



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF S-A-G-, INC.

DATE: MAR. 15, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a Florida corporation operating a “restaurant” business, seeks to temporarily employ the Beneficiary as the Operations Manager of its new office under the L-1A nonimmigrant classification for intracompany transferees. See Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that (1) it has a qualifying relationship with a foreign entity; (2) the foreign entity continued to do business abroad at the time the petition was filed; (3) it has secured sufficient physical premises to house the new office; (4) the Beneficiary has at least one year of continuous full-time employment with a qualifying foreign organization abroad in the previous three years; (5) the Beneficiary was employed abroad in a qualifying executive or managerial capacity; and (6) the Beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.<sup>1</sup>

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition, and submits a brief and copies of previously submitted evidence in support of this contention.

Upon *de novo* review, we will dismiss 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

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<sup>1</sup> We note that the Director also denied the petition because the record does not establish that the Beneficiary has been maintaining B-2 status. As we do not have jurisdiction over maintenance of status issues, we will not address this basis for denial.

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, Petition for a Nonimmigrant Worker, 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)(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 (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

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- (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.

## II. THE ISSUES ON APPEAL

### A. Qualifying Relationship

To establish a “qualifying relationship” under the Act and the regulations, the petitioner must show that the beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with “branch” offices), or related as a “parent and subsidiary” or as “affiliates.” See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term “qualifying organization” and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien’s stay in the United States as an intracompany transferee[.]

On the L Classification Supplement to the Form I-129, the Petitioner claimed that the Beneficiary’s last foreign employer in Venezuela, [REDACTED] is the Petitioner’s parent company. The Petitioner submitted its Florida Articles of Incorporation, dated [REDACTED] 2015, indicating that it is authorized to issue a total of 1000 shares of stock, as well as the foreign entity’s Act of General Assembly, dated [REDACTED] 2014, stating that the Beneficiary and [REDACTED] his spouse, each own 5,500 shares of the foreign entity, representing 100% ownership.

The Director issued a request for evidence (RFE) on March 20, 2015, noting that its articles of incorporation did not provide ownership and control information. The Director instructed the Petitioner to submit evidence demonstrating that the foreign entity wholly owns the Petitioner or other evidence that common ownership and control of both entities existed.

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In response, the Petitioner submitted a letter, dated June 15, 2015, specifically stating that the Petitioner is 100% owned by the foreign entity. The Petitioner submitted a copy of its Share Certificate No 01 issuing the Beneficiary 1,000 shares of common stock on [REDACTED] 2015. The second page of Share Certificate No 01 states that the Beneficiary transferred an unlisted number of shares to the foreign entity for \$100.00, also on [REDACTED] 2015.<sup>2</sup>

In denying the petition, the Director found that the record did not support the Petitioner's claims of a parent-subsidary relationship with the foreign entity. On appeal, the Petitioner contends that the Petitioner has a parent-subsidary relationship with the foreign entity, claiming that the Beneficiary assigned his ownership interest in the Petitioner to the foreign entity.

Here, the Petitioner consistently submits additional copies of Share Certificate No 01, which does not clearly indicate the number of shares the Beneficiary transferred to the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. The Petitioner did not submit a stock ledger demonstrating the history of share transfers, nor did it submit additional evidence identifying the current owners of its shares. As such, we cannot conclude that the foreign entity wholly owns the Petitioner, such that a parent-subsidary relationship exists.

Based on the deficiencies discussed above, the Petitioner has not established that the United States and foreign entities are qualifying organizations.

#### B. Foreign Entity Doing Business

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) provides:

*Doing business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In its March 12, 2015 letter, the Petitioner claimed that the foreign entity has three restaurants and 41 employees.<sup>3</sup> It claimed that the foreign entity began as a family-owned and operated business, and claimed that the Beneficiary and his spouse each own 50% of the Beneficiary's foreign employer.

The Petitioner states that in addition to the Beneficiary's employer abroad, the Beneficiary is also

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<sup>2</sup> We note that all of the submitted copies of Share Certificate No 01 in the record are blank at the line that should state the exact number of shares transferred from the Beneficiary to the foreign entity.

<sup>3</sup> These figures appear to comprise of three separate restaurants that employ 41 workers between them.

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part owner of two additional restaurants. Specifically, the Petitioner submitted an English translation of a document titled Act of General Assembly Ordinary of Shareholders of the Stock Corporation [the foreign entity], dated [REDACTED] 2014, indicating that the Beneficiary and his spouse each own 5,500 shares (50%) of the foreign entity. The Petitioner also submitted an English translation of a document for [REDACTED] dated March 3, 2010, indicating that the Beneficiary and his spouse each own 15,000 shares (50%) of that company. Finally, the Petitioner submitted an English translation of a document titled Act of General Assembly Extraordinary of Shareholders of the Stock Corporation [REDACTED], dated December 18, 2013, indicating that its 200,000 shares were equally distributed among four individuals: the Beneficiary; his spouse; [REDACTED] and [REDACTED]. The Petitioner also submitted untranslated copies of various financial documents, including income tax returns, bank statements, and invoices for the foreign entity, [REDACTED].

In the RFE, the Director instructed the Petitioner to submit evidence that the foreign entity continues to do business abroad, noting that the untranslated financial documents would not be considered.

In response, the Petitioner submitted a letter from Attorney [REDACTED] Public Accountant, dated May 15, 2015, stating that the foreign entity, [REDACTED], and [REDACTED] are all in good standing with the National and Regional Taxes in Venezuela. The letter further indicates that the foreign entity paid 39.260.00 Bs. in the first semester of 2015.

The Petitioner also submitted a second letter from [REDACTED] dated April 10, 2015, discussing the foreign entity's "general balance" as of December 31, 2014, and stating that neither he nor his office audited or revised specifically the financial statements of the foreign entity. The general balance statement of the foreign entity, from January 1, 2014 to December 31, 2014, shows a total income of 15.257.460.53 Bs., total sales costs of 11.313.021.35 Bs., total general and administration expenses of 3.049.658.47 Bs., and total profits of 894.780.71 Bs.

The Petitioner also submitted a contract between [REDACTED] and the foreign entity for exclusive distribution of [REDACTED] products at the foreign entity's restaurants. However, neither the translated copy nor the original in Spanish includes a date or signature signifying the actual execution of the contract. Finally, the Petitioner submitted what appear to be additional bank statements and invoices, but again, did not provide English translations.

In denying the petition, the Director noted that all financial documents submitted with the initial filing were in a foreign language and could not be considered. The Director found that neither the accountant's statement nor the unaudited financial statements were supported by independent documentary evidence and thus were insufficient to establish that the foreign entity was continuing to do business at the time of filing. Finally, the Director found that the unsigned and undated contract with [REDACTED] was also insufficient evidence of continued business operations.

On appeal, the Petitioner contends that it submitted the requested evidence in response to the RFE, including evidence of its three restaurants and 41 employees abroad, and states:

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In the RFE . . . [the Director] requested an independent audit of previously filed documents. The Petitioner hired an Accounting Firm in Venezuela which provided their findings. These findings were provided to [the Director] in response to an RFE. The [Director] in his denial decision indicates that the Petitioner failed to provide documents with the Audit Report. This is incorrect. The financial statements were included with the audit. Additionally, the account firm gave faith that the foreign company had paid taxes.

In the instant matter, the Petitioner's focus, as it relates to the foreign entity, is on the two restaurants it claims are owned and operated by the foreign entity: [REDACTED] and [REDACTED]. However, the evidence in the record shows that the foreign entity does not own either restaurant but rather is directly affiliated with [REDACTED] and loosely affiliated to [REDACTED]. The Petitioner did not submit evidence of actual work being performed at the foreign entity. Because the Petitioner did not submit certified translations of the documents, we cannot determine whether the evidence supports the Petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence has little probative value and will be accorded minimal weight in this proceeding.

Further, the accountant's letters, submitted in response to the RFE, are also minimally probative. In the letter discussing the foreign entity's actual finances, the accountant clearly states that he did not audit or revise the financial statements attached to the letter and, therefore, could not vouch for the documentation. As such, the unaudited financial statements for the foreign entity alone cannot establish that the company has been and is currently doing business abroad. Additionally, the unsigned and unexecuted contract between the foreign entity and [REDACTED] also is not sufficient evidence to establish that the foreign entity is doing business. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the Petitioner claims that we should consider that the foreign entity's restaurants are in operation and that the foreign entity currently employs 41 individuals. Even if it were determined that the foreign entity owns and operates the two restaurants noted above, the Petitioner has not established that it has 41 employees, now or at the time of filing. The Petitioner initially submitted position descriptions for one Supervisor of Production, one Administrative Assistant, 20 Kitchen Assistants, four Cashiers, and two Maintenance employees at the foreign entity. The Petitioner then submitted what appears to be an untranslated payroll list indicating that it had 16 employees and two Directors in February of 2015. Of the 16 employees and two Directors listed on the payroll list, only the Directors and three employees were listed in the position description documents.<sup>4</sup> In response to the RFE, however, the Petitioner submitted a new organizational chart which altered the claimed

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<sup>4</sup> The employees listed were: [REDACTED] Kitchen Assistant, [REDACTED], Cashier, [REDACTED] Cashier, [REDACTED] Director on the payroll list but listed as Cashier in the position descriptions, and the Beneficiary.

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structure and position titles for two of these five employees.<sup>5</sup> It remains unclear whether these employees are employed by the foreign entity itself or by [REDACTED], or [REDACTED] as the Petitioner did not provide evidence of wages paid to its employees. Given the inconsistent information contained in the record, we cannot conclude that the foreign entity has been and continues to do business abroad. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the deficiencies and inconsistencies discussed above, and the lack of clear evidence of the foreign entity's current business operations, the Petitioner has not established that foreign entity has been and will continue to do business abroad.

### C. Physical Premises

The claimed work location of the Beneficiary in the United States is [REDACTED] Florida [REDACTED]. The Petitioner submitted a Commercial Lease between [REDACTED] and [REDACTED] for the premises at this address, dated May 20, 2014, which commences on June 1, 2014 for a period of two years. The Commercial Lease is signed by [REDACTED] the Beneficiary, and [REDACTED] all listed as "Managing Members" on behalf of [REDACTED]. The Commercial Lease specifically states that the premises "shall consist of space located inside that [REDACTED] located at [REDACTED] and also states in Section 3 that the premises will be used for a deli/cafeteria.

The Petitioner also submitted a Lease Agreement between [REDACTED] and [REDACTED] for the premises at [REDACTED] FL [REDACTED]." The Lease Agreement is dated March 8, 2013 and expires 60 months after the Landlord delivers possession of the property. The Lease Agreement is signed by the Beneficiary as President on behalf of [REDACTED] and states that the space consists of approximately 1,200 square feet to be used for a restaurant.

In the RFE, the Director advised the Petitioner that, while it submitted leases for two different retail locations (one for [REDACTED] and one for [REDACTED] it remained unclear where the Petitioner and its potential employees will be performing their duties. The Director further noted that it was also unclear whether the retail locations have office space to accommodate managerial positions. The Petitioner was instructed to submit evidence demonstrating that it had acquired sufficient physical premises to house its new office.

In response, the Petitioner resubmitted the leases for [REDACTED] and [REDACTED] along with photos. There are numerous photos of a restaurant with the Petitioner's signage and building number [REDACTED] on the front door. The remaining photos, presumably of the restaurant located at [REDACTED] show a door with a lock, a peephole, and a sign that

<sup>5</sup> The new chart changed [REDACTED] position to a Shop Supervisor [REDACTED] and [REDACTED] to President.

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states “Private Management Team Only.” There is also one other photo of what appears to be an office with a desk, chair, computer, printer, telephone, and miscellaneous papers strewn about.

In denying the petition, the Director found that, while the Petitioner submitted leases for two different retail locations for its claimed subsidiaries, it is unclear where the Petitioner and its potential employees will be performing their duties, or whether either retail location has office space to accommodate managerial capacity positions. The Director further found that absent evidence that the Petitioner is or will be a holding company of the two restaurants or evidence of a legally binding agreement authorizing the Petitioner to provide the management of the entities, the evidence submitted did not establish that the Petitioner had acquired sufficient physical premises.

On appeal, the Petitioner does not address the Director’s findings on this issue and simply states: “Again the [Director] references that the company [does] not own the restaurants ignoring the previous explanation of assignment of ownership.”

If a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a “new office,” a Petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The phrase “sufficient physical premises” is broad and somewhat subjective, leaving flexibility in adjudicating this legal requirement. However, the Petitioner bears the burden of establishing that its physical premises should be considered “sufficient” as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the Petitioner’s growth during the first year of operations.

Here, the Petitioner submitted copies of two leases, both for restaurant retail space, but neither of which include any mention of the Petitioner. The lease for [REDACTED] the physical location claimed by the Petitioner, consists of space located inside a [REDACTED] Gas Station, and is authorized for use as a deli/cafeteria restaurant. The lease does not describe actual premises and does not specify that office space is available. The photos submitted show a single desk with office equipment in an unidentified location. In addition, the Petitioner does not explain why it does not have its own lease, and nor does it explain why it submitted lease agreements for other restaurants with different employer identification numbers.

Further, in response to the RFE, the Petitioner submitted its organizational chart indicating that it will have a total of four direct employees: one President, one Counter position, one Director of Operations, and one Administrative Supervisor. Given this number of expected employees, it is unclear where the Petitioner will house its employees as a new office. The Petitioner did not describe its existing physical premises nor did it explain how the premises would be sufficient for it

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to conduct its business. Moreover, it did not provide clarification on its physical premises and where it will house its listed employees when requested to do so. 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. at 165.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that it had acquired sufficient physical premises to house the new office as of the date of filing the petition.

#### D. Beneficiary's One Year of Employment Abroad

On the L Classification Supplement to Form I-129, where asked to list the dates of the Beneficiary's employment with the foreign employer, the Petitioner indicated that the Beneficiary had been employed by [REDACTED] since July 24, 2004. Where asked to summarize the Beneficiary's education and work experience, the Petitioner stated that the Beneficiary "[h]as been working for the company in Venezuela for 11 years." In its March 12, 2015 letter, the Petitioner also stated that the Beneficiary has been the Manager of Operations for the foreign entity "for the past 11 years."

According to an untranslated document that appears to be a payroll list, it appears that the foreign entity had the same 16 employees in October, November, and December of 2014, and the same 16 employees in January and February of 2015. Between December 2014 and January 2015, one employee was removed and a different one added in his place; otherwise, the remaining 15 employees were the same. The Beneficiary's name, however, did not appear in the payroll documents at any time, and no additional evidence of his claimed employment was submitted.

In the RFE, the Director noted that owning a business and being an employee of a business are two distinctly different designations and advised the Petitioner that in order to meet this requirement, the record must demonstrate that the Beneficiary performed services for the foreign entity and received wages as a result. The Director instructed the Petitioner to submit evidence that the Beneficiary was a full-time employee of the qualifying foreign entity for at least one continuous year within the three years preceding the filing of the petition.

In response, the Petitioner submitted an untranslated document that appears to be a list of payments to the Beneficiary on behalf of the foreign entity from January 2014 to December 2014. The Petitioner also submitted numerous "Deposit/Cards Payments" coupons, some of which are dated but most are not, listing the Beneficiary's name under "Holders Name." There were an additional 67 illegible coupons submitted by the Petitioner. The Petitioner stated, in the "Contents" page, that these are the Beneficiary's payroll and salary receipts for the past year. The Petitioner also submitted the Beneficiary's foreign tax return for the period from January 1, 2014 to December 31, 2014, indicating that he received 254.876.00 Bs. in "salaries and other similar remunerations." The tax return, however, does not list the Beneficiary's employer.

In denying the petition, the Director found that the significance of the "deposit/card payments" for

the Beneficiary submitted was unclear, since these documents only provided a monetary amount and nothing to indicate the source or the reason for the funds. The Director further found that the Beneficiary's 2014 income tax return was insufficient to establish either that the Beneficiary was an employee of the foreign entity, or that the income indicated was the result of work activities.

On appeal, the Petitioner does not address the Director's findings on this issue and simply lists the previously submitted evidence it deemed relevant to this issue, stating: "[t]hese were the best documents that the company could provide. We submit that these documents do establish his employment abroad as explained by the company's Board of Directors."

To review the required one year of continuous employment abroad, we must count back three years from the date that the petition is filed. The regulation at 8 C.F.R. § 214.2(1)(3)(iii) clearly requires that an individual petition filed on Form 1-129 be accompanied by evidence that the beneficiary "has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition." The definition of "intracompany transferee" also indicates that, if the beneficiary has been employed abroad continuously for one year by a qualifying organization within three years preceding the time of the beneficiary's "application for admission into the United States," the beneficiary may be eligible for L-1 classification. 8 C.F.R. § 214.2(1)(1)(ii)(A).

Here, the Petitioner simply stated that the Beneficiary had been employed at the foreign entity for 11 years. The Petitioner provided what appears to be a payroll document for the foreign entity that is not translated and lists the Beneficiary as a Director of the foreign entity from October 2014 to February 2015. However, we have found several inconsistencies with that payroll document, as outlined above. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

In response to the RFE, the Petitioner submitted what appears to be a list of payments to the Beneficiary on behalf of the foreign entity from January 2014 to December 2014, without English translations, and numerous "Deposit/Cards Payments" coupons, listing the Beneficiary's name under "Holders Name." The Petitioner also submitted the Beneficiary's 2014 foreign tax return, but that document does not list the Beneficiary's employer or the source of his listed income.

Furthermore, the "Deposit/Cards payments" coupons appear to be internally generated documents, some even handwritten, and the Petitioner has not provided any corroborating evidence, such as evidence of tax filings or bank accounts, to verify that these coupons represent actual salary payments.<sup>6</sup> Going on record without supporting documentary evidence is not sufficient for purposes

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<sup>6</sup> The Board of Immigration Appeals has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence,

of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. This documentation is simply insufficient to establish that the Beneficiary was continuously employed on a full-time basis at the qualifying foreign entity as it does not demonstrate his actual employment.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed full time by a qualifying foreign entity for one continuous year within the three year period preceding the filing of the petition, in accordance with 8 C.F.R. § 214.2(l)(3)(iii).

#### E. Beneficiary's Employment in a Managerial or Executive Capacity

The final issues addressed by the Director are whether the Petitioner established that the Beneficiary was employed abroad by the foreign entity, and will be employed in the United States, in a qualifying 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;

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where available." *Id.*; see also *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998) (noting that there is a greater need for corroborative evidence when the testimony lacks specificity, detail, or credibility).

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- (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.

#### 1. Foreign Employment

In its March 12, 2015, letter, the Petitioner claimed the Beneficiary was employed as Manager of Operations for 11 years, and described the Beneficiary's position as follows:

In this position, he is responsible for the introduction of data, accounts, payrolls, presentation of reports to the Board of Directors, and to serve as a member of the Direction Team. His main responsibilities include to guarantee the organizational effectiveness and to provide leadership for the financial activities of the organization. Additionally, he is responsible for contributing to the Development and Implementation of strategies of the company and to interact with the Board of Directors.

The Petitioner submitted an untranslated copy of the foreign entity's organizational chart, which did not include the names of the individuals employed in the listed positions. The Petitioner also submitted a document titled Description of Positions, listing the duties of each of the foreign entity's employees including the Beneficiary, the supervisor of production, the administrative assistant, 20 named Kitchen Assistants, four named Cashiers, and two Maintenance employees. According to an untranslated payroll list, however, it appears that the foreign entity had the same 16 employees and two Directors in October, November, and December of 2014, and the same 16 employees and two Directors in January and February of 2015. Between December 2014 and January 2015, one employee was replaced; otherwise, the personnel structure remained consistent.

The Petitioner submitted a lease agreement for mall space through [REDACTED], for 96 square feet of space to be used "strictly as a commercial place dedicated to use as Fast Food Restaurant." The Petitioner submitted a second lease agreement for commercial space through [REDACTED], to be used "as a Soda Fountain and for any other purpose of legal commerce related with such activity."

In the RFE, the Director advised the Petitioner that the extensive list of duties for the Beneficiary's position abroad as Director of Operations was vague and general, and instructed the Petitioner to submit evidence that the Beneficiary's position abroad is in a managerial or executive capacity. The Director further noted that the record did not clarify whether the Beneficiary was performing his duties in one of the restaurants noted above or in undocumented office space.

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In response, the Petitioner submitted an undated letter claiming that the Beneficiary had been the foreign entity's Manager of Operations for 11 years. The Petitioner highlighted the three main focus areas of the Beneficiary's duties, stating that he would be responsible for "introduction of data, accounts, payrolls, presentation of reports to the Board of Directors," "guarantee the organizational effectiveness and to provide leadership for the financial activities of the organization," and "contribut[e] to the development and implementation of strategies of the company and to interact with the Board of Directors."

The Petitioner submitted a new organizational chart for the foreign entity, depicting the Beneficiary as the Director of Operations, reporting to the President, [REDACTED]. In that position, the Beneficiary directly supervises a Production Supervisor, [REDACTED], three Administrative Assistants, [REDACTED], a Shop Supervisor [REDACTED], a Shop Supervisor [REDACTED], and a Shop Supervisor [REDACTED].

The Production Supervisor supervises three Kitchen Assistants and two Maintenance employees; the Administrative Assistants supervise on Driver; the Shop Supervisor [REDACTED] supervises six Kitchen Assistants and two Cashiers; the Shop Supervisor [REDACTED] supervises four Kitchen Assistants and the same two Cashiers as [REDACTED] and the Shop Supervisor [REDACTED] supervises four Kitchen Assistants and one Cashier.

The Petitioner also submitted resumes for some of the Beneficiary's subordinate employees as well as photos of the foreign premises, which included photos of the restaurant and three photos of what appears to be office space with two desks and signage of the foreign entity.

In denying the petition, the Director noted that the initial list of duties for the Beneficiary's employment as the Director of Operations at the foreign entity was vague and general. The Director also noted that the Petitioner submitted two leases for restaurant locations abroad, but did not indicate whether the Beneficiary is performing his duties at one of the restaurants or at office space not currently identified in the record. The Director observed that the Petitioner's RFE response asserted that the Beneficiary spends one full day a month meeting with the "Board of Directors" to go over the number and strategic goals; however, the record did not establish the existence of a Board of Directors and the documentation shows that the Beneficiary and his spouse are 50/50 owners and have full control of the foreign entity. The Director concluded that doubt was cast on the accuracy of the Petitioner's statements, since the record does not support the Petitioner's claims.

The Director further found that the new list of duties submitted in response to the RFE notably omitted duties that were described in the initial filing. The Director concluded that given the lack of explanation for revising the Beneficiary's duties abroad, and given that his actual duties were unclear, it could not be determined that the Beneficiary was employed abroad in a qualifying executive or managerial capacity.

On appeal, the Petitioner does not directly address the Director's findings on this issue and states that, since the Petitioner is opening a new company in the United States, it is "going to confront obstacles in the management of the new business and minor modifications are going to happen."

When examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) 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 in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the company's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The Petitioner first characterized the Beneficiary's role abroad as Director of Operations and described his duties in vague and very broad terms. The Petitioner noted, in part, that the Beneficiary will improve the operational systems and processes, and support policies to the organization of the mission; administrate and increase the efficiency and efficacy of the support services' plays an important role in long-term planning; supervise financial management, planning, and control systems; manage the budget of the company in coordination with the Executive Director; develop the budgets for individual programs; invoice financing sources; administer payroll; disburse checks for the expenses of the company; organize tax documents; periodically meet with the Board of Directors for fiscal planning; plan the annual budget of the organization; develop and administrate the annual budget; manage the day to day processing of accounts receivable and payable, producing reports in reference to what has been requested; conciliate monthly activity, year-end reports, and fulfill requirements related to taxes; assist the Executive Director and the Board in the creation of the annual budget; maintain the files of the archive and the administrative files of intersection; administer the payroll and benefits of employees; administer the insurance of the organization; ensure that the requests from the Department of Accounting are resolved and communicated opportunely to the internal and external parties; develop long term predictions and maintain long term financial plans; develop, maintain, and monitor all the systems and procedures of funds collection and accounting; prepare annual auditing; administrate functions; increase the efficacy and efficiency of support services; and provision consulting services in subjects related with the collection of funds, fiscal and insurance issues, and the company's structure and growth.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary, when the petition was filed, merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Here, in response to the RFE, the Petitioner omitted many of the above-referenced duties, stating that the Beneficiary would introduce data, accounts, payrolls, and reports to the Board of Directors, guarantee organizational effectiveness and provide leadership for the financial activities of the organization, and contribute to the development and implementation of strategies of the company. It appears that the Petitioner attempted to alter the Beneficiary's role within the foreign entity in order to demonstrate that he manages the business as Director of Operations. However, although the Beneficiary may manage the Petitioner's finances, as numerous duties reference budget and fiscal issues, it is not evident that he manages the business. Furthermore, even if it were established, by a listing of duties, that he manages the business of the foreign entity, the Petitioner has not established that he has sufficient subordinate staff to perform the non-qualifying tasks associated with producing a product or providing a service of the business. The information provided by the Petitioner in its response to the RFE did not clarify or provide more specificity to the original duties of the Beneficiary's position abroad, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The Beneficiary's duties as initially described do not offer any clarification regarding his actual duties at the foreign entity. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The Petitioner has not provided any detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Further, in light of the newly described duties in response to the RFE, the Petitioner did not provide any additional information pertaining to how much time the Beneficiary devotes to each duty. Given the evolving description of the Beneficiary's duties at the foreign entity, we are unable to determine whether the few claimed managerial duties would constitute the majority of the Beneficiary's time. Even if we were to consider the Beneficiary's newly described duties, the description does not establish what proportion of his duties are managerial in nature, and what proportion are non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

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* section 101(a)(44)(A)(ii) of the Act. Here, the foreign entity's organizational chart, submitted in response to the RFE, shows the Beneficiary directly supervising seven subordinates, four with supervisory titles, and three administrative assistants. The Petitioner submitted position descriptions for each along with what appears to be an untranslated payroll document listing 16 employees and two Directors employed from October 2014 to February 2015. Again, we have found several inconsistencies with that payroll document, as outlined at Section B above, and, as such, cannot conclude that the foreign entity actually employed individuals in the positions subordinate to the Beneficiary, such that they would relieve him from performing non-qualifying duties for the business. Regardless, even if the Beneficiary supervises the listed subordinate staff, the Petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. As the record neither contains information establishing the actual employment of these individuals, nor evidence regarding the specific duties and education of the claimed subordinate employees, we cannot determine whether these individuals hold managerial, supervisory, or professional positions.

The statutory definition of the term “executive capacity” focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* 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.* While the definition of “executive capacity” does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the Petitioner did not demonstrate that the Beneficiary's duties abroad primarily focus on the broad goals and policies of the organization rather than on its

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day-to-day operations. The job duties as described do not demonstrate that the Beneficiary focuses the majority of his time on executive duties rather than the day-to-day operations of the business.

Additionally, the Director specifically noted that, despite the submission of two leases for restaurant locations, it did not specify at which location the Beneficiary worked. The Petitioner did not provide clarification regarding the location at which the Beneficiary and his direct subordinates, all of whom the Petitioner states were directly employed by the foreign entity and not one of the restaurants abroad, perform their duties. Again, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not prevail without competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

## 2. U.S. Employment

The Petitioner intends to employ the Beneficiary as its Operations Manager. On the Form I-129, the Petitioner indicated that it operates a “restaurant” business with seven current employees and a gross annual income of \$804,163.00. In its March 12, 2015 letter of support, the Petitioner claimed that it has already opened two restaurants in [REDACTED] Florida: [REDACTED] and [REDACTED]

The Petitioner contends that [REDACTED] and [REDACTED] are both equally owned by the Petitioner and [REDACTED]

In support of this contention, the Petitioner submitted the 2014 IRS Form 1065, U.S. Return of Partnership Income, for [REDACTED] indicating that it paid \$5,050.00 in salaries and wages during 2014. It also submitted [REDACTED] Schedules K-1, Partner’s Share of Income, Deductions, Credits, etc., stating that the Beneficiary owned 97% of the company at the beginning and at the end of the tax year and that [REDACTED] owned the remaining 3% of the company also at the beginning and at the end of the tax year.

The Petitioner also submitted the 2014 IRS Form 1065 for [REDACTED] indicating that it paid \$47,155.00 in salaries and wages during 2014. [REDACTED] Schedules K-1, also included, indicated the following about its ownership:

- [REDACTED] owned 95% of the company at the beginning of the tax year and 3% of the company at the end of the tax year.
- [REDACTED] owned 5% of the company at the beginning of the tax year and 1% of the company at the end of the tax year.
- The Beneficiary owned 95% of the company at the beginning and at the end of the tax year.
- [REDACTED] owned 1% of the company at the beginning and at the end of the tax year.

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The sum of the Schedules K-1 indicates that there was 196% ownership of [REDACTED] at the beginning of the tax year and 100% ownership of [REDACTED] at the end of the tax year.

Finally, the Petitioner submitted the exact same (untranslated) organizational charts for [REDACTED] and [REDACTED] as it submitted for the foreign entity.

In response to the RFE, the Petitioner submitted a letter, dated June 15, 2015, specifically stating that the Petitioner “owns 50% of [REDACTED] and [REDACTED]. The Petitioner submitted a copy of Member Certificate No 01 for [REDACTED] dated March 11, 2015, certifying that [REDACTED] is a member of the limited liability company with a member’s interest of 50%. The Petitioner submitted a copy of Member Certificate No 02 for [REDACTED] dated March 11, 2015, certifying that the Beneficiary is a member of the limited liability company with a member’s interest of 50%. The second page of the Member Certificate No 02 states that the Beneficiary transfers his whole membership interest in [REDACTED] to the Petitioner, also on March 11, 2015.

The Petitioner also submitted a copy of Member Certificate No 01 for [REDACTED] dated March 11, 2015, certifying that the Beneficiary is a member of the limited liability company with a member’s interest of 50%. The second page of the Member Certificate No 01 states that the Beneficiary transfers his whole membership interest in [REDACTED] to the Petitioner, also on March 11, 2015. The Petitioner submitted a copy of Member Certificate No 02 for [REDACTED] dated March 11, 2015, certifying that [REDACTED] is a member of the limited liability company with a member’s interest of 50%.

In denying the petition, the Director noted that while the Petitioner claimed to be a holding company for the two restaurants, the evidence did not establish that either restaurant entity has any relationship to the Petitioner. The Director concluded that given that the lack of evidence establishing that the Petitioner is or will be a holding company of the two restaurants, and the lack of evidence that there is a legally binding agreement between the entities to provide the management of the entities as claimed by the Petitioner, it was not possible to determine that the new office will support a qualifying executive or managerial capacity position within one year of petition approval.

On appeal, the Petitioner states that the 2014 K-1 tax documents could not reflect the current ownership of the subsidiary restaurants in the United States because the Petitioner was established in [REDACTED]. The Petitioner then references the organizational charts submitted for the three restaurants in Venezuela.

As the Petitioner claims to operate as a “holding company” of both restaurants, and more in the future, and the Beneficiary’s position is dependent on the Petitioner’s ownership of these restaurants, this matter is relevant to these proceedings. Here, the Petitioner claims that it owns 50% of Super [REDACTED] and 50% of [REDACTED] and in support of this claim, it submits 2014 tax documentation and Share Certificates for each company.

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According to the 2014 Schedule K-1 for [REDACTED] the Beneficiary owned 97% of the business and [REDACTED] owned the remaining 3% of the business. Then, on March 11, 2015, [REDACTED] issued Share Certificate No 01 to the Beneficiary for 50% of its business and Share Certificate No 02 to [REDACTED] for the remaining 50% of its business. On the same date of March 11, 2015, the Beneficiary transferred all of his shares to the Petitioner. As previously noted in this decision, the Petitioner did not submit a stock ledger or explain why the Share Certificates issued in March 2015 were numbered one and two when there was previous ownership of shares by two individuals reflected in its 2014 taxes. The record lacks evidence regarding the transfer of shares from the Beneficiary to [REDACTED] such that he would have gone from 3% ownership to 50% ownership in March 2015 and such that the Beneficiary would have gone from 97% ownership to 50% ownership also in March 2015.

Second, according to the 2014 Schedule K-1 for [REDACTED] the Beneficiary had 95% ownership of the business at the beginning and at the end of the tax year, [REDACTED] had 95% ownership of the business at the beginning of the tax year and 3% ownership at the end of the tax year, [REDACTED] had 5% ownership of the business at the beginning of the tax year and 1% ownership at the end of the tax year, and [REDACTED] had 1% ownership of the business at the beginning and at the end of the tax year. Then, on March 11, 2015, [REDACTED] issued Share Certificate No 01 to [REDACTED] for 50% of its business and Share Certificate No 02 to the Beneficiary for the remaining 50% of its business. On the same date of March 11, 2015, the Beneficiary transferred all of his shares to the Petitioner. As discussed above, the Petitioner did not submit a stock ledger explain why the Share Certificates issued in March 2015 were numbered one and two when there was previous ownership of shares by four individuals at a minimum of five transactions reflected in its 2014 taxes. The record lacks evidence regarding the transfer of shares from the four named individuals such that the Beneficiary would have gone from 95% ownership to 50% ownership in March 2015 and such that [REDACTED] would have gone from 3% ownership to 50% ownership also in March 2015.

The record as constituted does not establish that the Petitioner owns and controls these two restaurants in the United States. Further, even if it were established that the Petitioner owned 50% of the shares for each of the restaurants in the United States, it would not be sufficient to establish control over the restaurants such that it could be considered a “holding company” as claimed. Given this fact, we are precluded from determining whether a bona fide job offer actually exists.

When a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally* 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Here, although the Petitioner claimed to have two restaurants and seven employees in the United States at the time of filing, these restaurants are not managed by the Petitioner as a holding company as originally asserted. Aside from these two unaffiliated restaurants, the Petitioner submits no evidence establishing that it has acquired sufficient physical premises at which to employ the Beneficiary in the capacity claimed. The Petitioner did not sufficient evidence to illustrate its staffing plan for its business and, in response to the RFE, it submitted an organizational chart that did not list the Beneficiary's name in any position on the chart. Although the chart indicates that the "Director of Operations" directly supervises one Administrative Supervisor who will then supervise the Shop Supervisors for the existing two restaurants, any claims pertaining to the existing two restaurants and their organizational structures are irrelevant for purposes of this analysis.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States within one year of approval of the new office petition. Accordingly, the appeal will be dismissed.

### 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-A-G-, Inc.*, ID# 15782 (AAO Mar. 15, 2016)