

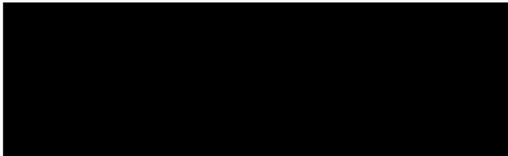
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAY 03 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 employ the beneficiary 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 California corporation, states that is a subsidiary of Comestibles Master Co., Ltd., located in Taiwan. The petitioner is self-described as a bakery café, manufacturer, wholesaler and retailer. It seeks to employ the beneficiary in the position of bakery manager at its Irvine, California location for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary has been and would be employed in a managerial capacity within the petitioner's international organization. Counsel suggests that the director misunderstood the nature and scope of the company, and placed undue weight on the beneficiary's performance of a few minor, non-managerial duties that do not require the majority of his time.

I. The Law

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 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.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

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

II. The Issues on Appeal

A. *Employment in a managerial or executive capacity in the United States*

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 22, 2009. In a letter dated April 18, 2009, the petitioner described the beneficiary's proposed duties as follows:

[The beneficiary] will fill the position of Bakery Manager of [the petitioner] in its Irvine, California store. The products are what attract customers to [the petitioner]. Its success heavily relies on its dessert and bakery products that are designed and manufactured by in-house chefs. Therefore, the Bakery Manager is a key managerial position in every [company] store because it is who brings together the creative team to design and work on the products that made [the petitioner] what it is today.

More specifically, [the beneficiary] will supervise the kitchen production staff, set standards for the work and general guidelines for each production which must be followed and executed by the production team, and coordinate the various staff to assure that each product is designed and manufactured adequately and on schedule.

[The beneficiary] will also be responsible to train new staff and coordinate the work of any outside independent contractors who are engaged to provide services to the bakery production division, such as maintenance workers, vendors, and delivery truck drivers.

[The beneficiary] has the day-to-day discretionary authority in coordinating the [sic] directing the work of the bakery production staff and is responsible for proper execution and manufacturing of everyday dessert and bakery products. He will also evaluate the performance of bakery personnel and can recommend hiring and firing of personnel.

As the person responsible for the daily production of the store, [the beneficiary] must spend a majority of his time coordinating the specific work of each staff, reviewing its quality for conformity to overall [company] standards, and administering the bakery production staff. Strong managerial skills are needed for the important coordination and scheduling functions performed by the Bakery Manager.

The petitioner submitted an organizational chart for its Irvine, California store. The organizational chart did not identify any employees by name, nor did it include a position titled "Bakery Manager." The chart depicts

a store manager who oversees three departments: kitchen, storefront, and favity [sic]. Within the kitchen department there is a "bread chef" who supervises 18 bakers, assemblers and Danish personnel, and a "cake chef" who supervises an assistant cake chef, and a total of 12 bakers, decorators and assembly personnel. The petitioner did not identify where the beneficiary's position falls within its existing organizational structure. The petitioner submitted wage and salary records corroborating its statements that it regularly employs between 60 and 70 workers.

The director issued a request for additional evidence ("RFE") on April 28, 2009. The director instructed the petitioner, *inter alia*, to submit additional evidence to demonstrate that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties in the U.S., including the percentage of time to be spent on each of the listed duties; (2) an explanation of exactly which employees the beneficiary will supervise including their job titles, educational levels, position descriptions, and annual salaries and wages; and (3) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and all employees under the beneficiary's supervision by name and job title.

In a response dated May 15, 2009, counsel for the petitioner provided the following description of the beneficiary's duties:

[The beneficiary] will spend 60% of his time supervising the bakery department staff, setting standards for the work and general guidelines for each production which must be followed and executed by the production team, and coordinating the various staff to assure that each product is designed and manufactured adequately and on schedule. [The beneficiary] will be directly supervising the baker, assemblers and workers in the Danish division for a total of 21 employees.

He will also need to maintain a record for maintenance and upkeep of the bakery department equipment and facilities. He will also be in charge of maintaining quality standard[s] for the products as the special bakery dessert products are what attract the customers in the first place.

[The beneficiary] will also spend the remaining 40% of his time to train new staff and coordinate the work of any outside independent contractors who are engaged to provide services to the bakery production department, such as maintenance workers, vendors, and delivery truck drivers. [The beneficiary] will have the day-to-day discretionary authority in coordinating and directing the work of the bakery department staff and will be responsible for proper execution and manufacturing of everyday bakery and dessert products. He will also evaluate the performance of bakery department personnel and can recommend hiring and hiring of personnel to upper level management team.

Additionally, as the person responsible for the daily production of the bakery department, [the beneficiary] will also spend significant amount of time coordinating the specific work of each

staff under his direct supervision, reviewing its quality for conformity to overall [company] standards, and administering the bakery department staff.

The petitioner submitted a revised organizational chart for the U.S. company on which a few handwritten changes were made. The petitioner removed the position of "bread chef" from the original chart and wrote in "bakery manager." The chart shows that this position reports to the "kitchen production manager," a position previously identified simply as "kitchen." Under the position of "bakery manager," the chart depicts three positions: baker (7 employees); assembler (8 employees); and Danish (3 employees). The petitioner did not identify any employees by name or provide the requested position descriptions for the beneficiary's subordinates.

The petitioner submitted copies of its 2008 IRS Forms W-2, Wage and Tax Statement, for over 80 employees, as well as the company's payroll check register for the two-week pay period ended on April 12, 2009.

The director denied the petition on June 2, 2009, concluding that the petitioner failed to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to submit the requested information regarding the beneficiary's subordinates, including the total number of employees supervised, their names, job titles and job duties. The director acknowledged that the petitioner submitted IRS Forms W-2 for 2008, but noted that many of the employees, based on the wages paid, appear to be part-time workers. Finally, the director determined that, based on the position description submitted, the beneficiary's position will include the daily operations of the petitioner's business rather than duties that are primarily managerial or executive in nature. Overall, the director concluded that the beneficiary would be primarily supervising non-professional employees, rather than supervising a subordinate staff comprised of managerial, supervisory or professional employees, or managing an essential function of the organization.

On appeal, counsel addresses the director's concern that the wages paid to employees in 2008 appear to be commensurate with part-time employment. Counsel emphasizes that the petitioner was not open for business for the entire year, and notes that the company's payroll for the quarter ended on June 30, 2009 was in excess of \$290,000. The petitioner provides a copy of the petitioner's California Form DE-6 quarterly wage report in support of the appeal.

The petitioner also submits a third organizational chart which, according to counsel, shows the names and positions of all employees to be supervised by the beneficiary. The newly revised chart has the beneficiary's position of bakery manager at the top, and indicates that he will directly supervise a chief baker who the beneficiary himself will hire. The chart indicates that the chief baker will supervise two shift supervisors in the bread section, and two shift supervisors in the cake section. A total of 17 subordinate employees are listed in the bread section, including bread makers, bread packaging, bread/food preparation and "bread Danish staff." The chart also lists a total of ten lower-level employees in the cake section.

Finally, the petitioner submits the following description of the beneficiary's proposed duties:

Beneficiary shall be the person directly in charge of the Bakery Department of the Company. Beneficiary shall oversee the entire operation through supervision over the Section Supervisors. Beneficiary has the sole authority and discretion in hiring, discharging and evaluating the performance of all personnel under him in the Department. Beneficiary shall be responsible and report only to the operation manager/vice president.

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

As a preliminary matter, the AAO notes that we have not considered the U.S. company organizational chart or position description submitted on appeal in reaching our determination regarding this issue. The petitioner availed itself of two prior opportunities to submit a chart depicting the structure of the U.S. company and the beneficiary's placement within the company's organizational and managerial hierarchy. 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).

Moreover, it appears that the new chart and position description were created to address the director's finding that the beneficiary would be acting as a first-line supervisor of non-professional personnel, as the new chart includes a tier of subordinate supervisors who did not appear in either previous chart, and the new position description indicates that the beneficiary will report directly to a vice president, rather than to a kitchen manager. Moreover, the new chart expands the scope of the beneficiary's authority to include both the "bread" and "cake" departments, when he was previously depicted as supervising only the employees in the bread department. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. We will consider the petitioner's organizational structure as depicted prior to the adjudication of the 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.*

The petitioner has provided a detailed description of the beneficiary's proposed duties as "bakery manager." However a comparison of the initial organizational chart and the chart submitted in response to the request for evidence suggests that the position the beneficiary will hold has also been titled "bread chef." The AAO emphasizes that 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 or department is sufficiently complex to support an executive or manager position.

Nevertheless, it is the beneficiary's duties, and not his position title, which must be considered in determining whether he will be employed in a primarily managerial or executive capacity. The petitioner indicates that he will spend "60% of his time supervising the bakery department staff," comprised of "bakers, assemblers and

workers in the Danish division." None of these employees are depicted on either organizational chart as supervisory personnel. The beneficiary's duties in this regard include supervising and coordinating staff, setting standards for work, maintaining records for maintenance and upkeep, and maintaining quality standards. An additional 40 percent of the beneficiary's time will be devoted to training staff, coordinating outside contractors, evaluating personnel, recommending hiring and firing decisions, and spending a "significant amount of time coordinating the specific work of each staff under his direct supervision." Based on this description, the beneficiary will devote the vast majority of his time to staff supervision, and will perform some additional administrative and record-keeping tasks.

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. § 214.2(l)(1)(ii)(B)(2). 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. § 214.2(l)(1)(ii)(B)(3).

While the petitioner indicates that the beneficiary will have the authority to recommend the hiring and firing of employees and other personnel actions for workers who report to him, the petitioner has failed to establish that the beneficiary will be required to primarily supervise and control the work of other supervisory, professional or managerial employees. Based on the organizational charts submitted and the petitioner's statements in response to the request for evidence, the job titles of the employees who report to the beneficiary's proposed position of "bakery manager" are bakers, assemblers and "workers in the Danish division." None of these positions are depicted as supervisory positions on the submitted organizational charts. Regardless, an employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

Although requested by the director, the petitioner did not provide names, full job titles, job descriptions or educational requirements for all employees who will be working under the beneficiary's supervision. 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). Accordingly, the petitioner has not established that any of the beneficiary's subordinates are employed in positions that are managerial, supervisory or professional in nature.¹ The AAO

¹ 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

concur with the director's conclusion that the beneficiary will be employed primarily as a first-line supervisor of non-professional employees. Again, the statute provides 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. Accordingly, the beneficiary does not qualify for the benefit sought as a personnel manager.

Furthermore, the percentage of time the beneficiary devotes to supervising non-professional personnel, clearly the majority of his time, will not be considered time allocated to qualifying managerial duties, and as such, the petitioner has not established that his duties will be "primarily" managerial in nature.

The beneficiary does not, in the alternative, qualify as 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 clearly describe 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. § 214.2(l)(3)(ii).

Here, the petitioner plainly states that the beneficiary will devote well over half of his time to supervising subordinate personnel in the bakery department. It has not articulated a claim that the beneficiary would be primarily managing an essential function of the petitioning company. As discussed above, the beneficiary will be devoting more than half of his time to the non-managerial task of directly supervising and training non-professional personnel, and as such, the petitioner has not established that the beneficiary's duties will be primarily managerial or executive in nature. While performing non-qualifying tasks will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; see also *Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). As discussed above, the petitioner has not sustained this burden.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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. Absent a description of job duties for the beneficiary's subordinates and evidence of their educational credentials, the AAO will not assume that the positions of baker, assembler or Danish worker require the services of individuals who have completed a bachelor's degree.

B. Employment in a managerial or executive capacity abroad

The second and final issue addressed by the director is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. See 8 C.F.R. § 214.2(1)(3)(iv).

In its letter dated April 18, 2009, the petitioner indicated that the beneficiary has been employed by the petitioner's parent company on a full-time basis since October 2005. The petitioner described the beneficiary's duties as follows:

He is the Bakery Master Chef in the bakery manufacturing factory. He is responsible for personnel training, quality control of the dessert and bakery products, and market research and products development.

[The beneficiary] is in charged [sic] of designing and creating new dessert and bakery products to satisfy the customers' demand. His responsibilities also include the recruitment and training of staff, over which he has hiring and firing authority. He is also responsible for coordinating the production of hundreds of stores in Taiwan on a daily basis and assuring compliance with scheduling needs. More importantly, he is responsible for the quality of the products that come out of the central manufacturing bakery every day.

[The beneficiary] has complete discretionary authority over the work of the bakery production staff.

The petitioner submitted an organizational chart for the foreign entity, however, the majority of the information in the "Bakery Department (Pastry & Bread)" is written in Chinese and the chart was not accompanied by a certified English translation. The petitioner did not identify the beneficiary's name or position on the organizational chart.

In the request for evidence issued on April 28, 2009, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties abroad, including the percentage of time the beneficiary allocates to each listed duty; (2) an explanation of exactly which employees the beneficiary directs including their job titles and position descriptions; and (3) the foreign entity's line and block organizational chart that clearly identifies the beneficiary's position and identifies all employees who report to the beneficiary by name and job title. The director advised the petitioner that any document submitted to USCIS containing a foreign language must be accompanied by a full English translation that has been certified by the translator as complete and accurate.

In response, counsel indicated that the beneficiary "is responsible for daily operations, personnel training, quality control of the bakery products, market research and products development." Counsel further stated:

More specifically, Beneficiary spends about 40% of his time assisting the Kitchen Manager and Assistant Kitchen Manager in overseeing the daily operations of the bakery department and the manufacturing plant. He also coordinates activities among various departments to ensure that customers are satisfied with their orders. He is also in charge of the factory's inventory, equipment, and supplies. He also needs to maintain a record for maintenance and upkeep of the equipments and facilities. He is also in charge of maintaining quality standard for the products as the special bakery dessert products are what attract the customers in the first place.

Beneficiary spends another 30% of his time running the administrative and human resources functions including recruiting and training new chefs and workers, monitoring employee performance and progress, and evaluating and firing of employees under his supervision Beneficiary oversees 75 employees total with 3 Assistant Controllers, 30 First Chefs, 14 Second Chefs, and 32 Assistant Chefs.

Beneficiary also has to oversee the training of new chefs and employees and sometimes trains them himself. He has to explain the department's policies and practices. He also schedules work hours for the employees under his supervision and makes necessary arrangements when workers are sick or needed. He also ensures that the employees are paid accordingly and comply with licensing laws and wage and hour issues.

Beneficiary spends the remaining 30% of his time monitoring industry trends, developing new recipes, and conducting market research. As a Master Chef, beneficiary has to coordinate with the many chefs he supervises to select the more popular and successful menu items, taking into account the likely number of customers and the past popularity of dishes. He also needs to work and implement the menu, determining the need for variety and the seasonal or cultural availability of bakery products so that expectations of the customers are met. . . . Beneficiary also meets with franchisees and managers from other stores to design and promote promotional items during the year.

The petitioner resubmitted the organizational chart provided at the time of filing, with minor revisions. The petitioner identified the beneficiary's position of Master Chef, reporting to the Assistant Kitchen Manager, within the Pastry Department. Under the beneficiary, the petitioner added handwritten notes, indicating that the employees under the beneficiary are assistant controllers, first chefs, second chefs and assistant chefs.

The director determined that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director observed that the beneficiary's duties include non-managerial tasks such as monitoring industry trends, developing new recipes and conducting market research, and the record did not establish that the beneficiary performs such duties through subordinate personnel. The director further found that the time the beneficiary devotes to performing administrative and human resource functions was not shown to involve primarily managerial or executive duties. Finally, the director emphasized that the petitioner failed to provide a certified English translation of

the foreign entity's organizational chart, and did not submit the requested names, job duties, educational level and salary of each employee working under the beneficiary's supervision. Overall, the director found the evidence insufficient to establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary's position of master chef is primarily managerial in nature. Counsel emphasizes that the foreign entity operates a chain of over 325 bakeries and cafes, and stresses that the position of master chef within such a vast enterprise "by definition and common knowledge, is a key and vital position."

Counsel contends that all criteria for managerial capacity, as set forth at section 101(a)(44)(A) of the Act, have been met. Specifically, counsel asserts that the beneficiary, as "master chef in charge of the Bakery Department," manages the "essential function and key component of the business." Counsel further contends that the beneficiary oversees three Assistant Controllers, who are professional employees, and 30 first chefs, who are supervisory staff responsible for overseeing second chefs, assistant chefs and other kitchen workers. Counsel asserts that the beneficiary's duties include human resources functions, and the authority to recruit, monitor, evaluate and fire employees. Finally, counsel asserts that he beneficiary exercises discretion over the day-to-day operations of the bakery department by monitoring industry trends, coordinating market research, making decisions regarding the company's menu, and designing promotional items.

Counsel emphasizes that the petitioner need only establish that the beneficiary's duties are primarily managerial, as long as the petitioner establishes that the beneficiary holds a high level of responsibility and does not spend the majority of his time on day-to-day operations. Counsel asserts that, upon review of the totality of the evidence, it was not reasonable for the director to conclude that the beneficiary spends a majority of his time conducting the non-managerial day-to-day operations of the foreign entity.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

As noted by counsel, 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 show 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). Here, while the petitioner has submitted a fairly detailed description of the beneficiary's duties, the evidence as a whole does not clearly convey his actual level of authority within the foreign entity's overall organization. As such, it cannot be concluded that his level of authority or actual day-to-day duties rise to the level of an employee who works in a primarily managerial 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 petitioner indicates that the beneficiary spends 40% of his time "assisting the Kitchen Manager and Assistant Kitchen manager in overseeing the daily operations of the bakery department and the manufacturing plant" and also "coordinating activities among various departments." Based on the organizational chart submitted, it appears that the foreign entity's bakery department includes two major divisions (pastry and bread), and has at least seven different sub-departments and hundreds of employees. It is unclear to what extent the beneficiary could be considered responsible for overseeing "the bakery department" or "the manufacturing plant" given that he appears to be responsible for employees within a single department. While the organizational chart does confirm that the beneficiary reports to the assistant kitchen manager, the petitioner has not adequately explained the scope of his authority. It appears that overall control for the entire department lies with the beneficiary's superiors. For the same reason, the petitioner's statement that the beneficiary is responsible for the entire factory's inventory, equipment and supplies is not supported by the organizational structure depicted in the foreign entity's chart. 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). Furthermore, the petitioner failed to clearly articulate exactly how the beneficiary assists in oversight of the bakery department and manufacturing plant or what specific duties this responsibility entails. 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 AAO notes that the beneficiary's responsibility for administrative and human resources functions associated with recruiting and training new chefs, may contain some qualifying managerial duties. However, some of the tasks included in this responsibility, such as directly training employees and scheduling work hours, are not clearly managerial in nature. Further, in order to establish that the beneficiary's supervisory responsibilities are qualifying managerial duties, the petitioner must establish that the beneficiary supervises a subordinate staff comprised of supervisory, professional, or managerial employees. Although the foreign entity's partially translated organizational chart depicts several tiers of employees below the beneficiary, an employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

Although requested by the director, the petitioner did not provide names, job descriptions or educational requirements for all employees who worked under the beneficiary's supervision in the foreign entity's bakery department. 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). Accordingly, the petitioner has not met its burden to establish that any of the beneficiary's subordinates are employed in positions that are managerial, supervisory or professional in nature. We acknowledge counsel's assertion that the beneficiary's subordinates include three professional assistant controllers and 30 "first chefs" who act as supervisors. However, without

documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If the petitioner wanted this information to be considered, it should have submitted a complete response to the director's request for evidence, including a full certified English translation of the foreign entity's organizational chart and job descriptions for the beneficiary's subordinates. Because the petitioner failed to submit the requested certified translation of the organizational chart, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).

The petitioner has not established that the beneficiary is primarily engaged in directing and controlling a subordinate staff of professional, managerial or supervisory personnel such that he qualifies for the benefit sought as a "personnel manager." *See* section 101(a)(44)(A)(ii) of the Act

The petitioner indicates that the beneficiary devotes the remaining 30 percent of his time to "monitoring industry trends, developing new recipes and conducting market research," a duty that includes coordinating with subordinate chefs, franchisee managers, store managers, implementing menus and determining the need for variety and seasonal fluctuations in product offerings. While making decisions about the foreign entity's menu may require a fairly high level of authority, the petitioner once again failed to clearly identify the scope of the beneficiary's authority. The beneficiary is clearly not charged with determining the foreign entity's organization-wide menu and product offerings. At most, it appears that he may be responsible for a specific bakery department which has not been clearly identified. The AAO concurs with the director's finding that market research duties do not fall within the definition of "managerial capacity."

Overall, while it appears that the beneficiary does possess authority over a component of the foreign entity's expansive bakery department, the petitioner's description of the beneficiary's duties is insufficient to establish that the majority of his duties are managerial in nature. This failure is based largely on the petitioner's failure to support its statements by providing a complete certified English translation of the foreign entity's organizational chart clearly identifying the beneficiary's level and area of authority, and its failure to provide the requested job descriptions and other requested information pertaining to the beneficiary's claimed subordinate employees. Again, 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).

The AAO acknowledges counsel's claims that the beneficiary is a "master chef in charge of the Bakery Department," and that he manages the "essential function and key component of the business." As noted above, 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 clearly describe 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. § 214.2(1)(3)(ii).

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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As briefly discussed above, the petitioner's claim that the beneficiary is "in charge of the Bakery Department" is simply not supported by the other evidence in the record. The petitioner's organizational chart, although only partially translated, depicts the beneficiary as being several tiers below the management of the entire bakery department, and thus does not support a finding that the beneficiary functions at a senior level within the organizational hierarchy or with respect to the function he is claimed to manage. See section 101(a)(44)(A)(iii) of the Act. Rather, the petitioner states that the beneficiary assists the assistant kitchen manager in overseeing the department. The assistant kitchen manager appears to have over 80 additional direct reports who may or may not hold a similar level of authority compared to the beneficiary. In addition, the petitioner has not clearly identified which component of the bakery department falls within the beneficiary's area of responsibility nor demonstrated how such component rises to the level of an "essential function." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)). While we acknowledge that the beneficiary holds a certain level of authority within a vast bakery facility, the record does not adequately document the scope of the beneficiary's authority and its impact on the petitioner's operations. The petitioner has not adequately supported its claim that the beneficiary qualifies for the benefit sought as a function manager.

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed 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.