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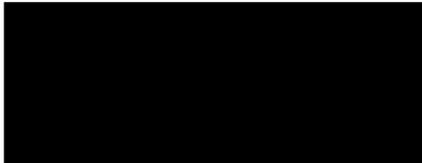
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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DATE: NOV 01 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 \$585. 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its operating manager 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 is an Indian partnership engaged in rice milling. It claims to be the parent company of [REDACTED] a North Carolina limited liability company, which in turn is claimed to have a majority-owned U.S. subsidiary, [REDACTED] a New York corporation. The beneficiary was initially granted one year in L-1A classification in order to open a new office in the United States and has received a one-year extension of status. The petitioner now requests that she be granted three additional years in L-1A status so that she may continue to manage both U.S. companies.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States 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. On appeal, counsel asserts that the director applied an inappropriate standard of review and erroneously denied the petition without challenging the credibility, relevance or probative value of the submitted evidence. Counsel suggests that the director placed undue emphasis on the size of the U.S. operations, and overlooked the petitioner's description of the beneficiary's duties. Finally, counsel cites to a 2004 USCIS policy memorandum in support of his assertion that the director should have given deference to the prior determination that the beneficiary is eligible for L-1A classification.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, that he would submit a brief or evidence to the AAO within 30 days of filing the appeal. The appeal was filed on October 23, 2009 and no brief or additional evidence has been received as of this date. Accordingly, the record will be considered complete.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

**I. Employment in a Managerial or Executive Capacity**

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 31, 2009. In a letter dated July 28, 2009, the petitioner stated that the beneficiary, in her role as operating manager, will continue to oversee the operations of its U.S. subsidiary, [REDACTED] a North Carolina limited liability company established in June 2007. The petitioner indicated that the U.S. company acquired a [REDACTED] and Pasta franchise in early 2009. In addition, the petitioner stated that [REDACTED] owns a 51 percent interest in a New York corporation, [REDACTED], since December 2007. The petitioner stated that [REDACTED] has seven employees and [REDACTED] has three employees.

With respect to the beneficiary's job duties, the petitioner stated:

She will identify, develop and direct operational activities and oversee the training and hiring and it [sic] necessary firing of U.S. staff for executive and supervisory positions. She will oversee the financial development including sales and marketing. [The beneficiary] will continue to be responsible for planning internal communications, developing an awareness of corporate direction, mission, aims and activities. She will negotiate contracts and agreements with clients and suppliers and review budgets prepared by her staff. She will report to [the Indian parent company] on organizational plans and performance.

The petitioner's supporting evidence included IRS Forms 941, Employer's Quarterly Federal Tax Return, and state quarterly wage reports for both U.S. entities for the first two quarters of 2009. The submitted evidence indicates that [REDACTED] reported seven employees as of June 2009, while [REDACTED] reported two employees, including the beneficiary. The beneficiary was not listed on the payroll records of [REDACTED]. However, the petitioner indicated on the Form I-129 that the beneficiary's work site is in [REDACTED] where [REDACTED] operates the [REDACTED] franchise.

The director issued a request for additional evidence ("RFE") on August 7, 2009. The director instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time spent performing each specific duty; (2) an organizational chart for the U.S. entity which clearly identifies the beneficiary's position and the names and job titles of her subordinates; (3) a detailed description of the job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; (4) copies of state quarterly wage reports for the last four quarters; and (5) copies of the U.S. company's payroll summary, Forms W-2 and W-3 evidencing wages paid to employees.

In a letter dated September 15, 2009, counsel submitted the following description of the beneficiary's duties as operating manager:

50 percent of daily duties (25 hours per week) are a combination of:

- Continue to oversee start-up operations in the U. S. – banking, meeting with professionals – accountants, attorneys, real estate agents, insurance agents, and others.
- Meet with representatives and agents of Franchise, [REDACTED]
- Plan, develop and establish strategic goals, objectives and policies of [REDACTED] employees to follow.
- Develop merger and acquisition opportunities for expansion of the company into the U.S. market. Meet with executives of companies to discuss a possible partnership. Participate in business development opportunities.
- Oversee human resource issues including hiring and if necessary firing of employees.
- Responsible for initializing and completing contract negotiations including financial debt instruments.

30 percent of daily duties (15 hours per week) are a combination of:

- Review sales reports to determine sales potential and customer preferences for [REDACTED]
- Review weekly financials reports and other performance data written by Manager.
- Determine areas needing cost reduction and program improvement and report finding to parent company's management.
- Review payroll and expense reports and make changes or ensure compliance.

20 percent of daily duties (10 hours per week) are a combination of:

- Oversee marketing and sales campaigns. Work to develop Public Relations opportunities and press opportunities.
- Maintain communication links with [the parent company] in India.

The petitioner stated that [REDACTED] employs nine employees, including the beneficiary, and that the staff includes a manager, three sandwich artists, two slicers, one cleaner and one delivery person. The petitioner indicated that all employees work at least 40 hours per week. The petitioner provided a detailed position description for each worker.

The petitioner provided copies of [REDACTED] Kansas Quarterly Wage Report for the first two quarters of 2009, along with the company's payroll summary through August 2009. This documentation confirmed the employment of seven of the beneficiary's eight subordinates, but did not support the petitioner's claim that it employs full-time workers. One of the petitioner's sandwich makers ([REDACTED]) was not named on any quarterly report or in the payroll summary. The remaining two sandwich makers appear to have been hired in July or August of 2009, perhaps after the petition was filed. One worked a total of 45.5 hours through August 31, 2009, while the other worked a total of 34 hours. The petitioner's slicers and delivery person, based on the evidence submitted worked more hours (between 910 and 1042 hours each) in the first eight months of 2009, but not on a full-time basis. The individual identified as a full-time cleaner worked only 223 hours through

August 2009. The evidence shows that the manager is a salaried employee who presumably works on a full-time basis.

With respect to [REDACTED], counsel stated that the company has three employees, including the beneficiary. The petitioner indicated that the company currently has a vacancy for a clerk and employs a full-time manager. The company's New York state quarterly wage reports indicate that the beneficiary and the manager are the company's only current employees.

The petitioner's organizational chart indicates that the beneficiary oversees the managers of both [REDACTED] sandwich shop.

The director denied the petition on September 26, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director determined that the beneficiary's position description includes a combination of vague and non-qualifying duties and is insufficient to establish that she would be engaged in primarily qualifying tasks. In addition, the director observed that the petitioner's payroll and quarterly wage records do not support its claims regarding the number of employees working for the two U.S. companies or the petitioner's claims that its employees work on a full-time basis.

On appeal, counsel for the petitioner asserts that the beneficiary "does in fact hold a managerial position in that she is the person making personnel decisions and all decisions regarding strategy and economic risks." Counsel contends that the position description submitted was sufficiently detailed to establish that the beneficiary will be employed in a primarily managerial position, and the fact that the petitioner operates a small business should not prohibit a finding that the beneficiary is employed as a manager or executive.

Counsel further asserts that the director erroneously denied the petition without challenging the credibility, relevance or probative value of any of the submitted evidence. Counsel specifically refers to a 2004 USCIS memorandum to support his assertion that it is USCIS policy that prior approvals should be given deference. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS: *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity* (April 23, 2004)("Yates Memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.*

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in the United States 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.*

While the petitioner has provided a list of eleven duties performed by the beneficiary and the amount of time she will devote to three areas of responsibility, the petitioner failed to provide the detailed description of the

position requested by the director in the RFE and required by regulation. The petitioner indicates that the beneficiary will devote 50 percent of her time to duties that include "oversee start-up operations," "plan develop and establish strategic goals, objectives and policies," "oversee human resources," and "initializing and completing contract negotiations." The petitioner offered no explanatory information regarding the objectives and policies that must be established on an ongoing basis, the nature of the beneficiary's contract negotiations, or clarification as to why the beneficiary is still required to oversee "start-up operations" two years after establishment of the U.S. operations. The petitioner's statements provide little insight into the specific tasks the beneficiary will perform on a day-to-day basis, such that they could be classified as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Based on the petitioner's description of the beneficiary's duties, much of the remainder of the beneficiary's time is devoted to either reviewing financial and sales reports prepared by [REDACTED] manager and overseeing sales and marketing campaigns with the assistance of the manager. As discussed further below, a review of the evidence as a whole raises questions as to how much time the manager actually devotes to writing reports or to design sales and marketing materials.

The AAO's review of the beneficiary's job description is complicated by the petitioner's failure to clearly establish the beneficiary's role with respect to the petitioner's affiliate, [REDACTED]. The petitioner's organizational chart depicts the beneficiary as the operating manager of both U.S. entities; her position description, however, references [REDACTED] only. [REDACTED] is located in Kansas and [REDACTED] is located in New York. As of June 2009, the month before the petition was filed, the beneficiary was receiving wages from the New York corporation, and not the Kansas limited liability company; the petitioner indicates that the beneficiary's worksite will be working at [REDACTED] retail location under the extended petition. Regardless of the beneficiary's actual location, the petitioner has not clarified how the beneficiary will manage two businesses in two different geographic locations, nor has it identified the beneficiary's duties with respect to [REDACTED] and the amount of time to be allocated to such duties. 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)).

Overall, while the record shows that the beneficiary is the majority owner of both U.S. entities, the definitions of executive and managerial capacity each 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).

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of

sections 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. See section 101(a)(44)(A)(iv) of the Act; see also 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799). While the AAO does not doubt that the beneficiary exercises discretion over the U.S. company's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to show that the beneficiary's duties as of the date of filing were primarily managerial or executive in nature.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner indicates that the beneficiary directly oversees the managers of [REDACTED], and is thus relieved from performing first-line supervisory duties as well as from performing the day-to-day operations of each business.

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 oversee two "managers," the beneficiary's job description contains no reference to the beneficiary's duties with respect to [REDACTED]. Given that the beneficiary and the manager, based on the evidence of record, are the sole employees of the New York company, and the petitioner now indicates that the beneficiary will be working in Kansas, it is reasonable to conclude that the "manager" of [REDACTED] operates the business single-handedly, and will not be performing managerial or supervisory duties. The manager of [REDACTED] based on the description submitted, will perform first-line supervisory and administrative tasks. Therefore, the record indicates that the beneficiary will supervise one subordinate supervisor. The portion of time the beneficiary will allocate to supervising this employee, however, has not been provided by the petitioner, and the record does not support a conclusion that the beneficiary will allocate the majority of her time to supervising this one employee. Therefore, the petitioner has not established that the beneficiary will be employed by the U.S. entity *primarily* as a "personnel manager."

The petitioner has not claimed that the beneficiary will manage an essential function of the U.S. company, and the record would not support such a finding even if the petitioner had claimed that the beneficiary qualifies 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 furnish a position description that identifies the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Neither counsel nor the petitioner has identified with specificity any essential function to be managed by the beneficiary, nor clearly established how much of the beneficiary's time would be devoted to management duties associated with 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* It is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, while the beneficiary is responsible for the goals and policies of the company as its operating manager, the evidence of record fails to demonstrate that these are her primary duties, and, as discussed further below, the record does not establish that the U.S. company has sufficient staff to perform all of the non-qualifying duties associated with operating the business.

The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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 (9<sup>th</sup> 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)). 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).

With respect to the petitioner's claimed subsidiary, Mansi Gift and Card, Inc., we note that the company, which operates a retail convenience, card and gift store in New York, has documented only two employees, including the beneficiary, who is claimed to work in Kansas. Even if the petitioner did establish that the beneficiary will be spending a portion of her time in New York as an employee of this company, the petitioner did not establish how the store's sole other employee would relieve her from performing non-managerial duties associated with the operation of the business, or why a store with two employees has a reasonable need for an operating manager and a manager, but no clerks, cashiers or other lower-level employees. If the beneficiary is working for this company, it is reasonable to conclude that her duties are primarily non-managerial in nature.

The petitioner's other claimed U.S. subsidiary, [REDACTED], operates a sandwich store that is likely open for business daily for significantly longer than 40 hours per week.<sup>1</sup> The petitioner claims to employ up to eight full-time employees subordinate to the beneficiary, but, as noted by the director, the record does not support the petitioner's claim that the employees work on a full-time basis. As discussed above, the record documents an aggregate of less than 80 hours worked by the company's three "sandwich artists" during the first eight months of 2009. The company's slicers and sole delivery person worked more hours, but were not employed full-time, and the petitioner's sole cleaning person worked less than 250 hours in eight months. While the [REDACTED] store does appear to have a full-time salaried manager, the petitioner has not established that he would be fully relieved from directly providing the products and services of the business, nor has the petitioner established who would perform his administrative and first-line supervisory duties during the operating hours when he is not present in the store. In addition, the petitioner has not provided a complete copy of its franchise agreement with [REDACTED] which likely contains critical information regarding expectations regarding the management of the store, such as any requirements that there be a food service manager on the premises during operating hours. Overall, while the petitioner has documented that [REDACTED] employs on average approximately seven workers, the petitioner has not supported its claim that this staff is capable of performing the non-qualifying duties associated with the day-to-day operations of the fast food restaurant.

The petitioner, as a service-oriented business with long operating hours, cannot establish its ability to support a qualifying managerial or executive position if it does not have sufficient lower-level workers and first-line supervisors to perform the non-qualifying duties of the business. Furthermore, the reasonable needs of the

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<sup>1</sup> According to the website for Mr. Goodcents Subs & Pastas, the Salina, Kansas location operated by [REDACTED] is open from 10:00 a.m. to 9:00 p.m. daily. *See* "Location Search" [https://order.mrgoodcents.com/Locations.aspx?all=t&ctl00\\_MainArea\\_radgLocationChangePage=3](https://order.mrgoodcents.com/Locations.aspx?all=t&ctl00_MainArea_radgLocationChangePage=3)

petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his or her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

## II. Qualifying Relationship

Beyond the decision of the director, the remaining issue in this matter is whether the petitioner established that it has a qualifying relationship with the beneficiary's U.S. employer, [REDACTED], and this company's claimed U.S. subsidiary, [REDACTED]. 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 petitioning Indian entity indicates that it is the sole owner of [REDACTED], a North Carolina limited liability company established in June 2007. The petitioner submitted a copy of the articles of organization for this company, along with a copy of its Membership Certificate #1 identifying the Indian entity as the owner of 51 membership units. The petitioner indicates that [REDACTED] is qualified to do business in the State of Kansas.

However, the record shows that a new limited liability company, also named [REDACTED] was established in Kansas in December 2008, and it is this company which acquired the [REDACTED] franchise. The petitioner submitted a document titled "Minutes of the Organization Meeting of [REDACTED]" dated December 1, 2008, which states:

It was decided that instead of [REDACTED] investing directly in the purchase of [REDACTED] franchise in Kansas, member invest individually, on this LLC's behalf, by acquiring interest in the newly formed [REDACTED].

[REDACTED] filed its initial IRS Form 1065, U.S. Return of Partnership Income, for the 2008 tax year. According to the Forms Schedule K-1, Partners Share of Income, Deductions, Credits, etc., the beneficiary owns a 90 percent interest in the Kansas limited liability company, while her spouse owns the remaining 10 percent. Based on the evidence of record, the beneficiary is one of seven owners of the foreign entity, but owns only a ten percent interest in that company. Therefore, the petitioner has not established that the Indian entity and [REDACTED] are affiliates based on common majority ownership and control

by the beneficiary, nor is the foreign entity the parent company of the newly established company which will serve as the beneficiary's U.S. employer.

With respect to [REDACTED] and [REDACTED], the petitioner claims that this New York corporation is majority-owned by [REDACTED] since December 2007. Based on a review of the company's 2008 IRS Form 1120-S, U.S. Income Tax Return for an S Corporation, the owners of [REDACTED] are the beneficiary (51 percent) and [REDACTED] (49 percent).

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Based on the foregoing, the petitioning Indian entity has not established its direct or indirect ownership of either [REDACTED] or [REDACTED], the two companies which would serve as the beneficiary's employers in the United States under the extended petition. Nor does the record show that the foreign entity has an affiliate relationship with these two companies. Therefore it cannot be concluded that the beneficiary would be employed by a qualifying organization in the United States.

The petitioner has submitted evidence suggesting that it does hold a majority interest in [REDACTED] (Carolina), however, the record contains no evidence that this company continues to exist and no evidence that this company is or has been doing business in the United States. The claimed U.S. operations consist of a restaurant franchise operated by [REDACTED] and a retail store operated by [REDACTED], two entities which are neither parents, subsidiaries or affiliates to [REDACTED] or to the petitioning foreign entity.

Finally, a review of corporate records made publicly available by the Secretaries of State of North Carolina and Kansas indicates that [REDACTED] has a current corporate status of "administratively dissolved" while the corporate status of [REDACTED] is "forfeited." The uncertain corporate status raises questions as to whether either company remains a qualifying organization that continues to do business in the United States.<sup>2</sup>

Based on the foregoing deficiencies, the AAO finds the petitioner's evidence insufficient to establish the claimed qualifying relationship between the U.S. and foreign entities. For this additional reason, the petition may not be approved.

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<sup>2</sup> See Website of the Department of the Secretary of State, North Carolina, <http://www.secretary.state.nc.us/corporations/searchresults.aspx?onlyactive=OFF&Words=STARTING&searchstr=manibaa> (accessed on October 28, 2011, copy incorporated into record of proceeding); see also, Kansas Business Center, Business Entity Search, <https://www.accesskansas.org/bess/flow/main?execution=e1s7> (accessed on October 28, 2011, copy incorporated into record of proceeding).

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

### III. Prior Approval and Conclusion

The record does show that USCIS has approved two prior L-1 classification petitions filed by the petitioner on behalf of the instant beneficiary, including one previous request for an extension of status. Counsel specifically refers to a 2004 USCIS memorandum to support her assertion that it is USCIS policy that prior approvals of petitions involving the same parties should be given deference. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS: *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity* (April 23, 2004)("Yates Memorandum"). The memorandum provides that exceptions to this policy should be made where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.* It is noted that the Yates Memorandum is addressed to service center and regional directors and not to the chief of the AAO.

The AAO notes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

Each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity based on the petitioner's failure to submit evidence that satisfies the regulatory criteria at 8 C.F.R. § 214.2(l). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

Furthermore, the evidence in the current record indicates that the beneficiary is not employed, will not be employed, and perhaps never has been employed by the North Carolina limited liability company which is claimed to be a subsidiary of her foreign employer. Instead, she is employed by an entity or entities which have no qualifying branch, subsidiary, affiliate or branch relationship with the foreign entity. Therefore, the conditions set forth in the Yates memorandum have been met, and no deference to the prior petition is required. Neither the director nor the AAO is required to approve applications or petitions where eligibility

has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director approves the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approvals by denying the instant petition.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.