**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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 2 7 2014 OFFICE: VERMONT SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 beneficiary's employment as a 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 Massachusetts corporation, states that it operates and franchises restaurants. The petitioner claims to be a subsidiary of The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his employment as president for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States. The director also found that the petitioner failed to establish that it was doing business as required by the regulations, or that the beneficiary had the requisite one-year of full-time employment with the foreign entity in the three years prior to the filing of the initial petition.

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 contends that the director's findings were erroneous and were based on unwarranted speculation. Counsel for the petitioner submits two briefs accompanied by additional evidence in support of these contentions.

## 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.

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

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

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. PROCEDURAL HISTORY

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 29, 2012. The petitioner stated on the Form I-129 that the beneficiary will be employed as its president, and indicated that the company had 23 employees and a gross annual income of $1 million as of the date of filing. The record indicates that the petitioner will operate restaurants specializing in Chinese/Mongolian cuisine.

Regarding its operations, the petitioner stated in a letter dated October 2, 2012 that in July 2012, the petitioner entered into its first long-term lease for a commercial premises located at It claims that this location's grand opening was anticipated to occur during the 2012 holiday season, partly resulting from delays in zoning approvals and extensive renovations. The petitioner claimed that, at the end of its first fiscal year in August 2012, it employed a team of thirteen managers and employees at its headquarters and was in the process of hiring 10 employees for the Boston restaurant. The petitioner further claimed that its expansion plans for 2013 would ultimately include a second Boston location as well as a location, which it claims will employ approximately 20 employees. The petitioner emphasized that the company "had spent its first year in searching and preparing for the opening of its franchise stores and has not opened to public for business."

Regarding the beneficiary's duties in his role as president, the petitioner stated:

> [The beneficiary] is responsible for the major corporate policies setting and business planning. In that effort, [the beneficiary] traveled extensively in the targeted metropolitans

> including Boston, New York, Chicago and Seattle, Washington to expend [the foreign entity's] business opportunity and to develop strategies for the [U,S, franchise's] business locations [the foreign entity] believes to be the single far most important element for the long term success of its business. He also attends trade shows to promote [the foreign entity's] goodwill and products; negotiated long-term contracts and other business arrangements and partnerships with potential landlords, suppliers distributors and franchisees; he met with municipality officials, neighborhood counsilors [*sic*] and community leaders in the targeted area to social support. He supervised the Assistant GM and a team of professionals' activities in local consumption marketing research, area consumer composition analysis, site investigation, selection and improvement contract negotiation; he oversaw the management of the renovation and licensing process; made decision on each location's investment size, marketing and operational strategy and human resource structure. He communicated with our parent company on important financial and investment matters. He reports to the Board of Directors of our parent company only.

The petitioner also submitted an organizational chart for the U.S. entity, which outlined the general structure of the company and the positions therein, but did not identify any employees by name. The petitioner's 2011 IRS Form 1120, U.S. Corporation Income Tax Return, was also submitted. The tax return, filed on September 20, 2012 for the fiscal year ending on August 31 2012, indicates that for its first year of operations, the petitioner had no gross receipts or sales, a taxable income of -$140,630, and no salary and wage expenses.

On November 9, 2012, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties, including a percentage of time required to perform the duties of the managerial or executive position; (2) a more detailed organizational chart, listing all employees by name and job title, including a summary of duties, educational level, and salary for each employee; (3) evidence pertaining to the petitioner's business premises, as well as evidence that the petitioner is doing business; and (4) evidence pertaining to the beneficiary's employment abroad with the foreign entity.

In response, the petitioner submitted a statement describing the beneficiary's U.S. position as follows:

> About 90% of [the beneficiary's] time is devoted to executive/managerial duties as president of [the petitioner], such as plan and direct business development, set and direct marketing strategy, make investment and budget decision; set franchising policy and operational management protocol; review and adjust the plan and policy; and direct and supervise subordinate managers, professionals and selected supervisors.
>
> About 10% of [the beneficiary's] time is devoted to executive/managerial duties involving [our parent company's] overseas business because of his historical role as the first and only General Manager in that department, including but not limited to receiving reports from deputy manager and provide supervisory instruction; respond to the Board for matters involving [the overseas] business.

> As the president of [the petitioner], [the beneficiary] exercises full discretion in managing [the] company's business development and operations, including setting up business plan, franchise policy and operational protocols, directing the implementation and making adjustment when needed. He has made important decisions we believe are essential to our future success.
>
> For example, [the beneficiary] initially planned to only set up chain restaurants including franchising stores, and train individual chefs for each franchise store to prepare [the petitioner's] style [of] food. After reviewing franchise applications and negotiation with corporate applicants, [the beneficiary] found that potential franchisees strongly prefer and desire a local production support center to supply [the petitioner's] food materials including dipping sauce, hot pot broth and condiments made with our secret recipes. [The beneficiary] directed the investigation of the US market's capacity in supplying needed raw materials, and ordered the research and development of new recipes using substitute ingredients and procedures available in the US while maintain[ing] the petitioner's food, style and nutritious value.

The petitioner also stated:

> The required knowledge and skills to perform the duties are essentially the same as the General Manager of the overseas business department of our parent company, including but [not] limited to: Superior knowledge of business management and HR management, strong interpersonal communication skills, sound business judgment, world-wide view and critical thinking skills, keen observation and investigative capacity, strong ability to learn and adopt; superior familiarity and understanding of [the petitioner's] food philosophy, organization structure, corporate culture, management style and investment philosophy. Experienced and knowledgeable in establishing strategic and long term business plans, targeted marketing, budgeting, and evaluation; prioritizing resources; and ability to adjust and correct company's strategic or operational missteps.

The petitioner submitted a document entitled "Employees Table" dated January 2013, which listed 17 employees by name, and identified 12 full-time and 10 part-time positions, not yet filled, in its (Boston) location. The petitioner provided updated photos of its premises as well as copies of its quarterly tax returns for 2012. Finally, the petitioner included an overview of the beneficiary's employment abroad as well as copies of the foreign entity's payroll records.

On February 12, 2013, the director denied the petition, finding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director found that the petitioner does not have an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The director also found that the petitioner was not doing business as required by the regulations nor that the beneficiary had the requisite one-year of employment abroad in a qualifying capacity in the three years immediately preceding the filing of the initial petition.

On appeal, counsel for the petitioner contends that the director's findings were erroneous. Counsel submitted a brief and additional evidence in support of the Form I-290B, and subsequently provided a supplemental brief with additional evidence in support of the petitioner's eligibility. This evidence, along with counsel's assertions, will be addressed in further detail below.

## III. THE ISSUES ON APPEAL

As discussed above, the director denied the petition on three separate grounds. Specifically, the director found that the petitioner failed to establish that: (1) the U.S. office had been doing business for the previous year; (2) the beneficiary was employed in a primarily managerial or executive capacity; and (3) the beneficiary had one continuous year of full-time employment with the foreign entity in the three years immediately preceding the filing of the initial petition.

### A. DOING BUSINESS

The first issue before the AAO is whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(*2*) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In order to extend a petition involving a new office, the petitioner is required to provide evidence to establish that it has been doing business during the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B).

On the Form I-129, filed on October 29, 2012, the petitioner indicated that the beneficiary would "operate and [franchise]" its restaurants, which specialized in Chinese/Mongolian cuisine. The petitioner listed its company address as and indicated that the beneficiary's worksite would be at the same location.

The petitioner further explained that during the past year, the beneficiary has been involved in researching and securing sites for its restaurants in various metropolitan areas such as New York and Boston. The petitioner claimed that, in July 2012, the petitioner entered into its first long-term lease for the property located at for its first U.S. restaurant. The record demonstrates, however, that the petitioner's restaurant business was not operational at the time of filing due to zoning variances and required renovations at the location. The petitioner submits photographs of the business premises while under construction, as well as copies of relevant documents from the zoning board pertaining to the delays associated with the petitioner's intended use of the premises.

The petitioner also submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for fiscal year 2011, covering the period from September 1, 2011 to August 31, 2012. In the tax return, the petitioner identifies its business activity as a "Chinese Hotpot Restaurant" and indicates its product or service is "Chinese Food." The Form 1120 indicates no gross sales or receipts, a negative taxable income and no salary or wage expenses.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from December 1, 2011 to November 30, 2012 to open a new office. However, there is no indication of any business activities whatsoever prior to July 2012, when the petitioner entered into its first long-term lease agreement for what the petitioner confirms would be its first U.S. store. The record contains documentation establishing that the petitioner entered into contracts for the purchase of restaurant supplies and for renovation services after the execution of its lease agreement on July 20, 2012. However, prior to this time, there is no documentation regarding the petitioner's or beneficiary's activities.

Moreover, based on the petitioner's tax return for fiscal year 2011, which ended on August 31, 2012, the petitioner had no gross receipts and no employees during this period, although it indicates the payment of approximately $50,000 in officer compensation (presumably to the beneficiary in his claimed capacity as president). The quarterly tax returns submitted into the record further indicate that from January 2012 to June 2012, the petitioner paid wages to only one person (again presumably the beneficiary). During the third quarter of 2012 the petitioner had two employees, and by the fourth quarter, at the time the petition extension was filed, the quarterly tax return indicates that the petitioner had five persons on its payroll.

This document directly contradicts the petitioner's claim on the Form I-129, which indicates that it had 23 employees on its payroll at the time of filing, and another claim in the record where the petitioner claimed to have a staff of 13 employees. The record contains no clear evidence of which U.S.-based positions were actually filled as of the date of filing. The petitioner did indicate that its "purchasing, logistic and financial personals [sic] are paid by its parent company," and later confirmed that some positions are located in China, but it is not clear why the petitioner claimed to have a team of 13 managers and employees at its U.S. headquarters as of August 2012 when the beneficiary was the sole employee at that time. 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).

Based on this limited information regarding the actual business activities of the petitioner, it is evident that the petitioner was not doing yet business as a Chinese restaurant or as a restaurant franchisor as claimed in the petition extension and as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that its business operations were impeded by zoning issues and ongoing renovations to the leased premises. However, the record is devoid of any evidence as to what the petitioner did from the time the initial new office petition was granted on December 1, 2011 to the time the lease for the first U.S. location was signed on July 20, 2012.

The record further lacks any explanation or documentation regarding other activities engaged in by the beneficiary to promote the business during this period, aside from the statements submitted by the petitioner with regard to the beneficiary's alleged research and extensive travel to various metropolitan locations to locate venues for its restaurant chain. Finally, although the record demonstrates that the petitioner entered into a lease for its first commercial restaurant space on July 20, 2012, this fact alone does not establish that the petitioner is doing business. There is no evidence in the record establishing that the petitioner's Chinese restaurant business was established and conducting business during the first year of operations, as required

by the regulations, or that the petitioner entered into any franchise agreements for its restaurant brand. The evidence submitted on appeal establishes that the petitioner opened its first restaurant in May 2013 and entered its first franchise agreement in June 2013.

The evidence in the record is likewise insufficient to establish that the petitioner has acquired and maintained physical premises sufficient to conduct its business. The business address of the petitioner at the time the petition extension was filed, which is also identified on the Form I-129 petition as the claimed work location of the beneficiary for the duration of the requested validity period, is The petitioner also stated on the Form I-129 that this is the beneficiary's current U.S. residential address. While the petitioner has referred to its U.S. "headquarters" office, it has not established that it actually leases an office, nor has it established that it had sufficient physical premise to operate a restaurant business prior to July 2012.

The evidence submitted on appeal includes a copy of a letter dated November 7, 2011, which the petitioner submitted in support of the beneficiary's initial L-1A visa petition. At the time, the petitioner stated that it leased a temporary office at , and indicated that it intended to lease commercial premises located at The initial petition was premised on the petitioner's claim that it had secured an office and had identified a restaurant location. The petitioner now claims that it spent the first six to seven months of its first year of operations researching potential locations for its restaurant and provides the beneficiary's residential address as its business address. 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. at 591-92.

The AAO observes that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business. In this case, the lack of evidence of sufficient business premises and the conflicting evidence of record fails to establish that the petitioner has been and will be doing business in a manner that will support the beneficiary's claimed position.[1]

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[1] The petitioner was required to show that it was prepared to commence doing business immediately upon approval of the initial new office petition so that it would support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* It appears from the record as currently constituted that the petitioner did not have sufficient physical premises to house its restaurant operations at

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required.

The fact that it began renovations and pursuit of new commercial locations and franchisees for its restaurant chain after the expiration of the beneficiary's initial stay, as demonstrated on appeal, does not entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner did not conduct business during the previous year. As stated above, the evidence establishes that the petitioner opened its first restaurant in May 2013 and signed its first franchise agreement in June 2013. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The petitioner has not provided evidence that it was doing business for the previous year. Accordingly, the appeal will be dismissed.

## B. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The next issue before the AAO is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary has been and will be employed in either a primarily managerial or primarily executive capacity. While the petitioner indicates that the beneficiary will exercise discretionary authority over the U.S. company as its president, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties to demonstrate that these duties qualify him as a manager or an executive. The petitioner did not submit any details about the beneficiary's proposed position in the United States. The description provided in support of the petition and as expanded upon in response to the RFE is vague and brief and does not provide any insight regarding the beneficiary's actual tasks. The petitioner did not provide any further description of the beneficiary's duties or a specific staffing plan indicating the duties to be performed by the beneficiary's subordinates to demonstrate that he will be relieved from performing primarily non-qualifying duties.

While several of the vague duties described by the petitioner would generally fall under the definitions of managerial and executive capacity, the lack of specificity raises questions as to the beneficiary's actual

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the time the initial new office petition was approved, nor was it prepared to commence doing business as a restaurant or restaurant franchisor.

proposed responsibilities. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner characterized the beneficiary's role as president, noting he will devote 90% of his time to managerial and executive tasks for the U.S. company, and 10% of his time to managerial and executive tasks for the foreign entity. These tasks are identified in general terms, but include a number of non-qualifying duties such as marketing. The petitioner also indicated that his tasks will primarily include the direction and supervision of subordinate managers and professional employees. While tasks such as this are undoubtedly necessary in order to continue operations, the petitioner has not indicated how the majority of these duties qualify as managerial or executive in nature. Marketing duties are generally not managerial or executive, and the record does not demonstrate that the beneficiary actually has a subordinate staff of managerial or professional employees that he will oversee and who will relieve him from performing non-qualifying duties.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) requires the petitioner to submit a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity,

The petitioner provides conflicting and inconsistent evidence with regard to the actual number of people employed by the U.S. entity at the time of filing. The petitioner claimed on the Form I-129 that it employed 23 persons at the time the petition extension was filed. However, a statement supplementing the record clarified that, contrary to these assertions, the petitioner actually employed only 13 individuals at the time of filing but would hire 10 additional employees with the opening of its next restaurant. The director found further fault with this statement, noting that the quarterly tax returns submitted into the record in response to the RFE demonstrated that only five persons were employed by the petitioner for the fourth quarter of 2012. Finally, the AAO notes that the employee table submitted in response to the RFE identified 17 full-time employees as of January 2013, nine of which were claimed to be employees of the U.S. entity. As noted previously in this decision, 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. at 591-92.

On appeal, counsel for the petitioner again relies on this employee table, and reiterates that in addition to the five individuals employed by the U.S. entity, it also employed a number of people in China to remotely work on the U.S. project. Counsel also claims that individuals such as "interns" and "commissioners" would not be included in formal wage reports, and contends that the director erred by failing to consider the totality of the evidence submitted with regard to the composition of the organization's staffing. Specifically, counsel claims that the employee table clearly demonstrates that some of the petitioner's employees, identified as "financial, logistic, product developing, designer/planner and trainers" worked from China and were paid by the foreign company, and points out that the payments made to these employees were allocated under the

department heading for the petitioner's business. Counsel concludes, therefore, that this payment structure establishes their role in the U.S. entity's organizational structure.

Upon review, however, the AAO finds these claims unpersuasive. The employee table identifies 17 full-time employees as of January 2013. However, the AAO must examine the organizational structure and staffing levels of the petitioner at the time of filing in October 2012. Although the petitioner's quarterly tax return for the fourth quarter of 2012 demonstrates that the petitioner paid wages to five employees during that time, the AAO is unable to determine from the record which positions were filled at that time, and whether they constituted full-time or part-time employment. Similarly, although the petitioner submits copies of payroll records generated by the Chinese entity for both October 2012 and November 2012, which demonstrate that the Chinese entity paid wages to ten individuals during that period under a heading that refers to its U.S. department, there is no independent evidence to establish the nature of their actual positions and associated duties or whether these employees were retained on a full-time basis. 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)).

Therefore, while these documents establish the payment of wages to various individuals both in the U.S. and abroad at the time of filing, they are not supported by independent evidence that identifies which positions were filled or whether they were full-time or part-time. This is relevant because it prohibits the AAO from determining the nature of the positions of these other claimed employees.[2] Although the petitioner, through counsel, submits additional payroll documentation in support of the appeal, this evidence will not be considered. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The record, therefore, contains insufficient evidence that the beneficiary was supervising a subordinate staff of managerial, professional, or supervisory employees at the time of filing, such that he could be relieved from performing non-qualifying duties. This finding has not been overcome on appeal.

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 managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be

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[2] Further discrepancies are noted with regard to whom the petitioner claimed in some instances is the manager/assistant general manager of the U.S. operation, but in some documentation is referred as the store manager of the location.

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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, 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, counsel for the petitioner asserts that the beneficiary is an executive, but the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, none of the beneficiary's listed duties, presented in response to the RFE and again on appeal, include duties that correspond to the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. The petitioner has not clearly established the organizational hierarchy of the petitioner, such that it could establish at the time of filing that the beneficiary had subordinate employees to relieve him from performing non-qualifying operational duties. The record fails to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

The AAO notes 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). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F 2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has failed to explain how the petitioner will commence operations as a Chinese restaurant without the required chefs, kitchen staff, and wait staff, and fails to explain how the "managerial" employees it claims to employ would permit the petitioner's business to commence operations.

Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from

primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. The petitioner's future hiring plans are not relevant to this determination. 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'r 1978).

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant matter, counsel for the petitioner contends that the U.S. company is still in a start-up phase due to zoning complications, and that the director placed an undue emphasis on the petitioner's business operations and the amount of time the beneficiary devotes to non-qualifying duties. Regardless, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed for this additional reason.

C. EMPLOYMENT ABROAD

The next issue to be addressed is whether the petitioner established that the beneficiary 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, as required by 8 C.F.R. § 214.2(l)(3)(iii).

The director denied the petition on this additional basis, noting that the record contained contradictory evidence regarding the beneficiary's recent employment with the claimed foreign parent. Specifically, the director noted that the foreign entity's internally-generated payroll records demonstrated that the beneficiary worked for the foreign entity for between December 2010 and November 2011. However, the director also noted that this documentation indicates that the beneficiary was working in the United States from September 2011 to November 2011, and was not compensated directly by the foreign entity during that period. This discrepancy, coupled with evidence that the beneficiary has a current and a previously-cancelled Residence Permit from the United Arab Emirates (UAE), as well as multiple entry and exit stamps from the UAE from 2008 through 2011, prompted the director to deny the petition on this additional ground when the petitioner failed to submit sufficient evidence of the beneficiary's continuous year of employment with the foreign entity.

The petitioner submitted a complete copy of the beneficiary's passport, which indicates that he was granted a residence permit by the UAE from May 19, 2008 through May 18, 2011 and again from March 17, 2011 through March 16, 2014. The beneficiary's passport demonstrates various entry and exit stamps from the UAE in 2009, 2010, and 2011, many of which are illegible. The permit identifies the beneficiary's sponsor as [redacted] and his profession as "partner." The residence permit states: "Residence Permit becomes invalid if bearer resides out of the U.A.E. for more than six months." The record also contains internal payroll records for the beneficiary's employment abroad, indicating that he earned wages from the foreign entity from July 2008 through June 2009, July 2009 through June 2010, and December 2010 through November 2011.

The petitioner claims that it has demonstrated one year of continuous employment abroad for the beneficiary based on the payroll records for the period from December 2010 through November 2011. Specifically, the record demonstrates that the beneficiary was assigned the task of establishing the new U.S. entity, and USCIS records demonstrate and the petitioner confirms on the Form I-129 petition that the beneficiary last entered the United States on August 15, 2011 for this purpose.[3] Counsel for the petitioner contends that, despite the U.S. petitioner's registration in September 2011, the beneficiary continued to be paid by the foreign entity until November of 2011 when the L-1 petition was approved.[4] Based on this contention, the petitioner claims that the beneficiary has the requisite year of continuous employment abroad.

On appeal, counsel for the petitioner asserts that the presence of the beneficiary in the United States beginning in August 2011 should not be considered disruptive of this continuous year of employment abroad. The AAO disagrees. While counsel correctly asserts that brief trips to the United States for business do not interrupt the continuity of the one year of continuous employment abroad for L-1 status, such periods likewise do not count toward fulfillment of that requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). In this matter, therefore, the petitioner must demonstrate that the beneficiary completed one year of continuous employment abroad with the foreign entity prior to August 15, 2011, the date the beneficiary last entered the United States. Therefore, the relevant dates to be examined are from August 16, 2008 through August 15, 2011.

Counsel asserts that the petitioner has satisfied this requirement, pointing to the appointment letters submitted in response to the RFE dated May 11, 2005, July 1, 2009, and September 1, 2011 respectively. Specifically, counsel claims that these letters support the petitioner's contention that the beneficiary possesses the requisite year of continuous full-time employment abroad with a qualifying organization. Specifically, the May 11, 2005 letter confirms the beneficiary's appointment as General Manager of the effective May 1, 2005. Likewise, the July 1, 2009 letter confirms the beneficiary's promotion to Deputy General Manager. Finally, the September 1, 2011 letter confirms the beneficiary's assignment to set up the U.S. entity and also corroborates the claimed career history of the beneficiary as set forth in the first two letters discussed herein. None of these letters, however, constitutes evidence of one continuous year of full-time employment with the foreign entity between November 16, 2008 and August 15, 2011.

As noted above, the petitioner also submitted internal payroll records for the beneficiary, demonstrating he earned wages from the foreign entity from July 2008 through June 2009, and from July 2009 through June 2010. The AAO notes that no documentation for the period from July 2010 through November 2010 is contained in the record. Although the petitioner has submitted payroll documents indicating that the beneficiary worked 26 days per month for each of these months, with the exception of February 2009 during

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[3] USCIS records demonstrate that the beneficiary entered the United States on August 15, 2011 as a B-1, Temporary Business Visitor.

[4] It is noted that the foreign entity's payroll chart continues to list wages paid to the beneficiary from the foreign entity from September to November of 2011, and simply annotates these months as "USA."

which he worked only 20 days, the record contains insufficient evidence to accept these documents alone as evidence of the beneficiary's continuous employment abroad for the required one-year period.

The beneficiary's possession of a residence permit from a sponsoring employer in the UAE, which also mandates that such permit "becomes invalid if bearer resides out of the U.A.E. for more than six months," raises questions regarding the validity of the petitioner's claims regarding the beneficiary's continuous and uninterrupted employment abroad with the foreign entity. The documentation in the record demonstrates that the beneficiary frequently traveled to the UAE during the period in question. However, the petitioner provides no details regarding the purpose of these visits, and the duration of each visit is unclear based on the numerous illegible passport stamps tracking the beneficiary's entry and exit from the UAE.

The petitioner is required to show that the beneficiary had one continuous year of full-time employment abroad with a qualifying organization. The petitioner claims that the beneficiary worked 26 days per month, with the exception of February 2009, during the period from November 2008 through June 2010, thus raising questions regarding the validity of these claims in light of the beneficiary's extensive travel records. If the beneficiary was simultaneously working for Asong in the UAE or elsewhere during the requisite period, such employment would be deemed interruptive of the beneficiary's employment with the Chinese entity, the qualifying organization with whom continuous, uninterrupted employment must be established.

The AAO acknowledges the petitioner's submission of a letter from Asong on appeal, stating that the beneficiary is a "sleeping partner" of that company and owns 10% of the total shares issued. The letter also states that the foreign entity issued a "no-objection" letter to Asong on March 21, 2008. However, the petitioner submits no additional evidence to support this claim, such as a copy of the foreign entity's "no-objection" letter or copies of relevant documents confirming that the beneficiary is a "sleeping partner" and not an actual employee of that worked and resided in the UAE using the residence permit during the relevant period. The beneficiary's possession of a residence permit sponsored by is inconsistent with statements made in letter that the beneficiary "shall not participate [in] any business operation activity except for the profit and loss distribution according to your share percentage."

Based on the numerous discrepancies noted above, there is insufficient evidence to establish the beneficiary's continuous employment abroad. Counsel does not provide any relevant documentation to clarify these issues. 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the claims made and the evidence submitted with regard to the beneficiary's relationship with contribute to the unresolved inconsistencies in this matter and cast further doubt on the veracity and legitimacy of the totality of the petitioner's evidence. 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. *Matter of Ho*, 19 I&N Dec. at 591.

Finally, counsel emphasizes that USCIS previously determined that the beneficiary had the required one year of continuous full-time employment with the foreign entity when it approved the initial new office petition. Counsel observes that the regulations at 8 C.F.R. § 214.2(l)(14)(ii) do not require the petitioner to re-

establish the beneficiary's qualifying employment abroad and asserts that the previous determination should be given deference. The director's decision does not indicate whether he reviewed the prior approval of the initial new office petition. If the previous nonimmigrant petition was approved based on the same unresolved inconsistencies regarding the beneficiary's employment abroad, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The prior approval in this matter does not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

For the reasons set forth above, there is insufficient evidence to establish that the beneficiary has one year of continuous, full-time employment abroad with a qualifying organization within the relevant three-year period. The record is devoid of documentary evidence establishing this continuous tenure of employment. Due to the inconsistencies detailed above, the petitioner has not met its burden to corroborate the beneficiary's claimed period of employment with the foreign entity. For this additional reason, the petition cannot be approved.

## IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER**: The appeal is dismissed.