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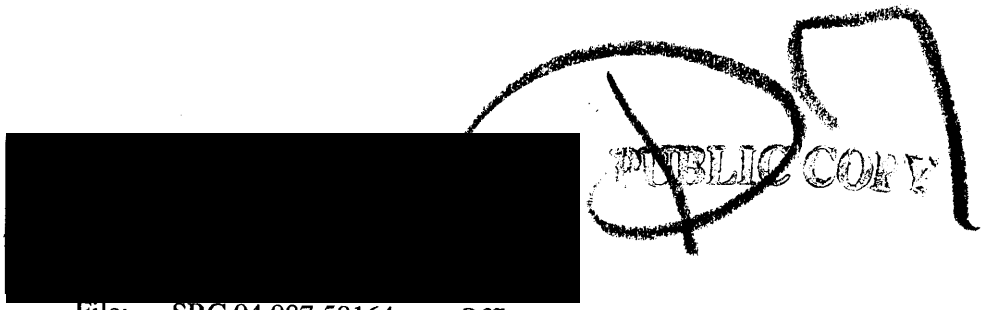
U.S. Citizenship and Immigration Services



APR 07 2005

File: SRC 04 087 50164 Office: TEXAS SERVICE CENTER Date:

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)

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president 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 a corporation organized in the State of Florida that operates a crepe restaurant. The petitioner claims that it is the subsidiary of [redacted] located in Carqueiranne, France. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and (2) that the petitioner had been doing business for the previous year.

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 states that the petitioner submitted sufficient evidence to establish that the beneficiary will perform primarily managerial or executive duties, and asserts "the evidence submitted clearly supports a very active and full first year of business operations and activity." In support of these assertions, counsel submits a brief.

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 management or executive capacity; and

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

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

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

In a statement submitted with the initial petition on February 3, 2004, the petitioner described the beneficiary's job duties as follows:

> As President, [the beneficiary] is responsible for the overall executive control of the Corporation, and for:
>
> - Directing the management of the organization;
> - Setting all corporate goals, policies and procedures;
> - Directing the realization of corporate policies and procedures;
> - Representing the Company to financial and legal entities;
> - Conceiving the company's business plan and directing its execution;
> - Setting and directing the implementation of the Company's short-term and long-term sales and marketing strategies and objectives;
> - Setting and directing the implementation of standards to ensure customer satisfaction;
> - Exercising discretion over day-to-day operations of the business;
> - Directing research and implementation of all future business opportunities;
> - Setting budgets and cash flows and directing their implementation;
> - Setting pricing policies and directing their implementation;
> - Hiring and firing middle management and restaurant personnel;
> - Directing continued compliance with required permits;
> - Directing implementation of and adhesion to all safety regulations;
> - Motivating staff.

The petitioner indicated on Form I-129 that the company had two employees at the time of filing and submitted an organizational chart depicting the beneficiary as president and general manager, a "chef de cuisine," a restaurant manager, a part-time kitchen assistant and a part-time waiter/waitress. The petitioner also submitted 2003 Forms W-2, Wage and Tax Statement, for the employees identified as its restaurant manager, who received wages and tips of $491.50, and its chef, who received wages and tips of $5,667. The petitioner also submitted an invoice from a cleaning services company indicating that it had paid $1,200 for the services of a full-time dishwasher/cleaning person in December 2003.

On February 11, 2004, the director requested additional evidence to establish that the beneficiary had been employed in a managerial or executive capacity, including: (1) a definitive statement describing the beneficiary's U.S. employment, including, in part, a list of all duties, percentage of time spent on each duty, number of subordinate managers/supervisors reporting to the beneficiary, and a description of the job titles, duties and educational background of his subordinates; (2) a copy of Form 1099 for the petitioner's contract employee, along with receipts, bills, I-9s or other documents to establish salaries being paid to contract employees, their job titles, and number of hours worked; (3) copies of state and federal quarterly wage reports for 2003 to the present; and (4) an organizational chart for the U.S. entity with names assigned for all employees.

In a response dated February 20, 2004, the petitioner submitted the following description of the beneficiary's typical eight-hour workday:

Long-Term/Continual Duties

Duties	**% Time Spent**
Reviewing and adapting Company policies and procedures such as product mix, ingredients, how to prepare and serve	7% - 34 min.
All major decisions for the Department other than policy and procedures including setting and revising the long-term company budget, pricing structure, profit margin on food items.	3% - 14 min.
Setting long-term goals in sales of each of the Company's products. . .	2% - 10 min.
Establishing the means to reach those goals such as advertising and sponsorships, wine tastings, minimizing low-margin and emphasizing high margin food and beverage lines.	5% - 24 min.
Adjusting salaries and staff levels to optimum levels through hiring and firing when necessary.	3% - 14 min.
Staff training, on-the-job, in cooking, serving, client management	8% - 38 min.
Long-term monitoring that policies and procedures are adhered to, Goals are met, growth ratio is as planned.	2% - 10 min.

Researching and implementing future business decisions.	5% - 24 min.

Short-Term/Frequently Recurring Duties

Duties	**% Time Spent**
Setting short-term corporate sales goals and review with managers	15% - 1hr.12min.
All major decisions for the Company such as setting and revising short term budget.	5% - 24 min.
Exercising discretion over day-to-day business operations and adjusting purchase and sales policy as needed.	15% - 1 hr.12min.
Monitoring product and service quality within the Company on a daily basis.	10% - 48 min.
Motivating staff through personal encouragement, incentive campaigns and other means.	15% - 1 hr.12 min.
Adjusting and fine tune all operations according to staff suggestions, market research, client feedback, overall business plan.	5% - 24 min.

The petitioner submitted a separate statement describing the duties of the beneficiary's subordinates as follows:

Chef de Cuisine – [redacted] Reports to [the beneficiary], President. Responsible for overall management of all kitchen activities. Specializes in preparation of the dishes served and the finding and daily purchasing of ingredients. Education: High School Diploma, cooking courses. 40 hours per week. Date of first employment: August, 2003: restaurant, November, 2003, chef.

Restaurant Manager – [redacted] Reports to [the beneficiary], President. Responsible for the correct functioning of the restaurant, including all place settings, reception and seating of guests, serving of guests, billing and payments. Also responsible for overall cleanliness of the restaurant and all its facilities

Kitchen Assistant/Dishwasher/Cleaner – [redacted] Reports to [redacted] Cuisine, secondary reporting to [redacted] Restaurant Manager. Not directly salaried but provided by agency. Responsible for cleaning all foods utensils during operation of the restaurant. Responsible for cleaning restaurant and restrooms on daily basis.

Waiter/Waitress/Part Time (Proposed). Reports to [redacted] To be hired when number of clients warrants. Responsible for seating and serving clients.

The petitioner also submitted its Florida Forms UCT-6, Employer's Quarterly Report, for the last three quarters of 2003, indicating that [redacted] was employed by the petitioner from April 2003 through December 2003, and [redacted] as employed by the petitioner beginning in October 2003.

In a decision dated March 4, 2004, the director determined that the petitioner had failed to establish that the beneficiary will be primarily performing in a managerial or executive capacity. The director noted that the beneficiary is not managing other managers or professionals, and that the evidence submitted indicates that the beneficiary would be required to engage in the day-to-day business activities of the company. Further, the director noted that the evidence submitted is conflicting with respect to the number of employees and their compensation. Finally, the director noted that the petitioner had not established that the beneficiary is managing or directing a function. Consequently, the director denied the petition.

On appeal, counsel for the petitioner asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary will serve as a manager or executive under the extended petition. Counsel emphasizes that the beneficiary operates at a senior level within the petitioner's organizational hierarchy and is not performing the "day-to-day ministerial functions as previously surmised, but rather developing plans for his subordinates to carry out." Counsel further states that the beneficiary manages the most important executive functions but also manages "subordinate managers and personnel as clearly presented in the evidence."

Upon review, counsel's assertions are not persuasive. 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.* A beneficiary may not claim to be employed 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 this case, the petitioner has asserted that the beneficiary performs both executive and managerial functions.

Rather than providing a specific description of the beneficiary's duties with the initial petition, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "directing the management of the organization," "establishing goals and policies of the organization," and "exercising discretion over day-to operations." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.).

The more detailed description of the beneficiary's job duties reveals that he devotes approximately half of his time to supervisory functions that would generally not be considered executive in nature, including training, monitoring, and motivating the restaurant's staff, and communicating sales goals to employees. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising

employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The beneficiary supervises a chef who is a high school graduate and a restaurant manager. Although, the restaurant manager possesses an accounting degree, she performs the duties of a hostess, waitress and cashier. The petitioner has not established that these employees perform duties that would require completion of a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or provided job descriptions which would establish that either of the beneficiary's subordinates manage a clearly defined department or function of the petitioner, such that they could be classified as supervisors or managers. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Counsel correctly states on appeal that the beneficiary is not required to manage others in order to be considered a manager or executive, so long as the he manages an important function of the company. 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 written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In this matter, the petitioner has not defined an essential function managed by the beneficiary, other than counsel's vague statement on appeal that the beneficiary manages "important executive functions of the company." Managing an organization in its entirety does not constitute managing a function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, as already discussed, the petitioner has indicated that the beneficiary does devote as much as half of his time to supervising his subordinates, which further undermines counsel's argument on appeal that the beneficiary meets the requirements of a function manager.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS 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 CIS 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.

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. The petitioner operates a restaurant that is open seven days a week for a total of 66 hours, according to the hours of operation listed on a sample menu submitted by the petitioner. The petitioner claims to employ the beneficiary as president, a full-time chef, a full-time restaurant manager, who actually performs the duties of a hostess, waitress and cashier, and a cleaning person/dishwasher. The petitioner claims that its full-time employees work 40 hours per week; however the petitioner's payroll records indicate that the restaurant manager received less than $500 in wages and tips for the last quarter of 2003. Over a nine-month period, the chef received a total of $5,667 in wages and tips. The petitioner has not submitted any documentary evidence, such as copies of recent paychecks, to establish that these employees were employed on a full-time basis when the petition was filed in February 2004. Even if the petitioner had established that the beneficiary's subordinates work on a full-time basis, it still has not explained how a staff of only three employees are sufficient to meet the reasonable needs of the petitioner's service-oriented business.

As noted above, the petitioner's restaurant is open for business for 66 hours per week and only employs the beneficiary and two other employees who the petitioner claims work 40 hours per week. The business would reasonably require at least two people in the restaurant during all operating hours. Therefore, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing the food preparation duties of the chef and the various operational and customer service duties of the restaurant manager during the 26 hours per week when neither subordinate employee is available. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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).

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove 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). Although the beneficiary in this case clearly performs some duties of an executive, the record does not demonstrate that such duties would require the majority of his time on a day-to-day basis, as claimed by the petitioner. The petitioner has not established that it employs a subordinate staff sufficient to relieve the beneficiary from directly providing the services of the restaurant on a day-to-day basis. Merely claiming that the beneficiary is a manager or executive is insufficient to establish eligibility.

It is noted that the petitioner indicates that it plans to hire additional employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On appeal, counsel further refers to a several unpublished AAO decisions to support its assertion that the beneficiary in this case is qualified for the benefit sought. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cited matters. Going on record without

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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 support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has established that it has been doing business for the entire previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H) "doing business" means the regular, systematic and continuous provision of goods and/or services. The beneficiary was granted an initial one-year period to open a new office valid from February 27, 2003 to February 19, 2004. Thus, the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition.

In support of the initial petition, the petitioner submitted: (1) evidence that it purchased its restaurant and acquired a lease for the property on May 23, 2003; (2) an invoice dated December 31, 2003 evidencing payment to a cleaning services company for a dishwasher/cleaning person; (3) invoices for rental of a dishwasher in November and December 2003; (4) a December 4, 2003 statement from a restaurant equipment provider; (5) an invoice for kitchen supplies purchased in January 2004; (6) copies of seven guest checks for meals purchased at the restaurant; and (7) its balance statement for the period ending December 31, 2003. The petitioner stated that it commenced operations in May 2003.

On February 11, 2004, the director requested additional evidence of business conducted by the petitioner during the past year, including documentation that permits the petitioner to do business as "[redacted]" The petitioner submitted invoices from a local newspaper for advertisements placed in May, July and August 2003; an electric bill for August 2003; two additional invoices for supplies purchased in September and November 2003; a June 2003 invoice for air conditioning service addressed to the restaurant's previous owner; bank statements for November and December 2003; and a January 31, 2004 invoice from a cleaning services provider for the services of a cleaning person/dishwasher. The petitioner also provided evidence that it registered the fictitious name [redacted] on February 12, 2004. This name is shown on the petitioner's photographs, menu and some of the submitted documents, while other documents show the petitioner is doing business as "[redacted]

The director denied the petition on March 4, 2004, determining that the petitioner had not established that it has been conducting business for the previous year. The director noted that the evidence submitted shows that the petitioner purchased 'limited inventory and utility services for the business" which is insufficient to establish that the petitioner has met the regulatory requirements of doing business.

On appeal, counsel for the petitioner states "it is our position that the petitioner has had a remarkable and outstanding first year of business. The mere fact for a restaurant to survive, and yet more, turn a profit within the first year is outstanding. . . The evidence submitted clearly supports a very active and full first year of business operations and activity which runs contrary to the Service's position on this issue."

Upon review, the petitioner has not established that it was doing business for the entire previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The beneficiary entered the United States in L-1 status for the first time on April 24, 2003 nearly two months after the new office petition was approved, purchased the restaurant from its previous owner on May 13, 2003 and signed a lease on May 20, 2003, which was to commence on May 23, 2003. The petitioner claims that it has been doing business since that date and emphasizes its overall sales for 2003. The AAO concurs with the director, however, that the minimal evidence submitted is insufficient to establish that the petitioner has been operating for the entire previous year. Again, 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. at 190. In this case, there is no evidence to establish that the petitioner was doing business between the date of approval and the acquisition of the restaurant on May 23, 2003. Further, there is insufficient evidence to substantiate the petitioner's claim that it began operating the restaurant in May 2003. For this additional reason, the petition may not be approved.

The AAO also notes that the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, since the petitioner did not acquire its restaurant until three months following the approval of the new office petition, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

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.