**U.S. Department of Homeland Security**
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

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**U.S. Citizenship and Immigration Services**

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[redacted]

FILE: EAC 07 164 52892 Office: VERMONT SERVICE CENTER Date: FEB 03 2009

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as an L-1A nonimmigrant intracompany transferee 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, a Florida limited liability company, operates a Chinese take-out restaurant. The petitioner states that it is a subsidiary of [redacted], located in Venezuela. The beneficiary was initially granted one year in L-1A status in order to open a new office in the United States, which was valid from October 19, 2004 until October 19, 2005. The petitioner subsequently filed an I-129 petition to extend the beneficiary's status on September 7, 2005; that petition was denied on June 14, 2006 (SRC 05 244 50595).[1] The petitioner seeks to continue to employ the beneficiary as its president for three additional years.

The director denied the petition concluding that the petitioner did not establish: (1) that that the U.S. company and the beneficiary's foreign employer have a qualifying relationship; or (2) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director placed undue emphasis on the size and nature of the petitioner's business, without giving due consideration to the beneficiary's job duties, and denied the petition, in part, based on the petitioner's failure to provide evidence that was never requested. With respect to the claimed qualifying relationship, the petitioner states that the foreign entity owns 100 percent of the petitioner's shares, although the shares have been issued in the name of [redacted], one of the shareholders of the foreign entity. The petitioner submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his

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[1] The petitioner explains that it never received a copy of the Notice of Denial issued in connection with the previous petition, and was not informed of the denial of the previous petition until February 2, 2007, at which time a status inquiry revealed that the petition had been denied on June 14, 2006. The petitioner requests that the instant petition be approved with a validity date commencing on October 19, 2005. The petitioner states that it still has not received a copy of the notice of denial issued on June 14, 2006. The AAO acknowledges that it appears there was some complication with the issuance of a decision in the previous matter. However, the instant petition was filed on May 17, 2007, 19 months following the expiration of the beneficiary's L-1A petition, 11 months following the denial of the initial extension request, and more than 3 months after the petitioner claims it learned of the previous denial. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. Therefore, it is noted for the record that the beneficiary is ineligible for an extension of status in the United States.

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) 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 first issue to be address is whether the petitioner established that there is a qualifying relationship between the United States and foreign entities. 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. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> > (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
> >
> > (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

*(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

*(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity[.]

The petitioner filed the nonimmigrant petition on May 17, 2007. The petitioner indicated on the L Classification Supplement to Form I-129 that the U.S. company is a subsidiary of the beneficiary's foreign employer. Specifically, the petitioner stated: "[redacted] owns 100% Interest in Subsidiary and delegated [redacted] the membership interest under her name for parent company."

The petitioner did not submit documentary evidence of its ownership and control, such as stock certificates or membership certificates. However, the petitioner did submit copies of its IRS Forms 1120, U.S. Corporation Federal Income Tax Return, for the years 2004 through 2006. All of the tax returns indicate at Schedule K that [redacted] owns 100 percent of the U.S. company. The petitioner also submitted a company registration document for the foreign entity which indicates that [redacted] owns 1,000 shares of the foreign entity's stock, and [redacted] owns 9,000 shares.

The director found this information insufficient to establish that the two companies possess the required qualifying relationship. Accordingly, on May 31, 2007, the director issued a request for additional evidence (RFE), in which he requested, *inter alia*, documentary evidence of the ownership and control of the petitioning company. The director advised that such evidence may include, but is not limited to, copies of stock certificates, stock ledgers, articles of incorporation, etc. The director further advised that the evidence submitted must clearly delineate the ownership and control of the United States petitioner. The director noted that, based on the evidence in the record, it appears that [redacted], rather than the foreign entity, is the sole owner of the petitioning company.

In a response dated August 24, 2007, the petitioner stated the following:

> Please accept the original Articles of Incorporation of Parent Company wherein it shows that Parent authorized the [Board of Directors] members to open subsidiaries in Venezuela and in any other country. In addition, please have the minutes with the authorization to [redacted], to open a subsidiary in the United States under her name to prevent two circumstances; One, to be charged double taxation by the government of Venezuela for having a subsidiary in the U.S. Second, to prevent law suits or related liability complaints to our parent company that might be filed by third party entities. Furthermore, the [Board of Directors] of the parent company authorized [redacted] to put under her name the total membership interest considering that the other stockholder in Venezuela is her brother who will manage the parent company; therefore, the qualifying parent/subsidiary is established.

The petitioner submitted a letter from [redacted], dated August 24, 2007, who stated that in his capacity as managing director of [redacted] authorizes [redacted] to establish a division in Miami, Florida. The petitioner did not submit a copy of the "minutes" referenced in its response letter, nor did it submit the documentary evidence of the petitioner's ownership that was requested by the director.

The director denied the petition on September 24, 2007, concluding that the petitioner failed to establish that the petitioner has a qualifying relationship with the foreign entity. The director acknowledged the petitioner's claim that the U.S. entity was not set up as a legal subsidiary due to the foreign entity's desire to prevent taxation by the government of Venezuela. However, the director concluded that "the fact remains that, legally, owns 10 percent of the foreign entity and 100 percent of the United States entity."

On appeal, the petitioner asserts that the foreign and U.S. entities do in fact have a qualifying relationship. Specifically, the petitioner states:

> Parent company has a minutes issued on March 01, 2003 for by [redacted] and [redacted] wherein they agreed to open a subsidiary and other related reasons for the subsidiary has to be open[ed] under [redacted] name; in addition, the Service accepted and is very clear when stated that [redacted] owns 10% of the parent company and 100% of Petition; in other word Service recognized the ownership abroad and in the U.S. belonging to similar shareholders; it is in records that the articles of incorporation of parent company stated that the only two shareholders are [redacted] and [redacted]; further the business activities are determined to the extended of opening subsidiaries in Venezuela and in any country that not limit the United States. It is also normal for foreign companies that usually requires to organized subsidiaries [sic] or branches under one of the shareholders' name for security and legal issues; in addition, Parent Company designated Beneficiary as the head of the [Board of Directors] of the subsidiary to balance powers and decision, so that said subsidiary could be run steady and organized. Therefore, it is very clear that the qualifying relationship between Parent Company and subsidiary exists at all times.

The petitioner submits for the first time a document titled "Minutes," apparently from a meeting between [redacted] and [redacted] shareholders of the foreign entity, held on March 1, 2003, for the purpose to "clarify the Articles of Incorporation of the company Mayoristas 2001, Inc." The meeting minutes indicated: (1) that [redacted] is authorized to incorporate a subsidiary in Miami, Florida under her own name, representing the

interest of the foreign company; and (2) that it is necessary to issue shares under [redacted] name to avoid taxation by the Government of Venezuela, and due to liability issues, but that [redacted] will be designated as the higher executive to manage the U.S. entity.

Upon review, the petitioner has not established the requisite qualifying relationship between the U.S. and foreign entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, U. S. Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

Preliminarily, the AAO notes that the record contains no membership certificates, articles of association, operating agreement or other documentary evidence which would definitively establish the ownership and control of the U.S. company, and these documents were specifically 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). For this reason alone, the petition cannot be approved.

As noted by the director, and conceded by the petitioner, the limited evidence in the record indicates that [redacted] is the majority owner of the foreign entity and controls that entity, and [redacted] owns 100 percent of the United States entity. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

Therefore, in this matter, [redacted] has "de facto" control of the United States entity based on her ownership of a 100 percent interest in the company, and [redacted] has "de facto" control of the foreign entity based on his 90 percent ownership interest in that company. Therefore, the petitioner has not established that the two entities have an affiliate relationship based on common ownership and control by the

same individuals or group of individuals. The apparent sibling relationship between [redacted] does not constitute a qualifying relationship under the regulations.

The claim that the foreign entity controls the U.S. entity, yet owns no interest in the U.S. entity, is not persuasive. The petitioner repeatedly emphasizes that the foreign entity's articles of incorporation establish that the company is authorized to establish a subsidiary in any country, including the United States. However, the fact that the foreign entity is authorized to establish a subsidiary does not in fact make it the parent company of the instant U.S. petitioner. Similarly, the minutes from the March 1, 2003 meeting, submitted for the first time on appeal, are not sufficient to establish the claimed parent-subsidiary relationship. While Venezuelan laws may have led the foreign entity to avoid establishing a U.S. subsidiary for tax purposes, the fact remains that the petitioner must still establish that the two companies have a qualifying relationship **according to the U.S. statutes and regulations governing this nonimmigrant visa classification.** In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Regardless, the petitioner has not established the essential elements of common ownership and control.

Furthermore, the petitioner has not submitted sufficient documentary evidence in support of its claim that [redacted] holds the 100 percent interest in the U.S. company as the foreign entity's representative. For example, there is no evidence that the foreign entity paid for [redacted]'s membership interest in the U.S. company. The petitioner did not submit its articles of association or operating agreement, which might have elaborated upon who, in fact, controls the U.S. company. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In light of all of the omissions and deficiencies in the evidence in the record, the petitioner has not established that it has the claimed qualifying relationship with the foreign entity. For this reason, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.

In its letter dated March 15, 2007, the petitioner described the beneficiary's duties as follows:

1. Direct the development and growth of the restaurant in the U.S. providing the appropriate services to the general public and institutions. As such, he will be responsible for directing and managing the negotiations with our providers. Furthermore, he will continue to supervise and control the food products and its derivatives to be used through the control of the kitchen manager and chef cooks; he will use the appropriate skilled personnel to accomplish this. As such, he is requiring the services of a marketing analyst to analyze the appropriate market, setting strategic goals for growth for the new opening of [redacted]' restaurant #2, and when is needed to participate with agreements with third-party companies. As such, he will plan the other business segments like providing related services of promoting banquets, catering for small to medium companies. In this activity, he would spend about 40 percent of his time.
2. Offer our clients the products of excellent quality and state-of-the-art services. As such, he will develop and implement company's policies and procedures accordingly with regulations to keep the high standard in order to satisfy client's expectations, and maintain the compromises with several companies. He would spend about 20% of his time on it.
3. He will be responsible for liaison between our company, clients, and provider/s, which currently provide support to the organization using the appropriate networks in the U.S. and abroad. Furthermore, he will be responsible for providing information, advice, and counsel to the Board of Directors in the U.S. and abroad; maintaining close contact and exchange of opinions to create also but not limited to policies, programs and strategic

direction of the company which needs to move forward in the business areas that we are already into. He would spend about 30% of his time.

4. He will contribute to our company's' knowledge and experience in the variety of business activities such research, management, providing the appropriate employment opportunities within the company's zone of influence, and contribute to strengthening the economic conditions in this area. As such he will continue directing and coordinating programs to provide new or continuing operations to maximize returns and to increase productivity. He would spend 10% of his time.

The petitioner submitted an organizational chart showing the beneficiary as executive director/president. The chart indicates that the beneficiary supervises [redacted], manager, who in turn supervises two chefs, one cleaning person, and one "assistant." The chart also depicts an accountant and an attorney who report to the beneficiary. The petitioner also provided copies of its Florida Forms UCT-6, Employer's Quarterly Report, for each quarter of 2005 and 2006. The petitioner's records show that it employed the same three employees at the same salaries for this entire two-year period. The beneficiary earned a monthly salary of $2,500, the manager earned a monthly salary of $1,200, and the chef, [redacted], earned a monthly salary of $1,000. The petitioner paid $1,400 in "professional fees" in 2006, but its detailed income statement showed no additional employee or contractor expenses.

In the RFE issued on May 31, 2007, the director instructed the petitioner to provide a detailed description of the beneficiary's typical workweek. The director advised the petitioner that although it indicated on Form I-129 that it has seven employees, the evidence submitted documented the employment of only three workers. The director therefore requested that the petitioner submit a list of current employees which identifies each employee by name and position title, and a complete position description for each employee. The director also requested evidence documenting the number of contractors used by the petitioning company, if any, and evidence of wages paid to them.

In its response dated August 24, 2007, the petitioner indicated that the beneficiary will perform the following duties under the extended petition:

> Direct, growth and managing the restaurant in addition to control and managing the negotiations involved in the business, plus supervise and control the food products and its derivatives to be use[d] through control the kitchen manager and chef cooks. [The beneficiary] also is guiding the business to the promoting banquets, catering for small and medium businesses. Furthermore, he will continue implementing and developing Petitioner's policies and procedures accordingly with regulations to keep high standards. He will continue to be the liaison with providers, companies, and with the [Board of Directors] abroad. Will also do research for new target markets, general management to pursue company's zone of influence and strengthening the economic conditions in this area. He coordinated with kitchen manager assignments of cooking personnel to ensure economical use of food and timely preparation in addition to keep records required by government agencies regarding sanitation, and food subsidies where appropriate. He also participated in establishing standards for personnel performance and customer service. He monitored food preparation methods, portion sizes, and garnishing and presentation of food to ensure that food is prepared and presented in an acceptable manner. He also monitored budgets and payroll records, and

> reviewed financial transactions to ensure that expenditures are authorized in accordance with annual budget. He also coordinate schedule of staff hours and assigned appropriate duties monitoring conveniently as per company policy created by Beneficiary; He monitored compliance with health and fire regulations regarding food preparation and serving, and building maintenance in lodging and dining facilities.

The petitioner also described the beneficiary's "daily work," which incorporated many of the above-described duties. As this description was recited in full in the director's decision, it will not be repeated here.

The petitioner also provided a statement of staffing, indicating that it employs the beneficiary, the manager/kitchen manager, a head chef, a cook, a part-time cook assistant, and two independent contractors (an accountant and an attorney), who each earn approximately $350 per month. The petitioner did not provide the requested position descriptions for the beneficiary's claimed subordinates. The petitioner resubmitted evidence of wages paid to three employees during the last quarter of 2006, but did not address the director's observation that there was a discrepancy between the number of employees claimed and the number of employees who actually received wages.

The director denied the petition on September 24, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director noted that the only salaried employees through 2006 were the beneficiary, the manager and a chef, and that, although requested, the petitioner had failed to provide a position description for any of the beneficiary's claimed subordinates. The director therefore concluded that the beneficiary would not be supervising a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing non-qualifying duties. The director also noted that a business the nature and size of the petitioning company would not appear to support a bona fide managerial or executive position.

On appeal, the petitioner asserts that the director placed undue emphasis on the size and nature of the U.S. company in determining that the beneficiary would not be employed in a qualifying managerial or executive capacity. The petitioner asserts that the director did not specifically observe or object to the beneficiary's duties, and instead only focused on the size of the company. The petitioner also contends that the director did not request position descriptions for the beneficiary's subordinates, and that is why such descriptions were not provided. The petitioner reiterates that the initial organizational chart submitted depicts the petitioner's actual staffing levels, and that the kitchen manager, two chefs, helper/cleaner and assistant relieve the beneficiary from performing the non-qualifying duties. The petitioner further asserts that it has shown its ability to support a managerial position, as the beneficiary has been on its payroll since 2004.

Upon review of the petition and the evidence, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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.*

While the petitioner submitted several lengthy descriptions of the beneficiary's position as president, the submitted descriptions fail to establish that he performs primarily managerial or executive duties. The petitioner indicated that the beneficiary devotes 40 percent of his time to "directing the development and growth of the restaurant," and noted that these duties include: "managing the negotiations with providers"; supervising and controlling food products though the kitchen manager and chefs; and planning the opening of a second restaurant and additional business segments such as banquets and catering. Although the petitioner has given these duties the managerial connation of "directing development and growth," the actual duties associated with this responsibility have not been shown to be managerial in nature. The petitioner did not indicate with whom the beneficiary would be negotiating, nor did it submit any documentary evidence to establish that the petitioner is in the process of opening a second restaurant or expanding its services. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also has not clarified that the beneficiary's duties associated with food production are in a managerial capacity, as it later stated that the beneficiary himself monitors such routine kitchen tasks as food preparation methods, portion control and food presentation. 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). Overall, the time the beneficiary devotes to "directing the development and growth of the restaurant," cannot be considered primarily managerial in nature.

The petitioner indicated that the beneficiary devotes an additional 20 percent of his time to offering clients high quality products and services, and indicated that he would "develop and implement company's policies and procedures accordingly." However, this statement offers little insight as to what the beneficiary primarily does on a day-to-day basis to develop and implement policies for the petitioner's Chinese take-out restaurant. 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).

The petitioner stated that the beneficiary allocates 30 percent of his time to "liaison between our company, clients, and providers." Again, these duties have not been defined. Considering that the petitioner's "clients" are retail fast food customers, it is not clear what type of "liaison" the beneficiary would have with them that is not sales or customer-service related. Similarly, it is unclear what "providers" the beneficiary would be liaising with on a day-to-day basis. These duties have also not been demonstrated to be primarily managerial or executive 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 fails to sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. As noted above, the general breakdown provided by the petitioner is of little probative value as it does not clearly specify what he does on a day-to-day basis within the context of the petitioner's business. Although the director specifically requested a description of the beneficiary's "typical workweek," the petitioner's response to the request for evidence was no more lucid than that provided at the time of filing, and failed to establish that the beneficiary's duties are primarily managerial or executive.

Upon review of the initial evidence, the director specifically requested additional evidence regarding the management and personnel structure of the foreign entity, including an explanation for the discrepancy between the number of claimed employees and the number of employees reported on the petitioner's quarterly wage reports, an employee list, a complete position description for each employee, and evidence of payments made to contractors. In response, the petitioner submitted an employee list consisting of five employees and two contractors, but failed to provide any evidence of wages paid to anyone other than the beneficiary, the manager, and the chef. The petitioner did not acknowledge the director's request for a complete description of duties for all employees in the company. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner incorrectly asserts that the director did not request position descriptions for the beneficiary's subordinates. Furthermore, the petitioner still has not provided the requested job descriptions, nor has it provided evidence to resolve the discrepancy between the number of employees reported on the petitioner's quarterly wage records and the number of employees claimed. Contrary to the petitioner's assertions, the company's self-prepared organizational chart is insufficient to establish the petitioner's actual staffing levels. 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). The evidence of record does not establish that the petitioner employs anyone other than the beneficiary, the manager and the chef.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's two subordinates perform the actual day-to-day tasks of operating the petitioner's Chinese take-out restaurant.

The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

On appeal, the petitioner argues that the director placed undue emphasis on the size and nature of the petitioner's business in determining that the beneficiary would not be employed in a primarily managerial or executive capacity. 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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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 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 petitioner operates a take-out Chinese restaurant. Based on the photographs submitted of the petitioner's business premises, the petitioner also offers delivery services. The petitioner employs the beneficiary as its president, a manager/kitchen manager whose duties have not been described, and one chef. It has not been established, based on the evidence of record, that a manager and a chef would perform the majority of the non-qualifying duties associated with operating the business, such as purchasing food and supplies, preparing food, receiving deliveries from suppliers, taking delivery orders by phone, operating a cash register, delivering orders to customers, cleaning and maintenance activities, as well as the daily administrative tasks associated with operating any business. The company's operating hours have not been provided, but it is reasonable to assume that the business is open daily or at least six days per week, and it is unclear how the company would be able to operate without the beneficiary's participation in the day-to-day operations. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, one manager, and one chef.

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.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. The AAO's

holding is based on the conclusion that the petitioner failed to establish that the beneficiary is primarily performing managerial duties, rather than on the size of the petitioning entity.

The beneficiary will not be considered to be employed in a managerial capacity simply because he has been given a managerial job title and placed at a senior level in the petitioner's organizational chart. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Based on the petitioner's failure to provide a clear and credible account of the beneficiary's current job title, duties and the amount of time he devotes to his duties, and its failure to provide the requested information regarding the beneficiary's subordinate staff, the AAO cannot discern with any degree of certainty what the beneficiary primarily does on a day-to-day basis, nor can it find that the two subordinate employees documented by the petitioner would reasonably relieve him from performing non-qualifying duties.

Therefore, the petitioner has failed to establish that the beneficiary will perform primarily managerial or executive duties under the extended petition. The petitioner has not submitted additional evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

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.

**ORDER:** The appeal is dismissed.