



U.S. Citizenship
and Immigration
Services

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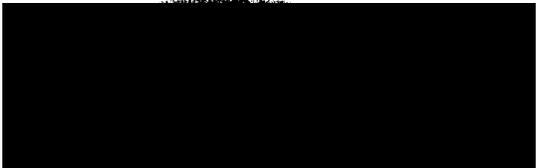


FILE: WAC 01 198 55833 Office: CALIFORNIA SERVICE CENTER Date: 400 3 1 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

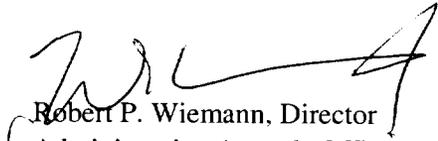
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that provides multi-media and video editing to medical facilities and doctors. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Buenos Aires, Argentina. The petitioner now seeks to employ the beneficiary as its vice-president of operations for two years.

The director denied the petition concluding that the petitioner had not established that the beneficiary had been employed abroad in a managerial or executive capacity and that the new U.S. office would support the beneficiary as a manager or executive within one year of approval of the petition.

Counsel for the petitioner subsequently filed a motion to reopen or reconsider. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel submitted a brief in which he asserts that: (1) the beneficiary, as Managing Director of the foreign company, manages and directs "the entire operations of the business," and "does not perform any technical or clerical work" of the organization; and, (2) the beneficiary "will manage and direct the overall function of the [petitioning] organization through subordinate employees," and will therefore be employed in a primarily managerial or executive position.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) further states that an individual petition filed on Form I-129 shall be accompanied by:

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

Additionally, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) sufficient physical premises to house the new office have been secured;
- (B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - b. the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - c. the organization structure of the foreign entity.

The AAO will first address the issue of whether the beneficiary has been employed in the foreign organization in a primarily managerial or executive capacity.

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

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

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

capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The beneficiary is identified as the managing director of the foreign organization since its establishment in 1994. In a letter submitted with the petition, the petitioner provided the following description of the beneficiary's job duties as managing director:

[H]e has been in charge of all the operations of the business, which includes the planning, developing and establishing policies and objectives of the business. [The beneficiary] has also been in charge of developing organizational policies to coordinate functions and operations of [the foreign company's] multi-media and video editing business activity. Furthermore, [the beneficiary] has been in charge of reviewing activity reports and financial statements to determine progress and status in attaining objectives and has revised these objectives and plans in accordance with current conditions of the company. [The beneficiary] has also been in charge of securing contracts for the company and ascertaining the company's continued operations.

The director issued a lengthy request for additional evidence. As the request is already part of the file, it will not be entirely repeated herein. The requests that are relevant to the present issue include: (1) an organizational chart of the foreign company describing its managerial hierarchy, including a clear identification of the positions of all current employees, and each employee's job description, educational level, and annual salary; (2) a more detailed description of the beneficiary's job duties in the foreign organization, including the percentage of time the beneficiary spends on each job duty, and all employees supervised by the beneficiary; (3) the foreign company's payroll records for the year 2000 evidencing employment of the beneficiary and other claimed employees; and, (4) an explanation as to how the foreign company will continue to operate during the beneficiary's absence from the organization.

In response, the petitioner submitted the foreign company's organizational chart in which the beneficiary was identified as the Managing Director. His direct subordinates included an accountant and a manager of personnel and services. The petitioner explained that the foreign company presently employs four full-time individuals, who are identified on the organizational chart as the manager, an office clerk, a graphic designer,

and a video editor, and “many independent contractors.” The petitioner further explained that the beneficiary personally directs the company manager, the accountant, and the graphic designer, but also “directs the work of everyone in the company through the company Manager.”

With regard to the beneficiary’s job responsibilities in the foreign organization, the petitioner noted that the beneficiary’s time is allocated as follows: 40% is spent obtaining and securing the company’s contracts, 30% is spent delegating and ascertaining that the subordinates have completed their work, and the remaining 30% is spent on the company’s financial matters, during which the beneficiary reviews financial reports and makes amendments to the company’s fees. Additionally, the beneficiary establishes and implements policies for the company and revises the policies as necessary.

The petitioner also submitted the foreign company’s 2000 payroll chart as evidence of employing the above-named company manager, office clerk, graphic designer, and video editor. The petitioner noted that the company may also contract with freelance workers, including cameramen, designers, and individuals employed for video duplicating and film developing. The remaining evidence submitted by the petitioner included various pictures of the beneficiary working in operating rooms as a “switchermeister” during the filming of a surgery, filming a dental operation, and using a “head mount display” to test a filming signal during surgery.

In her decision, the director determined that “[t]he record indicates that a preponderance of the beneficiary’s duties [abroad] have been directly providing the services of the business.” The director further noted that without the beneficiary, the foreign company would not have anyone to sell its services, obtain new contracts, review financial documentation, and hire and fire personnel. The director concluded that the evidence is not persuasive in establishing the beneficiary has been managing a subordinate staff who relieve him from performing non-qualifying duties, and consequently, that the beneficiary was not employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner claimed that the director’s denial of the petition is “capricious and arbitrary,” as the decision was “against the weight of the evidence and deviated from [CIS’] own policies and precedents.” Specifically, counsel asserted that CIS cannot acknowledge “that the beneficiary’s absence would cause the business’s [sic] collapse because there would be no one to hire and fire personnel,” which is a managerial and executive duty, yet conclude that the beneficiary has been performing day-to-day operations of the business. Counsel contended that the beneficiary has been acting at the highest level of the foreign organization’s hierarchy, and spends 90% of his time managing and directing the overall operations of the business. Additionally, counsel noted that even if the beneficiary had performed “incidental lower level duties, it should not affect his eligibility,” as the statute only requires that the beneficiary primarily, not solely, manages or directs the organization.

On review, the record does not establish that the beneficiary has been performing in the foreign company in a primarily managerial or executive capacity.

When examining the managerial or executive 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Additionally, the petitioner may not claim to employ the beneficiary as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the

statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In the present case, the petitioner neglected to specifically identify the beneficiary as either a manager or an executive.

The job descriptions provided by the petitioner fail to establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity. The petitioner described the beneficiary's responsibilities as managing director of the foreign company as being in charge of all operations of the business including planning, developing and establishing policies and objectives, developing organizational policies to coordinate functions and operations of the company, reviewing activity reports and financial statements in order to attain objectives, and securing contracts for the company. When asked for a more detailed description, the petitioner claimed that the beneficiary's time is allocated as follows: 40% is spent obtaining and securing the company's contracts, 30% is spent delegating and ascertaining that the subordinates have completed their work, and the remaining 30% is spent on the company's financial matters. According to the above descriptions, it appears that, at most, the beneficiary may be considered to be working in a managerial or executive role 30% of the time, during which he delegates work to the subordinates and determines whether it has been successfully completed. The remainder of the beneficiary's time is spent performing non-qualifying functions of the company, including securing company contracts and handling financial matters. The petitioner does not identify a subordinate of the beneficiary who performs the sales or marketing functions of the company, such as obtaining prospective clients. Therefore, it can only be assumed, and has not been proven otherwise, that the beneficiary is responsible for performing this function, as well as the financial matters of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, although the petitioner noted that the foreign company employs independent contractors for filming, the photographs provided by the petitioner depict the beneficiary performing such functions in the hospital operating rooms. The petitioner even added that the beneficiary is acting as a "switchmaster" during one surgery, and is filming and testing equipment during two separate surgeries. Although these photographs were not taken within the three years prior to the filing of the petition, during which time the beneficiary must have been performing in a primarily managerial or executive capacity in order to be eligible for the immigration benefit sought, the pictures cast doubt on the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may 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. 582, 591 (BIA 1988). The record as presently constituted fails to resolve the assumption that the beneficiary has been providing the services of the company. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, *supra*.

The remaining evidence is too vague to conclude that the beneficiary's job responsibilities as managing director satisfy the criteria of managerial or executive capacity. The petitioner describes the beneficiary's job duties as "planning, developing and establishing policies and objectives," "determin[ing] progress and status in attaining objectives," and "implement[ing] policies for the company." This is simply a restatement of the regulations in which the terms "managerial capacity" and "executive capacity" are defined. The petitioner has not defined the "objectives" to be attained by the beneficiary. Nor has the petitioner explained the managerial or executive services to be performed by the beneficiary. Specifics are 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). Further, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to establish the true nature of the beneficiary position. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Finally, counsel contends on appeal that the director was inconsistent in concluding that the beneficiary was not a manager or executive, while at the same time noting that the beneficiary's absence from the company would cause the business' collapse as there would be no one to perform the hiring and firing and financial matters of the company. Counsel asserted that these are "clearly managerial duties." While the AAO acknowledges that the beneficiary may be responsible for the hiring and firing of personnel in the foreign company, this job duty does not comprise the majority of the beneficiary's time. Rather, as noted by the director, the beneficiary reviews financial documents and obtains contracts for the foreign company, which, as also addressed above, are considered non-qualifying day-to-day operations of the company. As the majority of the beneficiary's time is spent performing these non-managerial and non-executive functions, the director correctly determined that the beneficiary was not employed in the requisite capacity.

Consequently, the petitioner has failed to establish that the beneficiary's job responsibilities in the foreign company satisfy the criteria of either managerial capacity or executive capacity.

The remaining issue is whether within one year of approval of the petition, the beneficiary will be employed in a primarily managerial or executive capacity in the new U.S. office.

In a letter attached to the petition, the petitioner indicated that the beneficiary's position as Vice-President of Operations, which the petitioner described as executive in nature, would include the following job responsibilities:

[The beneficiary's] duties will parallel those duties that he currently renders to [the foreign company] in Argentina. He will be responsible for planning, developing and establishing objectives of the business. He will further be in charge of day to day operations of the business, hiring and firing of personnel, as well as negotiations with [h]ospitals, [d]octors and various medical facilities to secure contracts for the company.

The petitioner noted that the beneficiary would be paid an annual salary of \$40,000.00.

In a request for evidence, the director requested the following information: (1) an organizational chart of the U.S. business identifying its hierarchy and the names of all executives, managers, and employees; (2) a more detailed description of the beneficiary's duties in the U.S. organization, including the educational requirements for the position of vice-president of operations, and evidence that the beneficiary is qualified for the position; (3) an allocation of time that the beneficiary will spend on each job duty; and (4) an identification of who the beneficiary directs including their job title and position description.

In response, the petitioner submitted a proposed organizational chart of the new U.S. office in which the beneficiary was identified as the Managing Director. His subordinate included the company's only other employee, a project manager. The petitioner explained that upon approval of the present petition, the

beneficiary will hire two or three additional employees to commence operations, and will also work with independent contractors "to establish the business firmly in the ground prior to hiring additional staff." The organizational chart identified the proposed employees as an accountant, a video editor, a graphic designer, and corporate counsel.

The petitioner further provided the following description of the beneficiary's job duties:

[The beneficiary's] duties in the United States will include obtaining and securing contracts for the company. Additionally, he will be in charge of hiring the required personnel who have experience in film and video taping and also securing contracts with various appropriate outside contractors to do various film work for the company. Furthermore, [the beneficiary] will be in charge of all financial matters of the company including the development of pricing strategies in order to maximize the company's share of the market and hence profitability. He will be responsible for planning, developing and establishing objectives of the business and also will be in charge of running the company on a daily basis. In addition to the above responsibilities, [the beneficiary] will be in charge of the company's detailed marketing strategies amongst [d]octors and [s]urgeons in California and the United States.

In her decision, the director concluded that the new U.S. office would not support the beneficiary as a manager or executive within one year of approval of the petition. Rather, the director found that, following this one-year period, the beneficiary would be performing more as a sales agent for the company than an executive or manager. The director noted that the beneficiary's related business abroad has been in operation for ten years, yet, as determined in the director's analysis, does not employ the beneficiary as a manager or executive. Therefore, the director concluded that it is reasonable to assume that the beneficiary would be acting as a sales agent in the day-to-day operations of the U.S. business, rather than directing activities through other executives, managers, or professionals.

On appeal, counsel emphasized that the regulations, as they apply to a new U.S. office, allow for a manager or executive to "perform incidental non-qualifying duties in addition to the management or executive function to be performed" during the start-up operations of the company. Counsel contended that the regulations provide beneficiaries of new offices "some room to function until subordinate staff is hired to relieve the beneficiary from performing non-qualifying duties."

Counsel also provided the following additional description of the duties to be performed by the beneficiary in the United States:

[The beneficiary's] duties will include developing new accounts (i.e. obtaining and securing contracts for the company), hiring the required personnel who have experience in film and video taping and also securing contracts with various appropriate outside contractors to do various film work for the company. Furthermore, [the beneficiary] will be in charge of all financial matters of the company including the development of pricing strategies in order to maximize the company's share of the market and hence profitability. He will be responsible for planning, developing and establishing objectives of the business and also will be in charge of running the company on a daily basis through subordinate staff. In addition to the above responsibilities, [the beneficiary] will be in charge of the company's detailed marketing strategies amongst Doctors and Surgeons in California and the United States.

Additionally, counsel asserted that there is no requirement in the regulations that a company employ a certain number of employees in order for the company's "top manager" to be classified as a manager or executive. Counsel argued that "it has long been recognized that a person may be a manager or executive . . . even if he is the sole employee of the company where he utilizes outside independent contractors or where the business is complex." Counsel asserted that this "new niche" focuses less on the size of an organization and more on the management of a function. In relation to the present case, counsel contended that as Vice President of Operations, the beneficiary "will be the driving force behind the entire business operation," "will function at the highest level within the U.S. organizational hierarchy," and "will manage and direct the overall function of the organization through subordinate employees as well as independent contractors such as the company's accountant, attorneys, vendors, etc." Thus, counsel contended that the director's finding that the beneficiary would perform the day-to-day operations of the business as a sales agent is "an overreach," and thus "arbitrary and capricious."

On review, the record does not support a finding that the beneficiary would be employed in the United States as a manager or executive. The AAO recognizes that the regulations allow a new office one year within the approval of the petition to establish a managerial or executive position. As noted in the regulations and above, the factors to be considered in determining whether such a position will exist are: (1) the nature of the organization, including its organizational structure and financial goals; (2) the size of the U.S. investment and the financial ability of the foreign company to remunerate the beneficiary; and, (3) the organizational structure of the foreign entity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Additionally, when examining the executive or managerial capacity of the beneficiary, the AAO will consider the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

In the present case, counsel and the petitioner have failed to establish that, upon consideration of the above-named factors, the U.S. entity will support a manager or executive. First, the proposed organizational structure of the U.S. company does not reflect the employment of the beneficiary in a primarily executive position. Although the beneficiary is named on the company's organizational hierarchy as Managing Director, it appears from the job descriptions provided by the petitioner and counsel that the beneficiary will actually be performing duties uncommon to those of a managing director. Specifically, the organizational chart identifies a project manager, video editor, graphic designer, accountant, lawyer, and outside services for printing. The petitioner has not identified any employees who would be responsible for the sales, marketing, or administrative functions of the business. More importantly, the petitioner has not indicated on the organizational chart which employees will be responsible for filming the surgeries, which is the actual purpose and function of the business. Counsel and the petitioner have simply mentioned that the beneficiary will hire "outside contractors to do various film work for the company." As no other evidence was submitted explaining the relationship of the outside contractors with the beneficiary, and whether the beneficiary will have managerial control over the independent contractors, it is impossible to conclude that the beneficiary will be performing primarily as a manager or executive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Also, simply giving a beneficiary the title of "manager" does not constitute employment in a primarily managerial or executive capacity.

Additionally, the job descriptions provided by the petitioner and counsel are not persuasive in establishing that the beneficiary will perform primarily managerial and executive job duties. The petitioner noted in its response to the director's request for evidence that the beneficiary will obtain and secure contracts for the company, will

execute the company's detailed marketing strategies, and will be in charge of all financial matters. Although the regulations allow the beneficiary to perform these non-managerial duties during the first year of establishing the new office, there is no evidence indicating that the beneficiary will cease performing these duties within one year of the petition's approval. As discussed above, the petitioner has not accounted for any employees who will perform the marketing, financial and administrative functions of the business. Rather, as noted by the director, it appears that the beneficiary will continue to perform non-qualifying functions of the business, such as selling the services of the company and handling all financial matters of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, there is inadequate evidence in the record to support a finding that the size of the U.S. investment and the financial ability of the foreign company are sufficient to support a primarily managerial or executive position within one year of approval of the petition. The documentation in the record indicates that the U.S. company was funded with \$60,000. In addition, the statements submitted for the company's checking and savings accounts reflect balances of approximately \$20,000 and \$7,000, respectively. Although the petitioner indicated on its petition an anticipated annual gross income of \$200,000, it does not appear that the U.S. business will be able to support the beneficiary's annual salary of \$40,000, the annual rent of \$46,000, and additional business expenses, such as employees' salaries and administrative costs. Therefore, it can only be assumed, and has not been proven otherwise, that the petitioning organization and the foreign business are financially unable to support a managerial or executive position.

Moreover, contrary to counsel's argument on appeal, the record fails to demonstrate that the beneficiary is a functional 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)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, *supra*. In this matter, counsel has not provided evidence that the beneficiary would manage an essential function. Rather, both counsel and the petitioner have contended that the beneficiary would run the entire company and would supervise subordinate employees. Consequently, the beneficiary cannot be deemed a functional manager.

For the foregoing reasons, the evidence is not persuasive in establishing that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.