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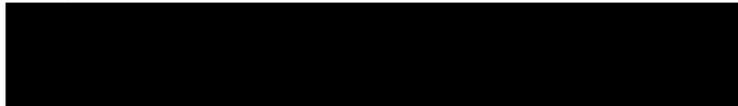
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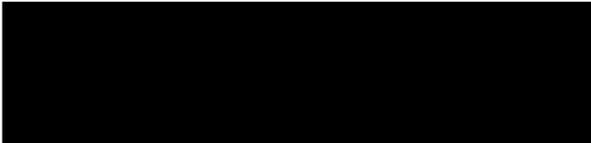
FILE: SRC 06 114 50642 Office: TEXAS SERVICE CENTER Date: **MAY 01 2007**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Florida corporation, claims that it operates a franchise restaurant, the International House of Pancakes. The petitioner states that it is an affiliate of the Image Group of companies, which is composed of six companies, located in Egypt. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of president and CEO for a three-year period.

The director denied the petition on June 20, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business. In addition, the director noted discrepancies between the number of employees listed on the company's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2006 and the company's bi-weekly labor report submitted by the petitioner.

Counsel for the petitioner filed the appeal on July 19, 2006. On appeal, counsel acknowledges the director's statements concerning the discrepancies regarding the U.S. entity's current employees. Counsel explains that the restaurant has one assistant manager trainee and an additional assistant manager. Counsel indicates that the assistant manager trainee is listed on the bi-weekly labor report and the second assistant manager is listed on the document entitled "7-Day Employee Labor Cost." In addition, counsel asserts that the "number of employees varies because there is turnover in the restaurant industry, so the total number of employees hired over the course of the year will be higher than the number employed at any one particular time." Counsel also states that the beneficiary is acting in an executive capacity as the manager of the entire organization. Counsel contends that the Service cannot look at the company's size alone but must also take into account the reasonable needs of the organization. Finally, counsel states that the beneficiary manages two assistant managers who relieve him of the day-to-day duties in managing a restaurant.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity; including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily 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.

The nonimmigrant petition was filed on February 27, 2006. The Form I-129 indicates that the beneficiary will be employed in the position of president and CEO for the petitioner, which claimed to have 21 employees. In a support letter dated February 23, 2006, the beneficiary's proposed duties in the U.S. are described as the following:

The Egyptian-based [foreign group] would now like to have [the beneficiary] continue his current L-1 employment with [the U.S. entity] on a temporary basis to fill the positions of President and Chief Executive Officer. In these positions, he was responsible for finding and opening a new business enterprise or acquiring an existing [sic] business in the United States. [The beneficiary] has now found a promising business enterprise; as such he will be responsible for directing, developing and marketing the corporation.

[The U.S. entity] has purchased/acquired that business known [sic] as IHOP (International House of Pancakes) located at [REDACTED] Florida.

In addition, counsel stated in the letter of support that the U.S. company currently employs 21 full-time and part-time employees. The petitioner stated the same on the Form I-129.

In addition, the petitioner submitted a payroll list for the employees of the restaurant for the period of December 12, 2005 until December 25, 2005. According to the payroll list, the restaurant employs four managers, eight servers, six cooks, two dishwashers, and one hostess. In addition, the petitioner submitted a "7-Day Employees Labor Cost" for the period from December 26, 2005 until January 1, 2006. The employees listed on this document are practically identical to the first payroll document, however, there are nine servers rather than eight, and four cooks rather than six. In addition, one cook was promoted to assistant manager. In addition, the petitioner submitted Forms W-2 for 2005 issued by the petitioner that confirmed that the U.S. entity employed 21 individuals in 2005.

The petitioner also submitted an organizational chart of the U.S. entity. The chart indicates the beneficiary as president and CEO of the U.S. entity, who in turn supervises a vice president and one assistant manager, who in turn supervises the kitchen manager and cooks, and a second assistant manager who supervises the hostess, the lead server, and servers.

On April 9, 2006, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) an organizational chart of the U.S. entity, including the names, job titles, a detailed job description and the educational background for each employee; (2) a copy of the U.S. entity's 2005 U.S. Corporation Income Tax Return; (3) copies of the U.S. entity's state quarterly tax return for the first quarter of 2006; and, (4) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for the first quarter of 2006.

In a response letter to the director's request, dated June 5, 2006, counsel for the petitioner submitted the following description of the duties the beneficiary will perform in the position of president and CEO for the U.S. company:

[The beneficiary] is not a first-line manager. His duties conform more closely to that of an executive. He doesn't supervise cooks or busboys or servers, or any one function of the restaurant...

His title is that of President and CEO, and his de factor duties are also those of an executive. A first-line manager does not make corporate decisions about expansion or investment. To the extent [the beneficiary] is a manager, he directs the entire organization. He alone has the power to hire and fire employees.

In addition, as President of [the U.S. entity], his interests aren't limited to this particular IHOP. His U.S. company has also invested in another restaurant (Perkins) and the company had made a \$42,000 down payment on purchase of the business. The payment

of the deposit is confirmed in the 2005 company profit and loss statement. The purchase contract has been signed and is pending approval by Perkins...

In addition, [the beneficiary], in further exercise of his executive duties, signed a letter of intent to purchase La Dolce Restaurant.... These additional two projects, currently on hold, are separate from the IHOP that his company owns. Payments made are reflected in the financial statements and/or tax returns.

In addition, the petitioner submitted a payroll statement from ADP Payroll Services, the company utilized by the U.S. entity to prepare the payroll and taxes for the company. The statement by the payroll services company indicated that for the first quarter of 2006, the U.S. entity employed 30 individuals. However, according to another page of the statement, the U.S. entity employed 19 individuals in January 2006, 19 individuals in February 2006, and 21 individuals in March 2006. In addition, the petitioner submitted a bi-weekly labor report for March 20, 2006 until April 2, 2006 and a "7-day employee labor cost" for March 27, 2006 until April 2, 2006. Since these labor reports are dated after the instant petition was filed on February 27, 2006, the AAO will not consider these documents. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 N. Dec. 248 (Reg. Comm. 1978).

The petitioner submitted evidence related to the petitioner's purchase of two additional restaurants, as referenced in counsel's letter.

The petitioner submitted an organizational chart of the U.S. entity that indicated 19 employees. The chart indicated the beneficiary as the president who supervises the vice president who supervises two assistant managers. The first assistant manager supervises two managers on duty, one hostess and six servers. The second assistant manager supervises the kitchen manager, who supervises two cooks, one cook and storekeeper, and two busboys. The chart also indicates that the beneficiary supervises [REDACTED] restaurants that are under contract. The petitioner did not submit a job description for each position listed on the organizational chart as requested by the director. 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).

The director denied the petition on June 20, 2006 concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business. In addition, the director noted discrepancies between the number of employees listed on the company's Employer's Quarterly Federal Tax Return for the first quarter of 2006 and the company's bi-weekly labor report submitted by the petitioner.

Counsel for the petitioner filed the appeal on July 19, 2006. On appeal, counsel for the petitioner acknowledges the director's statements concerning the discrepancies regarding the U.S. entity's current employees. Counsel explains that the restaurant has one assistant manager trainee and an additional assistant manager. Counsel indicates that the assistant manager trainee is listed on the bi-weekly labor

report and the second assistant manager is listed on the document entitled "7-Day Employee Labor Cost." In addition, counsel asserts that the "number of employees varies because there is turnover in the restaurant industry, so the total number of employees hired over the course of the year will be higher than the number employed at any one particular time." Counsel also states that the beneficiary is acting in an executive capacity as the manager of the entire organization. Counsel contends that CIS cannot look at the company's size alone but must also take into account the reasonable needs of the organization. Counsel further states that the beneficiary manages two assistant managers who relieve him of the day-to-day duties in managing a restaurant, and notes that given the company's employment of 17-20 individuals, the beneficiary "is not a micromanager." Counsel emphasizes that the beneficiary, in addition to supervising the assistant managers, is focused on "other restaurants" and company growth.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). 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.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. at 604.

The beneficiary's proposed job description includes vague duties such as the beneficiary will "make corporate decisions about expansion or investment"; "directs the entire organization;" and "invested in another restaurant (Perkins)." 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The record does not provide a clear understanding as to what duties the beneficiary performs on a day-to-day basis, such that they could be classified as managerial or executive.

The petitioner also stated in its response to the request for evidence that the beneficiary's "interest are not limited to this particular IHOP. His U.S. company has also invested in another restaurant (Perkins)" and "signed a letter of intent to purchase La Dolce Restaurant." Although the beneficiary is

responsible for acquiring new restaurants, the petitioner has not explained the exact duties the beneficiary will perform in order to achieve this goal, nor indicated how much of his time is allocated to such duties. 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). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has 21 employees. In addition, the organizational chart of the U.S. entity indicated that the beneficiary will supervise one vice-president and two assistant managers. In the decision, the director stated that the U.S. entity's payroll documents only include one assistant manager trainee, and does not include an assistant manager. On appeal, counsel for the petitioner explains that one assistant manager is listed on one document and the second assistant manager is listed on another document because one is paid hourly and the other individual is paid on a salary. The AAO reviewed the documentation and confirms that the U.S. entity employs one assistant manager trainee and one assistant manager as claimed by the petitioner. The AAO will withdraw this part of the decision.

Counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Again, there is no provision in CIS regulations that allows for an extension of this one-year period.

Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner managed a restaurant and employed one vice president, one assistant manager trainee, one assistant manager, nine servers, four cooks, two dishwashers and one hostess. Since the petitioner failed to submit job descriptions for these positions, as requested by the director, it is impossible to determine the duties performed by each employee. 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).

Without this information, the AAO cannot determine if the U.S. entity's employees would relieve the beneficiary from performing the non-managerial or non-executive operations of the company.

In addition, based on the organizational chart, it appears that the assistant manager trainee supervises the hostess, the lead server and the servers, and the assistant manager supervises the kitchen manager and the cooks. Based on the evidence submitted, it is not clear who will be performing many of the various operational tasks inherent in operating the restaurant on a daily basis, such as acquiring supplies, equipment and inventory, obtaining contracts with suppliers and service providers, marketing and promotion, budgeting, bookkeeping, preparing reports for the franchiser, paying bills, and personnel functions, and other administrative tasks inherent to operating a large restaurant. Since the assistant managers are supervising the kitchen and the restaurant's front-end operations, and the vice president's duties are not explained, it is very possible that the beneficiary is performing several of the above-mentioned duties and thus the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

Further, it is not clear that two assistant managers are sufficient to fulfill the petitioner's reasonable needs for supervision of the floor and kitchen staff. Based on an employee schedule submitted by the petitioner, it appears that the petitioner's restaurant is open daily at 6:00 a.m. or 7:00 a.m., and closes at 9:00 p.m. or 10:00 p.m., while each manager works forty hours or less per week. Therefore, the record does not establish who supervises the routine operations and duties of the lower-level staff during the many operating hours in which the assistant managers are off-duty. In addition, one of the assistant managers is a trainee, thus it can be assumed that as a trainee, he/she is supervised and assisted by another individual. The petitioner has not explained how one assistant manager trainee, one assistant manager, and one vice-president are able to perform most or all of the day-to-day functions of ordering merchandise and supplies, dealing with food vendors, handling the restaurant inventory, managing the staff schedules, managing the restaurant staff and many other routine duties associated with operating a restaurant. Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of his time directly providing the services of the company or directly supervising employees performing cashier duties. *See Matter of Soffici*, 22 I&N Dec. at 165.

Therefore, based on the above, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the president and one vice president, one assistant manager and one assistant manager trainee and the restaurant staff. 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) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating 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. 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 claims that the beneficiary will supervise the vice-president, two assistant managers, two managers on duty, and one kitchen manager. The petitioner did not submit the job duties for these employees, thus the AAO cannot determine if the managers obviate the beneficiary from performing primarily non-managerial and non-executive duties. The petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the service functions and restaurant management functions of the subordinates supervised by the beneficiary. Rather, based on the type of business operated by the petitioner and its staffing levels, the assistant managers, the managers on duty and the kitchen manager would necessarily be involved in the routine tasks associated with operating a restaurant, which can not be considered professional or managerial in nature.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is executive in capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the petitioner has failed to provide a detailed description of the duties performed by the beneficiary and all of the individuals employed by the U.S. entity, the petitioner has not established the hierarchy and complexity of the organization which would elevate the beneficiary to a position of executive capacity.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the

beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

As noted above, the petitioner explained that the beneficiary will assist in the expansion of the U.S. entity through the purchase of two additional restaurants. The petitioner stated that the U.S. entity has made a "down payment" on one restaurant, and "signed a letter of intent to purchase" the other restaurant. Thus, the U.S. entity has not yet acquired the two new restaurants and the beneficiary is not supervising staff in the new restaurants. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Based on the foregoing discussion, the appeal is dismissed.

Beyond the decision of the director, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

In the instant matter, the petitioner indicated that the U.S. entity acquired the IHOP restaurant on December 9, 2005, nearly a year after the beneficiary entered the United States in order to commence operations of the U.S. entity. The petitioner did not provide any documentation that the U.S. entity was doing business prior to the purchase of the IHOP restaurant in December 2005. The petitioner submitted Form 1120, U.S. Corporation Income Tax Return, for 2005 that indicated gross sales of \$58,797. In addition, the tax return indicated that the U.S. entity did not pay any wage or salaries, and paid \$1500 for the compensation of officers. The petitioner failed to provide any documentation to establish that the U.S. entity was doing business for the previous year, and prior to the purchase of the IHOP restaurant in December 2005, nor did it explain the lengthy delay in commencing operations. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petition indicates that the beneficiary owns 80 percent of the foreign entity, and thereby of the petitioning company. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United

States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. For this additional reason, the appeal must be dismissed and the petition denied.

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.