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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 17 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: 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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this immigrant visa 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, an Illinois limited liability company, operates a 40-room ' ' hotel. It seeks to employ the beneficiary as its vice president.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying 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. On appeal, counsel for the petitioner asserts that the director's decision cited insufficient reasons to support the conclusion that the beneficiary would not be employed in a qualifying capacity. Counsel states that USCIS has approved three nonimmigrant petitions granting the beneficiary classification as an L-1A manager or executive and emphasizes that the same definitions of "managerial capacity" and "executive capacity" at section 101(a)(44) of the Act are applicable to the instant matter.

I. The Law

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 or 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, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. The Issue on Appeal

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.

A. Facts and Procedural History

The petitioner filed the petition on September 19, 2011. The petitioner stated on the Form I-140, Immigrant Petition for Alien Worker, that it was established in 2010, and has six current employees and gross annual income of $97,219. It seeks to employ the beneficiary as its vice president. The petitioner described the position as follows:

> His duties include supervising and controlling U.S. operations of the company by directing and participating in the development, interpretation, evaluation, and recommendation of goals, policies, and operations of the company. He will continue to have broad athority [*sic*] to make decisions for the company, including having complete authority over departmental managers. The beneficiary will work closely with the company's senior management to ensure the company's further development and growth in the U.S. marketplace. He will be subject only to general supervision by the company president.

The petitioner also provided a copy of its franchise agreement with , which indicates that the petitioner operates a 40-room " " hotel.

As evidence of wages paid to employees, the petitioner provided copies of six Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement issued to its employees in 2010. The petitioner also provided its IRS Forms 941, Employer's Quarterly Federal Tax Return for the last two quarters of 2010 and first two quarters of 2011, and its Illinois state quarterly wage report for the second quarter of 2011. According to the most recent report, the petitioner had six employees in April 2011, eight employees in May 2011, and five employees in June 2011.

The director issued a request for evidence (RFE) on December 28, 2011. The director instructed the petitioner to provide "a very detailed description of the duties of the proposed position in the U.S. that reflects the staffing at the time the petition was filed" as well as "an estimate of the percentage of time the beneficiary would dedicate to each specific duty." The director also requested a detailed organizational chart which includes the names of all departments, employees, their titles and a description of their duties.

In response to the RFE, the petitioner submitted a letter dated March 9, 2012 which provided the following description of the beneficiary's duties:

- Supervising and controlling Finance, Accounting, Sales, Marketing and Environmental Services.
- Identify and develop an overall leadership structure and team.
- Interpretation, evaluation and recommendation of goals, policies, and operations of the corporation.
- Develop and implement a strategic and operational plan for the company that addresses: mission, staff development, financial performance, market assessment and analysis, human resources and information management.
- Assist in the development of structure and framework that integrates managers into decision making with the corporation's business and significantly involves them in strategic planning and budgeting.
- Research and develop new business locations for future business growth.

The petitioner also submitted a chart outlining the percentage of time the beneficiary allocates to five areas of responsibility as follows:

Manage Strategy, Planning and Implementation: 30%

- Manage hospitality operations, including franchise sales and marketing.
- Develop and implements with management team, the business, operations and financial strategy and action plans in line with company strategy.
- Analyze trends and determine financial implications of alternative strategic scenarios.
- Ensure timely alignment of business to changes in hospitality industry.
- Will have executive and decision making authority for the operations of the company. Establish goals and policies for Company.

Supervise, Personnel, Financial Planning, Budgeting and Forecasting: 30%

- Supervise and control work of hospitality manager, responsible for all personnel actions.
- Responsible for supervising financial planning, budgeting and forecasting process and acts as interface between related stakeholders: customers, vendors and lenders.
- Define business performance targets in line with company's financial plan.
- Integrate planning and controlling with other business processes.

Exercise Discretionary Authority, Analysis for Business Decision Making: 25%

- Exercise complete discretion over hospitality operations.
- Supervise analysis of business performance and related Actual versus budget and forecasts and makes recommendations for corrective actions
- Ensure high quality and timeliness of decision relevant information.

- Evaluate options for capital investments, growth strategies, acquisitions, restructurings, etc. . . .
- Monitor the development of capital structure and decide on the financial implications of operational strategies: new locations versus developing existing locations.
- Identify issues along the value/supply chain and challenges the same.

Business Performance: 10%

- Drive achievement of targets and implements best practices along with managers based on internal and external benchmarks.
- Follows-up on corrective actions for deviations and monitors regularly.

Stakeholders Relationship: 5%

- Ensure smooth relationship with all of company's stakeholders.
- Responsible for maintaining, updating and negotiating supplier's contracts.
- Responsible for executing, monitoring and modifying company's sustainability programs and be a good corporate citizen.

The petitioner submitted an organizational chart identifying the beneficiary as vice president, reporting to the company president, and directly supervising sales and marketing, a finance and development manager, a contracted accountant, a hospitality manager and two real estate agents. The chart depicts a desk supervisor, two desk clerks and two cleaners who report directly or indirectly to the hospitality manager. Finally, there is a "Maintenance and EPA" position filled by a contractor, , which reports to the finance and development manager. In total, the chart depicts a total of 14 positions, including the contractors, real estate agents, and nine employees.

The petitioner indicated that the beneficiary, in addition to his role as vice president, concurrently holds the "sales and marketing" position, but failed to provide a description of his duties in this capacity. The petitioner provided duties for the positions of hospitality manager, finance and development manager, "maintenance supervisor" (which is not included on the chart), accountant, and "motel staff." The petitioner provided evidence that the finance and development manager has a master's degree in electrical engineering and the hospitality manager has a bachelor's degree in psychology.

The record also includes a copy of the Service Agreement between the petitioner and . According to the terms of the agreement, agreed to "provide services for the [petitioner's] wastewater treatment facility and associated mechanical equipment," for a monthly fee of $270. The petitioner provided evidence that the contractor is a Class 2 Wastewater Treatment Works Operator.

The director denied the petition on October 19, 2012, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. In

denying the petition, the director observed that the petitioner claimed only six employees at the time of filing and that only two of those employees earned wages commensurate with full-time employment as of the second quarter of 2011. The director also noted that the petitioner submitted nearly identical position descriptions to describe the beneficiary's role with the U.S. and foreign entity's in spite of the fact that the two companies are quite different in size and nature. The director concluded that the beneficiary "appears to be the manager of a motel and is engaged in the day to day operations necessary for the success of the business."

On appeal, counsel for the petitioner asserts that the director "erred in failing to articulate any sufficient reason for denying the instant I-140," and that the director's conclusion was unsupported by any valid reasoning, particularly in light of the two previous L-1A approvals granted by USCIS for the same position. Counsel emphasizes that both the L-1A nonimmigrant classification and the instant immigrant classification rely on the same statutory definitions of "managerial capacity" and "executive capacity."

Counsel further asserts that "insofar as the Service suggested that the Beneficiary does not qualify as a manager or executive simply because the two entities engage in different businesses. . . the Service erred as a matter of law." Finally, counsel contends that the director's brief explanation regarding the reasons for denial of the petition amounted to a violation of due process.

On April 13, 2013, counsel submitted a supplemental letter accompanied by evidence that the USCIS California Service Center granted the beneficiary an additional extension of his L-1A status in March 2013. Counsel asserts that in light of this most recent determination that the Beneficiary's position qualifies as managerial or executive in nature, the appeal must be sustained.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity.

As a preliminary matter, we will address counsel's claim that the director's decision provided insufficient explanation for the grounds for denial. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review, while the director could have provided a more specific explanation of the reasons for denial, the director cited the appropriate law and acknowledged all of the relevant evidence submitted. As the petitioner asserts that the evidence of record is sufficient to establish the beneficiary's eligibility as a manager or executive capacity, it would serve no useful purpose to remand the case for entry of a new decision. The AAO reviews each appeal on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

1. Description of Job Duties

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.* A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's 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 AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted, the size of the beneficiary's subordinate staff, and any other facts that may contribute to a comprehensive understanding of the beneficiary's actual role in the organizational hierarchy of the entity in question.

The petitioner's initial description of the beneficiary's duties was vague and offered little insight into what he would do on a day-to-day basis within the context of the petitioner's hotel business. Rather, it paraphrased the statutory definition of "executive capacity" at section 101(a)(44)(B) of the Act. The petitioner stated that the beneficiary will participate in the development and recommendation of "goals policies, and operations of the company," will "have broad authority to make decisions for the company," and will "be subject only to general supervision by the company president." Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In response to the director's request for details regarding how the beneficiary's time is allocated among specific duties, the petitioner submitted two different lists of duties. The list of duties provided by the company president indicated that the beneficiary would be "supervising and controlling Finance, Accounting, Sales, Marketing and Environmental Services," repeated some duties from the initial description, and failed to include the specific duties and percentages requested by the director.

The petitioner also submitted a lengthy description comprised of 20 duties, but did not indicate the percentage of time to be allocated to each specific task. Further, the expanded list of duties failed to provide any meaningful insight into what the beneficiary primarily does as the vice president of a company that operates a motel with five other employees. For example, the petitioner stated that the beneficiary's role is to "manage hospitality operations," "exercise complete discretion over hospitality operations," to "have executive and decision making authority for the operations of the company" and to "establish goals and policies." The description includes other duties that are overlapping or repetitious, including developing and implementing strategies and action plans, defining business performance targets, driving achievement of targets and implementing best practices, as well as duties that are simply poorly defined such as "ensure high quality and timeliness of decision relevant information."

While most of the duties broadly described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual day-to-day responsibilities, in light of the nature of the petitioner's business and the company's staffing levels as of the date of filing. 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 has failed to provide adequate 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. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the list of employees that the petitioner submitted with its organizational chart clearly identifies the beneficiary as holding a concurrent position of "sales and marketing" within the company's hierarchy. Despite the director's request, the petitioner did not provide a description of the duties the beneficiary will perform in this concurrent role or information regarding the amount of time he allocates to it. However, it is reasonable to conclude that the beneficiary does not, in fact, allocate all of his time to the duties associated with the vice president position if he fills a secondary "sales and marketing" role within the company.

This failure of documentation is critical because the "sales and marketing" tasks would not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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)).

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the beneficiary may exercise discretion over the petitioner's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to submit a position description sufficient to establish that his actual duties, as of the date of filing, would be primarily managerial or executive in nature.

2. Personnel Manager Duties

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. 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.

Here, the petitioner indicates that the beneficiary allocates 30% of his time to responsibilities that include supervising and controlling the work of the hospitality manager, and being "responsible for all personnel actions." The petitioner also indicates that the beneficiary supervises the finance and development manager, and the petitioner has provided evidence that both subordinate managers have completed at least a bachelor's degree.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that the finance and development manager or hospitality manager position at a 40-room hotel would require a bachelor's degree. Nor has the petitioner established that the position of finance and development manager for a hotel requires an electrical engineering degree or that the position of hospitality manager requires a psychology degree.

Turning to the question of whether the beneficiary's subordinates were acting as managers or supervisors at the time of filing, the AAO notes that the petitioner indicated on the Form I-140 that it had six employees as of September 2011 when the petition was filed. The petitioner has not submitted evidence of wages paid to employees for the relevant quarter. However, the record reflects that only one employee, the beneficiary, earned wages commensurate with full-time employment during the second quarter of 2011. In fact, the hospitality manager and finance and development manager earned wages of only $1,625.25 and $1,798.50, respectively, during that quarter, suggesting an average work week of no more than 15 to 17 hours, assuming Illinois' minimum hourly wage of $8.25. The evidence does not support a conclusion that the beneficiary allocates a significant portion of his time to supervision and control of subordinate supervisors or managers, such that he could qualify as a personnel manager.

3. Function Manager Duties

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. Here, the petitioner has not articulated a claim that that the beneficiary manages an essential function of the petitioning organization, and the position description provided would not support such a claim.

4. Executive Duties

On appeal, counsel asserts that even if USCIS determines that the beneficiary's duties are not managerial, he clearly qualifies as an executive.

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.*

In support of his assertion that the beneficiary will be employed in an executive capacity, counsel asserts that the beneficiary "directs the entirety of the hospitality operations for the company"; "spends much of his time as Vice President establishing the goals and policies of the organization"; "has wide-ranging decision-making authority for all aspects of the company's operations"; and "receives only general supervision/direction in undertaking all of these discretionary, visionary and important tasks."

As stated above, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden to provide a specific description of the beneficiary's duties.

Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). While we acknowledge that the beneficiary has responsibility for oversight of the hotel, the record does not support a finding that he is relieved from performing non-qualifying duties associated with its day-to-day operations or that he spends the majority of his time on duties that are within the statutory definition of "executive capacity."

5. Reasonable Needs

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

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 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 in this matter operates a 40-room hotel and claimed to have six employees as of the date of filing. While the petitioner submitted an organizational chart in response to the RFE which depicts a total of 14 positions for employees and contractors, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Based on the most recent wage information available, from the second quarter of 2011, only the beneficiary has been shown to be employed on a full-time basis. While there is no requirement that the petitioner employ full-time workers, it is reasonable to expect the petitioner to have sufficient part-time staff to answer phones, check-in guests, clean guest rooms, respond to guest inquiries and requests, order supplies, maintain the facilities, and perform daily administrative and clerical tasks associated with the operation of the hotel. The petitioner has not indicated how five part-time subordinates are able to relieve the beneficiary from performing these duties such that he would be free to perform primarily managerial or executive duties.

Moreover, three of the beneficiary's five subordinates are claimed to be managers or supervisors, which would leave only two part-time workers to perform the most routine functions of operating a hotel. Based on the petitioner's representations, it does not appear that petitioner has a reasonable

need for a vice president who allocates the majority of his time to managerial or executive functions. 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 due to its failure to provide a sufficiently detailed description of the beneficiary's day-to-day duties.

It is understood that all companies, regardless of size, require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities. However the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities, as contemplated in the statutory definitions, and not the routine operational or administrative tasks. Again, the fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44) of the Act. Here, the record fails to establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. Accordingly the appeal will be dismissed.

6. Previous Nonimmigrant Petitions

We acknowledge that USCIS had approved two L-1A classification petitions filed on behalf of the beneficiary prior to denying the instant immigrant petition.

Each visa petition filing is a separate proceeding with a separate record and a separate burden of proof. 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).[1]

The AAO notes that I-140 immigrant visa petitions are frequently denied after USCIS approves prior nonimmigrant visa 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 the present immigrant E-13 visa petition,

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[1] In matters relating to an extension of nonimmigrant visa petition validity that involve the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, 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). Based on the evidence submitted with the present petition, the director would be justified in reviewing the previously approved petitions for possible revocation.

which would permit the beneficiary 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).

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).

Although counsel contends that the petitioner's rights to procedural due process were violated, he has not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case and reached an appropriate conclusion based on the evidence submitted. The petitioner's primary complaint is that the director denied the petition.

As previously discussed, regardless of any prior approvals granting the beneficiary L-1A nonimmigrant status, the petitioner has not met its burden of proof in this immigrant proceeding and the denial was the proper result under applicable statute and regulations. Accordingly, the claim is without merit.

III. Conclusion

The record reflects that the petitioner was a relatively new company at the time of filing, only 18 months removed from the beneficiary's initial approval to open a "new office" in the United States. The petitioner may of course file a new immigrant petition on the beneficiary's behalf without prejudice.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.