



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAR 24 2014** OFFICE: TEXAS SERVICE CENTER

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:

[REDACTED]

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, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York limited liability company operating as a bakery and café. It claims to be a subsidiary of the beneficiary's foreign employer located in Turkey. The petitioner is seeking to employ the beneficiary as its "Store & Production Manager." Accordingly, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, 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 failed to establish: (1) that it would employ the beneficiary in a qualifying managerial or executive capacity; (2) that the foreign entity had employed the beneficiary in a qualifying managerial or executive capacity; (3) that the petitioner had been doing business for at least one year prior to filing the petition; or (4) that the foreign entity is doing business as defined in the regulations.

On appeal, counsel disputes the director's findings and submits a brief with ten exhibits including utility bills, bank statements, corporate papers, and tax forms.

### 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 and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

## **II. Employment in a Managerial or Executive Capacity**

The first issue to be addressed is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

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.

#### A. Facts

The petitioner filed the Form I-140 on December 31, 2012 and asserted that the beneficiary would be employed as its "Store & Production Manager." The petitioner stated that it operates a bakery and café business with ten (10) employees and that it currently employs the beneficiary in the proffered position pursuant to an approved L-1A nonimmigrant petition.

In a letter dated December 27, 2012, the petitioner stated that the company had expanded to four locations throughout the New York Metropolitan area and currently had a total of 24 full-time employees working in its four facilities. The petitioner described the beneficiary's duties as follows:

He is responsible for not only managing the entire production facility, but also for supervising and overseeing the production budget, the hiring of staff for the production facility, the hiring of individuals involved in the mechanics of packaging, delivering and marketing the products and overseeing the daily activities of 10 individuals.

\* \* \*

In the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing, training and delegation of assignments according to capabilities, production goals etc. He conducts performance reviews and ensures that his staff follows corporate and quality control procedures.

Functioning autonomously, [the beneficiary] also establishes and promotes the standardization and quality-control of the company's products based upon the traditional ingredients originated in the parent office in Turkey. He also modifies some of the products to better accommodate American tastes and preferences. He meets regularly with the CEO to ensure that the corporate philosophy is understood and that he translates the unique concerns and requirements of a specialty food enterprise, into a viable business that incorporates traditional Turkish foods with American tastes, preferences and culinary presentations. He also assists in formulating strategy and plans to improve the corporate goals, and in fact, his participation in strategizing company's long-term goals has been quite successful to the extent that the corporate has opened 3 new facilities in addition to its new manufacturing facility in Queens, New York. . . .

In sum, [the beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision-making and establishing the most advantageous course of action for the successful management, product and direction of our organization, as well as its increased sales.

In addition to this letter, the petitioner provided copies of Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements for 16 individuals employed in 2011. The petitioner did not provide an organizational chart or evidence of wages paid to employees in 2012.

The director issued a request for evidence (RFE) on February 2, 2013, in which he instructed the petitioner to submit, among other items, the following: (1) the beneficiary's position title; (2) the beneficiary's specific daily duties; (3) the percentage of time spent on each duty; (4) an organizational chart showing the number of subordinate managers/supervisors or other employees who report directly to the beneficiary along with a brief description of their job titles, duties and education level, and whether they work full or part-time; and (5) IRS Forms W-2 for each employee covering relevant years.

In response, the petitioner submitted a one-page letter dated April 9, 2013, in which it described the beneficiary's duties as follows:

It is the responsibility of the beneficiary to manage the new production facilities [in Queens, NY] and the Master Baker . . . who obtained certificates from the [redacted]. The beneficiary must also determine culinary standards, oversee the activities of professional baking staff and ensure compliance with culinary and health standards. He must also instruct individuals working under his management and ascertain the highest level of quality control.

Most importantly, [the beneficiary] is a functional manager with broad decision making discretion of functions at a senior level within the organizational hierarchy. With respect to the function managed, that is the production facility, he is solely responsible for it and is therefore in a managerial or executive position. Not only does he function at a senior level in the organizational hierarchy with respect to the functions managed, but he has absolute authority over the functions, specifically production and quality control, which are essential to the organization. The employees under his management must follow the standards established by [the beneficiary], and his determinations are mandatory. He decides when to change the product line, when to change ingredients, the volume of production and the staff necessary to maintain the production facility at maximum capacity.

The petitioner did not provide its organizational chart in response to the RFE. It provided copies of IRS Forms W-2 issued to 15 employees in 2012, with reflected that five employees received salaries consistent with full-time employment. The remaining employees' salaries were consistent with part-time or part-year employment and ranged from \$763 to \$9,500.

After reviewing the record including the petitioner's response, the director determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. In denying the petition, the director observed that the petitioner provided an overly broad position description at the time of filing and failed to add any additional information regarding the beneficiary's actual duties in response to the RFE, including the requested percentages of time the beneficiary would allocate to performing specific tasks. In addition, the director observed that the petitioner failed to submit the requested organizational chart or job descriptions for the beneficiary's claimed subordinate employees. The director denied the petition, in part, based on the petitioner's failure to submit a complete response to the RFE. *See* 8 C.F.R. § 103.2(b)(14). Based on these evidentiary deficiencies, the director concluded that the petitioner did not adequately support its claim that the beneficiary will manage an essential function of the organization, or that he will otherwise be employed in a primarily managerial capacity.

On appeal, the petitioner asserts that the director "erroneously misconstrued the evidence and failed to give proper weight and consideration to the previously submitted documentation and evidence." The petitioner submits an "addendum" to its prior letter dated April 9, 2013 in which it provides information regarding the amount of time the beneficiary allocates to four broad areas of

responsibility, along with an organizational chart identifying the names and job titles of the beneficiary's subordinates, and payroll records for the first eight months of 2013.

Counsel states that the beneficiary is responsible for managing production of the petitioner's products, but also manages the production staff. Counsel asserts that the newly submitted letter and organizational chart establish that the majority of the beneficiary's duties relate to operational and policy management and to the supervision of supervisory employees. Counsel acknowledges that "there are technical elements in the production process which were require [sic] his professional expertise as a baker, but these are incidental to his overall managerial responsibilities." Finally, counsel contends that the director "summarily dismissed the petition on the grounds that the petitioner purportedly does not employ staff deemed sufficient to support the beneficiary in a primarily managerial or executive capacity." Counsel states that the director's decision reflects a bias against small businesses.

#### B. Analysis

Upon review, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In 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). Published case law clearly supports the pivotal role of a clearly defined job description, as 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); see also 8 C.F.R. § 204.5(j)(5). USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of other employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In this matter, the petitioner has consistently failed to provide information regarding the actual tasks the beneficiary would perform on a day-to-day basis. The petitioner indicates that the beneficiary is responsible for "managing the entire production facility," "supervising and overseeing the production budget," hiring, firing, training and scheduling employees, overseeing packaging and delivery, marketing of products, ensuring quality control, modifying products, and contributing to the company's long-term strategies. While some of these duties suggest the beneficiary's heightened level of authority, the information provided at the time of filing was overly general and was not supplemented by any information regarding the staffing or personnel structure of the petitioner as of the date of filing. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 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.).

Accordingly, the director reasonably requested a more detailed description of the beneficiary's duties, including information regarding the specific tasks he will perform and the percentage of time he will allocate to such tasks. While the petitioner submitted a duty description in response to the RFE, it did not expand upon the original description or include information regarding the amount of time the beneficiary would allocate to specific duties on a weekly basis. Rather, the petitioner added new non-specific language to the initial job description, noting that the beneficiary would "determine culinary standards," oversee "professional baking staff," ensure "compliance with culinary and health standards," provide instruction to his subordinates, and make decisions regarding product and ingredient changes, production volume and staffing. The petitioner did not mention the previously claimed duties associated with marketing, budgeting, packaging and delivery, but rather seemed to focus more on the beneficiary's oversight of employees. These employees were not identified in the record despite the director's specific request for an organizational chart and information regarding the beneficiary's subordinates.

Overall, the two brief position descriptions submitted prior to adjudication were overly vague and lacked the detail necessary to establish that the beneficiary's duties would be primarily managerial in nature. 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 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. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Therefore, it was appropriate for the director to deny the petition, in part, based on the petitioner's failure to submit a complete response to the RFE. The petitioner's response did not include the detailed description of the beneficiary's duties, the percentage of time he allocates to each duty, the requested organizational chart, or the requested evidence identifying the beneficiary's subordinates and their job duties. 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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as marketing, product development, and training non-professional employees, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner has not established that the beneficiary would be performing duties that are primarily managerial in nature. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, the petitioner has submitted an "addendum" to its April 9, 2013 letter in an attempt to comply with the RFE. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept

evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Regardless, the newly provided job description, even if it had been timely submitted, is insufficient to establish eligibility as it is even less specific than those previously submitted. The petitioner states that the beneficiary will allocate 60% of his time to "manage and supervise the new production facility," 20% to "manage and supervise the production staff," 10% to "manage and supervise culinary and quality control staff," and 10% to "manage and oversee the activities of the entire baking staff." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Beyond the required description of the job duties, 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 director denied the petition, in part, based on the petitioner's failure to submit evidence to corroborate the number and types of subordinates supervised by the beneficiary.

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. § 204.5(j)(5). 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. § 204.5(j)(5).

The petitioner states that the beneficiary manages its production facility in [REDACTED] New York, and identified his position as "Store & Production Manager" on the Form I-140. The submitted photographs reflect that the Astoria facility includes both a production area and a retail storefront. Although the director requested an organizational chart and the names, job titles, job duties, educational levels and full- or part-time status of the beneficiary's subordinates, the petitioner failed to provide this evidence in response to the RFE. The petitioner simply reiterated that the beneficiary supervises 10 employees without providing any additional information beyond identifying one employee as a baker. As discussed, any failure to submit requested evidence that

precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals, and in fact counsel acknowledges on appeal that the petitioner does not employ professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, and he cannot qualify as a personnel manager. *See* section 101(a)(44)(A)(ii) of the Act.

On appeal, the petitioner submits an organizational chart for the first time and indicates that the beneficiary supervises two supervisory employees - a pastry chef and a master baker. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO need not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Nevertheless the petitioner has not provided position descriptions for the employees depicted on the chart.

Further, even if the petitioner had submitted the chart previously, the evidence does not corroborate the petitioner's employment of most of the employees listed therein as of the date of filing. The payroll records submitted on appeal reflect that three of the beneficiary's claimed subordinates (all "assistants") were on the payroll of "[REDACTED]" as of January 2013. The individuals listed as "pastry chef" and "master baker" on the organizational chart are not listed on the payroll records as of January 2013 and did not receive IRS Forms W-2 in 2012. An individual identified as a "helper" was hired in June 2013 and works for "[REDACTED]". Another "helper" was hired by the petitioner in August 2013, while the third helper does not appear on any Forms W-2 or payroll records. Therefore, although the petitioner listed a total of 11 employees on the chart, the record confirms the petitioner's employment of only three of these workers - the beneficiary, the company president, and a cook - as of December 2012 when the petition was filed. 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). The record does not corroborate the petitioner's claim that the beneficiary supervised 10 employees at the time the petition was filed. The latest payroll report submitted for review, for August 2013, reflects only five employees.

The petitioner also asserts that the beneficiary is a function manager. 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. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

Although the petitioner stated in response to the RFE that the beneficiary manages its production and quality control functions, it has not provided sufficient evidence to establish that he will perform primarily managerial duties associated with these functions, nor has it corroborated its claim that it has 10 employees working at its Astoria, New York production facility to perform the operational tasks at the facility. Further, the petitioner indicated that the beneficiary is responsible for overseeing budgeting, marketing, packaging and delivery functions for this location, but did not identify employees to perform operational tasks associated with these areas of responsibility. Overall, the evidence is insufficient to establish that the beneficiary will primarily manage an essential function.

On appeal, counsel correctly observes that 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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the director's decision reflects that the petition was denied primarily based on the petitioner's failure to submit requested evidence that was material to establishing the beneficiary's eligibility, including his detailed position description, a company organizational chart, and information regarding the duties performed by the beneficiary's subordinates. The director also correctly observed that the IRS Forms W-2 submitted did not corroborate the petitioner's claim that it has 10 full-time employees or its alternate claim that it has 24 full-time employees. Therefore, the petitioner did not meet its burden to establish that the beneficiary would be relieved from performing non-managerial duties associated with the operation of the petitioner's production facility, such that it would have a reasonable need for the beneficiary to perform primarily managerial duties.

In sum, the petitioner has submitted an inadequate description of the beneficiary's duties and insufficient evidence of its organizational structure as of the date of filing. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or

executive capacity, as required by section 203(b)(1)(C) of the Act, and for this reason, the appeal will be dismissed.

### III. Employment Abroad in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

As previously stated, the AAO gives primary consideration to the description of the beneficiary's position and duties, as a detailed description of the beneficiary's actual daily tasks tends to reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, at 1103. The AAO also gives ample consideration to the job duties of the beneficiary's subordinate employees, the nature of the business, the employment and remuneration of employees, and any other facts that contribute to a comprehensive understanding of the beneficiary's actual role in a business.

According to the petitioner's initial letter, the beneficiary was responsible for "managing several specific functions to wit, the production of the products, overseeing the research and development of the products and training the staff to produce products according to the companies [*sic*] ancient recipes." The beneficiary was "required to meet with our own personnel which were involved in the creative and aesthetic design of the food products." The petitioner further stated that it was the beneficiary's responsibility "to determine production capacity, prepare baking schedules, improve and create the inventory of products, hire and manage the bakers, kitchen staff and other personnel involved in the manufacturing and distribution process."

In response to the director's detailed RFE, the petitioner provided a letter from the foreign employer stating that the beneficiary had been employed as production manager with the company since 2001 until being transferred to the U.S. petitioner in January 2006. The letter further described the beneficiary's responsibilities as follows:

[H]e was required to meet with our executive staff on a daily basis to discuss quality issues, the quantity of production, experimentation with new recipes and preparing the products for delivery to our foreign customers. [The beneficiary] managed the staff of machine operators, technicians, bakers, kitchen assistants and the quality control staff. He was required to hold daily staff meetings with the individuals who worked under his management and control and to insure that the products were made according to the recipe, that all timetables for production were maintained, and most importantly, that the products met the stringent quality control standards mandated by the owners. He also managed an individual who worked under his direct control and whose primary function was to experiment with various ingredients, components and recipes in an effort to improve existing products and to create new products that the company wished to popularize.

His functions were entirely managerial. He did not participate in the actual work of preparing the products nor did he participate in their sale and distribution. His role

was to manage the team of employees that work in the production facility. In his capacity as a manger, he was able to hire and fire employees, he set the pay scale for his department and had the discretion to raise salaries for his employees or terminate their employment. He would typically walk around the production facility, which was quite large, and ensure that the production line moved swiftly, that each employee knew the tasks they were responsible for, he periodically checked the production for quality control purposes and maintained inventory of both raw products and finished products so that we could always be capable of meeting demand and special orders. An appropriate breakdown of his job duties would be the following:

Manage and supervise the production staff which consisted of ___ employees---	50%
Manage and supervise the quality control staff which consisted of __ employees-	20%
Manage and supervise the creation of new products and new recipes	10%
Manage and supervise the purchase of inventory	10%
Inspection of Machinery	5%
Arrangement of work schedules and assignment of personnel	5%

The letter also referred to an enclosure containing a complete list of job titles for the employees working under the beneficiary and a description of their duties. A careful review of the record confirms that this evidence was not included with the petitioner's response.

The petitioner provided the foreign employer's undated organizational chart identifying ten employees subordinate to the beneficiary in a variety of positions, including two baklava chefs, chef's assistant, a helper, one cutting chef, a sherbet-syrup chef, a baker, a packaging staff person, a cold room staff person, and a shipper.

The petitioner provided few details regarding the beneficiary's specific duties, and the percentage of time breakdown included in the letter refers to categories of duties that are general and vague leaving little insight into the tasks actually performed by the beneficiary. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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 any detail or explanation of the beneficiary's activities in the course of his daily routine.

The petitioner's staffing is unclear and may be inconsistent. The foreign employer left two blank spaces in its letter, plainly omitting the number of employees on both its production staff and its quality control staff. Further, the employees identified by position on the organizational chart appear to be primarily kitchen workers whereas the foreign employer's letter discusses the beneficiary's role in managing technicians, machine operators, and quality control staff in addition to kitchen personnel. The petitioner has not provided a clear understanding of the role or duties of the foreign entity's employees. 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).

Overall, based on the limited evidence, the beneficiary's work appears to be more consistent with that of a first line supervisor rather than a manager/executive. For example, the petitioner's description refers to the beneficiary's regular monitoring of the production facility floor ensuring that employees were performing properly and quality control is maintained. The beneficiary also directly supervised employees in the development of new recipes and products. The beneficiary is not required to supervise personnel but 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. In this matter, the petitioner denies that its employees are professional. Further, some of the beneficiary's duties involve overseeing those employees directly providing a service or creating a product; therefore, the beneficiary would have been performing in a first-line supervisor role. There is insufficient documentation to determine how much time the beneficiary spent involved in those duties and there is insufficient documentation to establish that any of the beneficiary's subordinate employees were supervisors or managers.

Accordingly, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason the appeal will be dismissed.

#### **IV. Doing Business in the United States**

The third issue addressed by the director is whether the petitioner had been doing business in the United States for at least one year prior to filing the petition.

According to 8 C.F.R. § 204.5(j)(3)(i)(D) the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The director determined and the AAO agrees that the petitioner did not submit sufficient evidence to establish that it had been doing business for one year prior to filing the instant petition. The petition was filed on December 31, 2012 and therefore the petitioner's evidence must reflect regular and continuous business activities since January 1, 2012.

The petitioner indicated on the Form I-140 that it has gross annual income of \$709,562; however, the figure reported on the petitioner's IRS Form 1065, U.S. Return of Partnership Income for 2011 indicates an ordinary business loss of \$378,686.

According to the petitioner's initial letter, the limited liability company has employed the beneficiary as its production and quality control manager since his arrival in the United States in January 2006. The petitioner explained that the company prospered and expanded to include a total of four locations throughout the New York metropolitan area. The petitioner's factory and retail store, located in Queens, N.Y., "sells foods on a retail level as well as serving as the wholesale distributor to restaurants and food shops, and the production facility for all of North America." The petitioner provided evidence including photographs of retail café establishments, a company van, and a kitchen.

In the RFE, the director requested additional evidence such as receipts, invoices, detailed reports of traded goods or services and/or import/export licenses, contracts or agreements with shipping and receiving companies. In response, the petitioner provided bank statements covering the months of February through April 2012, several untranslated foreign language documents, and IRS Form W-2 statements for 2012. The petitioner also resubmitted 2011 tax documents.

The director determined that the petitioner's documentation was insufficient to establish that it had been in business for at least one year prior to filing the petition. The AAO agrees with the director, finding that the record lacks evidence of regular and continuous sales transactions for the requisite one-year period prior to the date the petition was filed on December 31, 2012. Despite the petitioner's submission of tax returns and W-2s, there is no way of determining the frequency of the petitioner's sales transactions from those annual returns and documents. The petitioner's bank statements do not establish the regular transaction of business but even if it did, the petitioner submitted statements covering only three months in 2012. Finally, the petitioner submitted foreign language documents but failed to include certified translations of the documents therefore the AAO cannot determine whether that evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The petitioner has not shown that it has been doing business for at least one year prior to filing this petition. For this additional reason the appeal will be dismissed.

#### **V. Doing Business Abroad**

The fourth and final issue addressed by the director is whether the petitioner established that the foreign entity is doing business.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

The director requested additional evidence after determining that the petitioner failed to establish that the foreign employer was doing business when it filed the petition. In response, the petitioner submitted un-translated corporate documents. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The AAO agrees with the director's finding that the petitioner failed to provide sufficient evidence to establish that the foreign employer is actively engaged in the regular, systematic, and continuous provision of goods or services. Therefore, it cannot be concluded that the petitioner has established that the foreign parent company is a qualifying organization as required by the regulation at 8 C.F.R. § 204.2(l)(1)(ii)(G)(2). For this reason, the petition may not be approved.

## VI. Qualifying Relationship

Although not addressed by the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary."

In support of the initial Form I-140, the petitioner refers to the foreign entity as "[o]ur parent company in Turkey." The petitioner's letter describes itself and the foreign entity as the same entity and refers to the petitioner as its U.S. office. The director's RFE correctly stated that the petitioner provided no evidence establishing a qualifying relationship with the foreign entity and asked the petitioner to submit documents such as its Articles of Organization, operating agreement, meeting minutes, and other documentation to establish its ownership and control. The director also requested complete 2011 federal tax returns. In response, the petitioner submitted an Operating Agreement and 2011 federal tax returns.

The petitioner submitted an operating agreement which identified [REDACTED] the managing member holding a 99% interest in the petitioning company. A provision in paragraph 18 of the agreement required the managing member to issue certificates evidencing membership in the LLC but the petitioner did not provide these documents.

According to the petitioner's Schedule B-1, Information on Partners Owning 50% or More of the Partnership of the petitioner's Form 1065, U.S. Return of Partnership Income for 2011, a Turkish citizen identified as [REDACTED] owns 99% of the LLC. This information is also stated on the petitioner's 2011 Schedule K-1, Partner's Share of Income, Deductions, Credits, etc. However, these entries are contrary to the petitioner's claim that it is a subsidiary of the foreign employer, a Turkish corporation.

Furthermore, the petitioner did not provide evidence regarding the foreign entity to evaluate whether there was an affiliate relationship between the entities. 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). Notably the director requested documentation such as the articles of organization and membership certificates in order to address ownership and control of the company, but the petitioner failed to provide the documents. 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). For these additional reasons the petition will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

## VII. Conclusion

The AAO acknowledges that USCIS approved nonimmigrant petitions that had been previously filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant 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).

(b)(6)

NON-PRECEDENT DECISION

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The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.