



U.S. Citizenship
and Immigration
Services



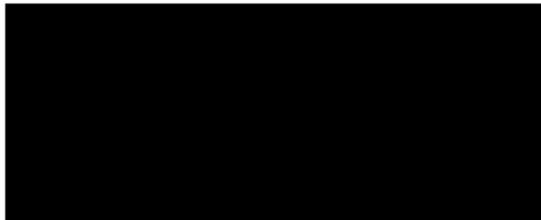
17

DATE: **DEC 28 2012** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 AAO will dismiss the appeal.

The petitioner seeks to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Florida corporation established on September 2, 2010. It intends to engage in the business of "investment and business development services." The petitioner claims to be a subsidiary of Butaval C.A., based in Venezuela. The petitioner seeks to employ the beneficiary as President and Director of its new office location.¹

On April 12, 2012, the director denied the petition, finding the petitioner failed to establish: 1) that it would employ the beneficiary in a managerial or executive capacity within one year; 2) that sufficient physical premises have been obtained to run the proposed operation; and 3) that the foreign entity employed the beneficiary in a managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity and would be employed in the United States in a primarily managerial or executive capacity. Counsel asserts that the director's decision reflects a misreading and oversight of the evidence submitted. Counsel submits a brief, but no additional evidence, in support of the appeal.

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

¹ The petitioner requested a three-year period of approval. However, pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

the alien are qualifying organizations as defined in paragraph (1)(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(1)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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; and
- (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 (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) 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
 - (3) The organizational structure of the foreign entity.

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

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

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

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

II. The Issues on Appeal

The director denied the instant petition on three separate grounds, finding that the petitioner failed to show: 1) that it would employ the beneficiary in a managerial or executive capacity within one year; 2) that sufficient physical premises have been obtained to house the new office; and 3) that the beneficiary was employed abroad in a managerial or executive capacity for one out of the previous three years.

A. Managerial or Executive Capacity in the United States

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 11, 2011, and stated that the company is engaged in "investment and business development services," with three employees as of the date of filing.

In a letter dated February 1, 2010, the petitioner stated that the company will begin operations in the United States by managing [REDACTED] an existing cafeteria-style restaurant. The petitioner stated that it anticipates that it would be able to invest in additional restaurants "within the next three years."

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). The petitioner's description 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.*

With respect to the beneficiary's proposed duties as president, the petitioner indicated that he "will be responsible for developing business strategies in marketing, human resources, food safety and quality assurance, nutrition, loss prevention, finance, internal audit, and risk and safety."

The petitioner's business plan expands and lists the following job duties for the position of President:

President – Manage our investments. Assess [the petitioner's] assets, liabilities, cash flow, insurance coverage, tax status, and financial objectives to establish investment strategies. Make investment decisions. Conduct feasibility studies. Oversee the management of [REDACTED] as the first of what we anticipate will be a chain of 5 cafeteria style restaurants and other investments. Know the bottom line profit on an ongoing basis. Analyze operations and cut expenses, improve operations and maximize profitability. Establish a plan for success which includes preparing and reviewing a guided action plan; recording data and key financial information; focusing on all aspects of the business. Evaluate performance and solve unexpected variances. Attend industry events and seminars such as the National Restaurant Conference in Chicago, Illinois.

Nearly all of the responsibilities listed by the petitioner for the beneficiary's position of president are extremely vague and do not state with any specificity what the beneficiary will actually do when working for the petitioner. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The above list fails to indicate which tasks are executive or managerial in nature and the percentage of the beneficiary's time each will require. 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 actual duties themselves reveal the true nature of the employment. *Id.* at 1108. The petitioner has failed to provide any detail or explanation of the beneficiary's expected daily routine.

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. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Therefore, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. See generally, 8 C.F.R. § 214.2(l)(3)(v)(C).

At the time of filing, the petitioner claimed to be operating [REDACTED] with three employees: an operations and shift manager, a chef, and a waitress. The petitioner provided evidence of wages paid to three individuals during the fourth quarter of 2010. The petitioner included brief position descriptions for these positions in its initial business plan and provided the following expanded descriptions in response to the director's Request for Evidence (RFE) issued on August 16, 2011:

Operations and Shift Manager: Estimate how much food and beverage will be used, place orders with suppliers, check the deliveries of fresh food and baked goods for quality; oversee each shift order supplies of non-food items, such as dishes and silverware, cooking utensils, and cleaning products. (15% of time spent on this) Arrange to have equipment repaired or maintained and schedule other services. (5% of time spent on this) Total cash and charge receipts at the end of each day. (15% of time spent on this) Deposit them in the bank. Supervise the kitchen and dining room. (20% of time spent on this) Oversee the food preparation, checking the quality and size of the servings, resolve customer complaints about food or service, ensure kitchen and dining areas are cleaned according to standards, keep records of these practices for health inspectors. (20% of time spent on this) Ensure safety standards are obeyed. Schedule staff work hours, making sure that peak dining hours are covered. Administrative duties include keeping records of employee hours and wages and preparing payroll and tax report paperwork. Keep records of purchases and pay suppliers. (25% of time spent on this)

Cook – Prepare the food and be responsible for operation of the kitchen. (85% of time spent on this) Most food will be prepared on the premises. The kitchen will be designed for high standards of sanitary efficiency and cleaned daily. Food will be made mostly to order and stored in large coolers. Food for delivery may be similar to take-out (prepared to order) or it may be prepared earlier and stocked. Catering will be treated as deliveries. Cleaning and adhering to sanitary standards. (15% of time spent on this).

Waitress—Prepare tables for meals, including setting up items such as tablecloths, silverware, and glassware. (15% of time spent doing this). Greet customers and Escort customers to their tables. (10% of time doing this). Take orders and write food orders on order slips, memorize orders, or enter orders into computers for transmittal to kitchen staff. Check with customers to ensure that they are enjoying their meals and take action to correct any problems. Remove dishes and glasses from tables or counters, and take them to kitchen for cleaning. Collect payments from customers. Answer phone and take delivery orders. Cooks as necessary.

The petitioner indicated that the beneficiary would hire an administrative assistant upon approval of his visa petition, and also "oversee the hiring and management of all staff positions," but it did not identify any additional positions to be filled during the first year of operations. Further, the petitioner's business plan included profit and loss projections for the first three years of operations. These projections reflect no increases in monthly salary and payroll expenses for the period January 2011 through December 2013, which suggests that the company intends to maintain its current staffing levels.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

In denying the petition, the director found the petitioner has not established that the beneficiary would act as other than a first-line supervisor of non-professional employees within one year. The AAO concurs with this determination. Each of the petitioner's three employees is claimed to have "no formal education" and the petitioner does not claim the positions are professional. In addition, the beneficiary's proposed subordinates are not managers or supervisors, as all three employees are primarily involved in performing job duties associated with producing the petitioner's goods and providing its services. Although the petitioner indicates that the cook and waitress officially report to the Operations and Shift Manager, the description of job duties for Operations and Shift Manager is not such that he could be considered to spend

the majority of his time supervising other employees. The petitioner has not provided evidence of a proposed organizational structure sufficient to elevate the beneficiary to a supervisory position that would be higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

The petitioner has also stated that it will hire additional employees as business expands, however such vague plans are insufficient to show that the petitioner will within one year be working primarily in a managerial or executive capacity. 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)). As noted above, the petitioner's business plan includes profit and loss projections for the first three years of operations. These financial projections reflect no anticipated increases in monthly salary and payroll expenses, and thus do not support the petitioner's claims that it will hire an administrative assistant or any other staff within that timeframe.

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 in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner did not clearly articulate an essential function that the beneficiary will manage. However, the petitioner's company letter of support states:

As the President and Director of [the petitioner], [the beneficiary] will be expected to manage our investments. He must assess [the petitioner's] assets, liabilities, cash flow, insurance coverage, tax status, and financial objectives to establish investment strategies. He will be the only executive in charge, through subordinate personnel, of all operations of our investments. His responsibilities will include strategic analysis, business development, establishing company goals and policies and hiring and all related personnel decisions. He will also monitor investments and review current procedures to implement improved procedures and practices.

This description emphasizes beneficiary's authority over the petitioner's finances and investments. However, it fails to identify the beneficiary's actual duties and the percentage of time the beneficiary will dedicate to each. The petitioner merely paraphrases from the statutory definitions of managerial and executive capacity and describes generic managerial duties without explaining what they mean in the

context of the petitioner's business. This is particularly problematic for the petitioner, which states that it will spend its first year running its restaurant in order to determine the operation's profitability and potential for opening future stores. The petitioner has also already stated its investment strategy and company goals, which are to profitably run its restaurant. It is therefore unclear how the above description translates into actual job duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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); *Ayr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). While the AAO does not doubt that the beneficiary holds ultimate responsibility for the performance and functioning of the new business in the United States, the record does not support a finding that he will be performing primarily managerial duties or primarily managing a clearly-defined essential function of the organization.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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 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.*

On appeal, counsel for the petitioner contends that the petitioner clearly demonstrated the executive nature of the beneficiary's position and states:

[The] Beneficiary made the executive decision of where to open the restaurant. He is the sole executive entrusted with the responsibility of managing the investments, assessing the corporation's assets and liabilities, the sole executive responsible for establishing company goals, financial plans, and investment strategies. The letter also explained that he is the only executive in charge of the operations of the investments including strategic analysis, business development, establishing company goals and policies and all personnel decisions.

The AAO does not question the beneficiary's authority to make important decisions for the petitioner. However, the petitioner must demonstrate that the beneficiary will be employed *primarily* in an executive capacity. As previously noted, the responsibilities attributed to the beneficiary lack the meaning and clarity necessary to support a finding that he will primarily spend his time dealing with executive matters. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties):

see also Boyang, Ltd. v. I.N.S., 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has three employees other than the beneficiary and operates a restaurant which is stated to be open weekdays from 6:00 a.m. to 5:00 p.m. Although the petitioner vaguely refers to plans to hire additional staff, the petitioner's business plan and proposed organizational chart do not identify any additional restaurant staff to be hired, nor does it account for any additional employees in its profit and loss projections for the first three years of operation. Given the small number of employees and the restaurant's hours, the record does not support the petitioner's claim that the beneficiary will have no role in the restaurant's day-to-day operations. Rather, given the number of employees, it has not been shown how the beneficiary would be relieved from directly supervising non-professional employees or from performing the routine restaurant functions during operating hours when one or more of the three employees are not available.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). It would be reasonable and acceptable for the beneficiary to have some involvement in running the restaurant, especially in its first year of operation. However, the petitioner did not indicate that the beneficiary will spend *any* time on the operation of the restaurant, which calls into question the accuracy and completeness of the submitted position description. This is especially the case in light of the petitioner's failure to provide a satisfactory list of other job duties, and in light of the petitioner's statement that it does not anticipate investing in another restaurant for approximately three years. 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. 582, 591 (BIA 1988).

Based on the foregoing discussion, the record does not support a finding that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the petition or that the petitioner would grow to the point where it would support such a position. Accordingly, the appeal will be dismissed.

B. Sufficient Physical Premises

The director also denied the instant petition on the ground that the petitioner did not demonstrate it had acquired sufficient physical premises to house the new office, as required by regulation. 8 C.F.R. § 214.2(1)(3)(v)(A).

The petitioner indicates that it intends to operate an existing restaurant and has no plans to operate any other type of business during the first year of operations. The petitioner provided a lease, color photographs, and a floor plan of the leased restaurant space and initially indicated that the beneficiary's worksite would be at the restaurant's address.

In the RFE issued on August 16, 2011, the director acknowledged the evidence submitted with respect to the restaurant, but noted that the evidence did not indicate that the petitioner has secured "an office." The director requested new color photographs depicting "every single room" of all premises secured for the U.S. entity.

In a response dated November 10, 2011, counsel for the petitioner stated that "the office where [the beneficiary] will be working will need to be leased once [the beneficiary] is granted a visa to come to the U.S. to oversee the operations." At the same time, the petitioner submitted a revised business plan which indicated that the petitioner's management, which would include the beneficiary, "will be located at [REDACTED]"

In denying the petition, the director observed that the petitioner introduced a new work location for the beneficiary in response to the RFE, but failed to provide the requested photographs and lease pertaining to the premises located at [REDACTED]. The director determined that, although the petitioner initially indicated that the beneficiary would be working on-site at the leased restaurant, "it now appears that you did not have sufficient physical premises to house both the U.S. entity and the management together on one site/premise." Accordingly, the director determined that the petitioner failed to meet the regulatory requirement at 8 C.F.R. § 214.2(1)(3)(v)(A).

On appeal, counsel states: "[t]he Petitioner did indicate that the Beneficiary would operate as President and Director from another address and that he did not need to perform these duties at the restaurant, the first venture in which [the petitioner] had invested." However, the petitioner fails to identify the address at which the beneficiary would work or to submit any additional documentary evidence related to the petitioner's physical premises requirements. 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)).

Upon review, the AAO will uphold the director's determination. The AAO does not concur with the director's assumption that the beneficiary could not perform managerial or executive duties while working on-site at the petitioner's leased restaurant. However, the petitioner introduced evidentiary deficiencies and inconsistencies in the record when responding to the RFE that have not been resolved. While the petitioner initially indicated

that the beneficiary would work on-site at the leased restaurant, it appears to have abandoned that claim and now indicates that he would be required to work at another location that has not been adequately documented in the record. As a result of these inconsistencies, the petitioner has not adequately identified its space requirements for its "investment and business development services" and the AAO cannot determine that the leased restaurant space alone is sufficient to meet its physical premises requirements. Accordingly, the appeal will be dismissed.

C. Managerial or Executive Capacity Abroad

The final ground for the director's denial was the petitioner's failure to demonstrate that the beneficiary had worked in a managerial or executive capacity abroad. The director's finding was based on his conclusion that the beneficiary did not supervise professionals.

In support of the beneficiary's managerial and executive duties abroad, the petitioner submitted a letter from the foreign entity:

██████████ has served as the Administration Manager since 1994 when he first took corporate control of the company. As the Administrative Director he currently supervises the Direction Manager and the Commercial Manager. There are also currently thirteen subordinate personnel that either report directly to him or subordinate managers. He has been responsible for directing and managing the company's commercial operations and has acted as the company's legal representative. He directs, and coordinates, through subordinate managers, all commercial activities. He reviews and analyzes budget reports and financial records. He makes all financial decisions and has been responsible for our success as one of Venezuela's leading upholstery and furniture companies. He has been responsible for business development and improved business relations with our most important purchasers which have resulted in the steady increase of our operations.

██████████ holds the highest executive position in our corporate hierarchy. He supervises the Direction and Commercial Managers and fifteen current employees through subordinate managers.

A first-line supervisor will generally not be considered "managerial" as defined under the Act, unless he or she supervises professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). In this case, however, the beneficiary does not appear to be a first-line supervisor. According to the organizational chart for the foreign entity, the beneficiary has four employees directly under him: a Commercial Manager, a Direction Manager, an Iron Work Chief, and a Production Chief. These subordinates, in turn, have between one and five subordinates each. Thus, whether the beneficiary supervises professionals is not determinative.

In response to the RFE, the petitioner submitted a letter from the foreign entity describing the managerial duties of the petitioner's direct subordinates. It also submitted certificates reflecting their various levels of education and training. When considered in its totality, the evidence submitted supports the petitioner's claim that the beneficiary has worked for the foreign entity in a managerial capacity for at least one out of the previous three years. The decision of the director on this issue only is therefore withdrawn.

However, the appeal will be dismissed based on the petitioner's failure to establish: (1) that it would employ the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition; and (2) that it has secured sufficient physical premises to house the new office.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal must be dismissed.

ORDER: The appeal is dismissed.