. Accordingly, the petitioner provided information relating to both the position of assistant restaurant manager that the beneficiary occupied at the time the petition was filed as well as his new position as restaurant manager. The petitioner submitted two different organizational charts relating to the beneficiary's U.S. position in the restaurant. One chart depicts the beneficiary as the restaurant manager, supervising two assistant restaurant managers, who supervise a restaurant supervisor, who in turn supervises 4 hostess/cashiers, 13 restaurant servers, 4 busboys, 5 cocktail servers, 3 bartenders, 2 bar attendants, a room service coordinator, 5 room service servers and a floor attendant. The other chart shows an identical organizational structure, with the beneficiary in one of the two assistant restaurant manager positions. The petitioner also submitted an organizational chart depicting the senior management of the hotel to which the beneficiary is assigned, which shows the restaurant manager under the supervision of the director of food and beverage, who is among the senior personnel directly under the supervision of the general manager.

In addition, the petitioner submitted what appear to be the company's standard job descriptions for the positions of restaurant manager and assistant restaurant manager. The description for the assistant restaurant manager position summarizes the position as follow:

Entry level management position that is responsible for the daily operations in Restaurants/Bars and Room Service. Position assists with menu planning, maintains

sanitation standards, assists servers and hosts on the floor during peak meal periods and supervises Restaurants/Bars and Room Service Departments, where applicable. Responsibilities include ensuring guest and associate satisfaction while maintaining the operating budget. Accountable to ensure standards and legal obligations are followed.

In addition, the description lists the following "job specific tasks":

- Interact with guests to obtain feedback on product quality and service levels.
- Supervises staffing levels to ensure that guest service, operational needs and financial objectives are met.
- Ensure all associates have proper supplies, equipment and uniforms.
- Empower associates to provide excellent customer service within guidelines.
- Handles associate questions and concerns.
- Handles guest problems and complaints, seeking assistance from supervisor as necessary.
- Monitors associates to ensure performance expectations are met.
- Provides feedback to associates based on observation of service behaviors.
- Strives to improve service performance.
- Sets a positive example for guest relations.
- Assists in the review of comment cards and guest satisfaction results with associates.
- Supervises daily shift operations.
- Supervises restaurant and all related areas in the absence of the Director of Restaurants or Restaurant Manager.
- Communicates to Chef and Restaurant Manager any issues regarding food quality and service levels.
- Meets and greets guests.
- Participates in department meetings by communicating a clear and consistent message regarding the departmental goals to produce desired results.
- Ensures compliance with all restaurant policies, standards and procedures.
- Monitors alcohol beverage service in compliance with local laws.
- Manages to achieve or exceed budgeted goals.
- Supervises on-going training initiatives.
- Perform all duties of restaurant associates and related departments as necessary.
- Opens and closes restaurant shifts.
- Uses available on the job training tools for associates.
- Communicates performance expectations in accordance with job expectations
- Coaches and counsels associates regarding performance on an on-going basis.

The petitioner provided a breakdown by percentage of time spent per duty for the restaurant manager position and stated that the beneficiary's duties as assistant restaurant manager were "essentially the same." In addition, the petitioner submitted job descriptions for the position of director of food & beverages and all positions under the restaurant manager's supervision, as requested.

On June 27, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. With respect to the U.S. position, the director noted that in the Form I-140, the petitioner stated that it would be employing the beneficiary as assistant restaurant manager. Thus, although the petitioner later indicated that the beneficiary has been promoted to restaurant manager, the petitioner must establish eligibility based on the proposed position at the time of filing. The director found that the record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the restaurant business. The director further found that the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties, or that the beneficiary manages an essential function of the organization or operates at a senior level within an organizational hierarchy. The director concluded that, based on the record, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the beneficiary's position in the U.S. qualifies as "managerial". While the petitioner acknowledges that the beneficiary occupied the position of assistant restaurant manager at the time the petition was filed, the petitioner claims that during the 18 months prior to his promotion, the beneficiary was already performing the duties of the restaurant manager, as the position was vacant during that time period. The petitioner claims that the beneficiary's duties as assistant restaurant manager were essentially the same as those in his current position as restaurant manager and in his position abroad. The petitioner restates and provides more details on the breakdown of job duties and percentage of time spent per duty that was provided earlier in connection with the restaurant manager position and states that the beneficiary performed these same duties during his tenure as assistant restaurant manager. The petitioner maintains that the duties performed by the beneficiary as assistant restaurant manager were entirely managerial in nature and that he was not encumbered with the daily operations of the restaurant, but rather was responsible for the management of staffing, budgets, training and communication. Therefore, the petitioner asserts, the beneficiary served in a managerial capacity as per the criteria described in the regulations.

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

Initially, the AAO notes that the record contains material inconsistencies regarding what position the beneficiary actually held at the time the petition was filed. In the Form I-140 and its February 21, 2007 letter, the petitioner clearly stated that the beneficiary's proposed employment, for purposes of this petition, was as assistant restaurant manager for the hotel in Miami, Florida. In its letter, the petitioner stated unequivocally that the beneficiary has served as assistant restaurant manager at that facility since September 2002 and described in narrative form the duties the beneficiary performed in that position.

However, in response to the RFE, counsel for the petitioner claimed that the beneficiary was promoted to the position of restaurant manager effective November 2006, more than five months before the petition was filed. At the same time, counsel acknowledged that the beneficiary was an assistant restaurant manager at the time the petition was filed (stating that he would "discuss the managerial nature of both the Restaurant Manager position and the Assistant Restaurant Manager position that [the beneficiary] held at the time the . . . petition was filed"). The evidence provided in response to the RFE includes separate job descriptions for the positions of restaurant manager and assistant restaurant manager.

On appeal, the petitioner presented yet another depiction of the beneficiary's position at the time the petition was filed. This time, without providing any specific dates, the petitioner claims that the beneficiary was already performing restaurant manager duties 18 months prior to his actual promotion, and further, that his duties as assistant restaurant manager were "essentially the same" as those of a restaurant manager. It is noted that at no time prior to the director's decision did the petitioner mention that the beneficiary was performing the duties of the restaurant manager prior to his promotion, or that the position of restaurant manager was vacant at any time during the beneficiary's tenure as assistant restaurant manager. In fact, the organizational chart for the beneficiary's U.S employer submitted with the Form I-140 listed an individual named Philippe Riguard as restaurant manager, and the organizational chart depicting the Food & Beverages Department of the U.S hotel prior to the beneficiary's promotion that was submitted in response to the RFE lists an individual named Angela Vaccaro in that position. There is no indication in the record as to when either of these individuals ceased to occupy the position of restaurant manager.

Given these three inconsistent accounts of the beneficiary's title and duties at the time the petition was filed, the AAO is unable to determine which of these accounts represents his actual position and job responsibilities at the time of filing. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Further, as the director noted, a petitioner must establish eligibility at the time of filing. A visa petition may not be approved based on future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As the Form I-140 and accompanying initial evidence stated the proposed position for the beneficiary as assistant restaurant manager, the AAO will evaluate the beneficiary's eligibility for the benefit sought on the basis of that position.

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.* Beyond the required description of the job duties, the 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 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 or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

In this instance, while the evidence indicates that the beneficiary performs some of the high-level responsibilities that are specified in the definition, the record does not sufficiently establish that the beneficiary *primarily* performs these specified responsibilities, and does not spend a majority of his time on day-to-day functions. As previously noted, while the petitioner submitted a breakdown by *percentage of time spent per duty for the restaurant manager position*, it failed to provide a similar breakdown for the assistant manager position, as the director requested in the RFE. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). The 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).

In his June 2, 2008 letter responding to the RFE, counsel for the petitioner claimed that as assistant restaurant manager in the Miami hotel, the beneficiary "performed essentially the same organizational and operational functions" as he does in his subsequent position as restaurant manager. However, it is noted that the two positions have different job descriptions, and based on the job descriptions, the two positions have different job responsibilities. As such, the evidence does not support counsel's claim that the two positions are "essentially the same." 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).

Further, based on the job descriptions provided, a large number of the tasks the beneficiary performed as assistant restaurant manager do not fall directly under traditional managerial duties as defined in the statute. For example, the narrative description of the beneficiary's job duties in the petitioner's February 2007 letter indicates that the beneficiary "assisted" rather than directed or

controlled many of the administrative or managerial tasks described. In addition, the job description for assistant restaurant manager submitted in response to the RFE includes a number of tasks that are non-managerial tasks relating to the day-to-day operations of the restaurant, such as "interact with guests," "ensure all associates have proper supplies, equipment and uniforms," "meets and greets guests," "opens and closes restaurant shifts," and the generic "perform all duties of restaurant associates and related departments as necessary." Because the petitioner has failed to provide a breakdown of time spent for each of the beneficiary's duties, the AAO cannot determine based on the record what proportion of the beneficiary's duties would qualify as managerial or executive and what proportion would be non-qualifying. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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).

The petitioner claims on appeal that the beneficiary had been performing the duties of the restaurant manager even when his title was assistant restaurant manager. However, as previously noted, the petitioner did not make this claim at any time prior to the issuance of the director's decision. Again, a petitioner must establish eligibility at the time of filing. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

The petitioner also claims on appeal that the beneficiary manages "multiple tiers of employees, which the AAO has recognized as qualifying managerial experience." The petitioner refers to an unpublished AAO decision, in which the proposed position was found to be managerial because the beneficiary in that case supervises two levels of direct and indirect reports. The petitioner claims the scenario in that case is comparable to this matter. However, without further evidence, it cannot be established that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, the AAO emphasizes once again that, in this instance, the proposed position for the beneficiary at the time the petition was filed was *assistant* restaurant manager, which does not appear to be comparable to the position of "food and beverage manager" at issue in that decision. In addition, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Moreover, irrespective of the presence of nominal supervisory personnel under the beneficiary's direction on the organizational chart, the various descriptions of the beneficiary's U.S. position still indicate that, in the role of assistant restaurant manager, the beneficiary functions in large part as a first-line supervisor, directly overseeing the non-managerial restaurant employees in their performance of tasks necessary for the day-to-day operations of the restaurant, and from time to time, performing those tasks himself. In addition, the job descriptions submitted for the assistant restaurant manager position do not indicate that the beneficiary "has the authority to hire or fire" personnel, as specified under the statutory definition of "managerial capacity." 8 U.S.C. § 1101(a)(44)(A)(iii). In fact, the petitioner's initial description of the beneficiary's position explicitly states that the beneficiary only "assists with the recruitment, interviewing and hiring of restaurant

team members" rather than having ultimate authority in that area, and the job descriptions provided subsequently fail to mention any hiring or firing capability at all among the beneficiary's job responsibilities.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has failed to establish that, as assistant restaurant manager, the beneficiary would be employed in a primarily executive or managerial capacity in the United States. For that reason, the petition will be denied.

The second issue in this matter is whether the beneficiary was employed by the foreign entity in a primarily executive or managerial capacity.

In its February 2007 letter submitted with the Form I-140, the petitioner stated that the beneficiary was employed as a restaurant manager at Club Grill Restaurant of the Ritz-Carlton Cancun Hotel in Cancun, Mexico, a wholly-owned subsidiary of the petitioner, from December 1999 to February 2001. The petitioner provided the following description of the beneficiary's responsibilities in that position:<sup>1</sup>

[The beneficiary] reported directly to the Director of Food & Beverage, and assisted the Director of Food & Beverage in managing the daily operation of The Club Grill restaurant, overseeing hourly associates. [The beneficiary] oversaw the activities of two levels of employees including supervisory level employees and hourly associates. More specifically, he supervised the hiring, training, orientation, development, coaching and counseling, performance reviews, and disciplinary action of employees to ensure consistency in accordance with company standards; set leadership examples in all areas of hospitality performance; handled/monitored situational issues; and ensured reports were provided to the Director of Food & Beverage. In this regard, he used his knowledge of our standard operating procedures, knowledge of sanitation standards and equipment, including knowledge of Night Audit procedures. Moreover, he supervised food and beverage preparation, cost, quality, portion control, and menu planning for the restaurant and worked closely with the Executive Chef to ensure the highest quality of product and service, as well as to host, organize, and participate in special events for the hotel and city of Cancun; developed and implemented a workable accident prevention program, an incentive program for the staff, and a sales promotion program for the restaurant; and oversaw the preparation of weekly payroll and progress reports. In addition, he coordinated with the Director of Operations plans and actions to achieve The Ritz-Carlton's high standards, overcome deficiencies, and instigate necessary changes; conducted daily training sessions and monthly departmental meetings to constantly improve quality of food and service; ensure proper reports were maintained and provided to the Director of

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<sup>1</sup> The petitioner also submitted a document labeled "Job Description Ritz Carlton" for the position of "manager" in the "fine dining" department, the job overview for which indicates that it is a lead or supervisory server or waitstaff position. It is unclear whether this was meant to be a description of the beneficiary's position as restaurant manager abroad.

Food & beverage; and ensure room forecasts and daily house counts were used for proper scheduling.

The petitioner did not submit any evidence relating to the organizational structure or staffing of the beneficiary's overseas employer.

In the RFE, the petitioner was asked to provide a more detailed description of the beneficiary's duties abroad, stating what actual specific, day-to-day tasks are involved with the completion of each duty, and supplementing these descriptions with an estimate of the percentage of time the beneficiary dedicated to each duty. The director also requested a detailed organizational chart for the beneficiary's employer abroad, with the names of all departments and teams, and the names and detailed descriptions of the job duties for the beneficiary's immediate supervisors and subordinate employees.

In response, the petitioner provided organization charts for the Food & Beverage Department of the Ritz-Carlton Cancun, which shows the beneficiary as one of five restaurant managers who reported directly to the Director of Food & Beverage. In the Club Grill Restaurant, the beneficiary is the most senior employee. Below him were a sous-chef who supervised four line cooks and a pastry chef, two reservation coordinators, a four-person jazz group, a hostess, seven servers, two dining room attendants, and a bartender. The petitioner submitted a description of the beneficiary's overseas job duties, consisting of the following categories and percentage of time spent:

- 35% Customer Interaction
- 10% Training
- 10% Administrative work
- 5% Scheduling
- 7% Ordering/Purchasing
- 8% Supervising
- 5% Interviewing/Hiring/Firing
- 10% Assignment and delegation of daily operation
- 8% Providing feedback and open lines of communication
- 2% Problem Solving

The petitioner also submitted a document labeled "Job Description" for the position of "Restaurant Manager," prepared in July 1992, which states the job overview as:

Responsible for the management of all aspects of the Formal Dining Restaurant function, in accordance with hotel standards. Directs, implements and maintains a service and management philosophy, which serves as a guide to respective staff.

The document enumerates 53 "essential job functions" in connection with the position of restaurant manager.

As was the case with the beneficiary's position in the U.S., the director found that the record indicates that a preponderance of the beneficiary's duties was directly providing the services of the restaurant business abroad.

On appeal, the petitioner contends that the beneficiary's position abroad qualifies as "managerial" based on the regulatory definition. The petitioner restated and provided more details on the breakdown of job duties and percentage of time spent per duty that was provided earlier in connection with the beneficiary's overseas position. The petitioner maintains that these duties were entirely managerial in nature and that the beneficiary was not encumbered with the daily operations of the restaurant, but rather was responsible for the management of staffing, budgets, training and communication. Therefore, the petitioner asserts, the beneficiary served in a managerial capacity in his position abroad as per the criteria described in the regulations.

Upon review, the AAO finds that the petitioner has failed to establish that the beneficiary was employed in a primarily executive or managerial capacity.

Again, 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). As the director noted in his decision, based on the job description provided, a large number of the tasks the beneficiary performed as a restaurant manager at the Ritz-Carlton Cancun Hotel do not fall directly under traditional managerial duties as defined in the statute. For example, the beneficiary spent 37% of his time on "customer interaction," 7% on "inventory and purchases of essentials for day to day operations," 5% on "scheduling," and 10% on administrative work that is described as "managing the daily operations of the restaurant including scheduling, payroll, attendance controls, ordering specialty products, payment of bills and invoices." The petitioner has not established that these duties -- a combination of operational, administrative and first-line supervisory duties that account for more than half of the beneficiary's time -- rise to the level of managerial capacity as contemplated in the statutory definition. 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; *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. at 604.

Further, based on the organizational chart provided by the petitioner, the beneficiary's subordinate staff abroad consisted of six persons with cooking responsibilities, four music performers, a hostess, ten servers and dining room workers, and two reservation coordinators. While the petitioner provided a number of job descriptions in response to the RFE, none of them appear to be specifically applicable to the positions of the beneficiary's subordinates at the Club Grill Restaurant. Without any information relating to the job responsibilities of the beneficiary's subordinates, it cannot be determined that the beneficiary was supported by a staff that would relieve him from performing the non-qualifying tasks relating to the daily operations of the restaurant described above. Furthermore, as previously noted, the 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).

Moreover, 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 supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Since no evidence has been provided with regards to the job responsibilities and qualifications of the beneficiary's subordinate staff, the petitioner has failed to establish that the beneficiary supervises managerial, supervisory or professional employees, as required by the Act.

In light of these deficiencies in the evidence, the AAO finds that the petitioner has failed to establish that the beneficiary was employed abroad in an executive or managerial capacity as required by section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C). For this additional reason, the petition will be denied.

Finally, the AAO acknowledges that USCIS has previously approved multiple L-1A petitions filed by the petitioner on behalf of the instant beneficiary. 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; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103. 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 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).

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. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approvals by denying the instant petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.