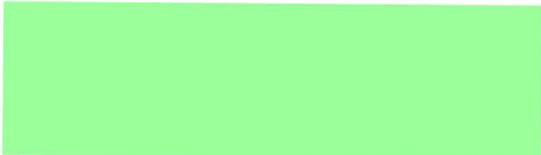


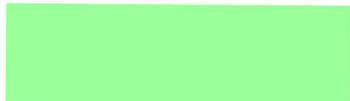


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 28 2013 Office: TEXAS SERVICE CENTER



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

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Texas Service Center, initially approved the immigrant visa petition. The director subsequently issued a notice of intent to revoke the approval of the petition, and, after reviewing the petitioner's rebuttal evidence, issued a notice of revocation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this immigrant petition seeking to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Texas corporation established in November 1998, states that it operates a retail trade and investment business. The petitioner claims to be a subsidiary of [REDACTED] located in Karachi, Pakistan. The petitioner seeks to employ the beneficiary in the position of Vice President of Operations.

The director initially approved the immigrant visa petition on June 29, 2011. On March 13, 2012, the director issued a notice of intent to revoke, and ultimately revoked the approval of the petition on May 24, 2012, based on a finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a qualifying 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 for review. On appeal, counsel for the petitioner asserts that the petitioner established by a preponderance of the evidence that the beneficiary will be employed in a qualifying managerial or executive capacity and that the director did not have good and sufficient cause to revoke the approval of the petition. Counsel submits a brief and duplicate copies of evidence previously submitted in support of the appeal.

I. THE LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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

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

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

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

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

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on October 1, 2009. The petitioner indicated on the Form I-140 that it engages in retail trade and investment with 10 current employees and a gross annual income of \$6M. In a letter dated September 25, 2009, the petitioner stated that the U.S. company "owns and operates gas stations and a multi-service shopping plaza called ([REDACTED] consisting of a fully [sic] service truck stop, restaurant, gas station and mini mart, and a motel in [REDACTED] Texas."

In support of the petition, the petitioner submitted a letter describing the beneficiary's proposed duties as follows:

As a Vice President of Operations for [the petitioner], [the beneficiary] will be one of the key U.S. contacts for the shareholders and directors of the parent company. [The beneficiary] will be employed at one of the highest positions within the U.S. Company, and will oversee managers who supervise employees who run day-to-day operations. In sum, [the beneficiary], will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run

the operations, supervising all financial aspects of the company and developing policies and objectives for the company.

As the Vice President of Operations for [the petitioner], [the beneficiary] will be one of the key U.S. contacts for the shareholders and directors of the parent company. [The beneficiary] will be employed at one of the highest positions within the U.S. Company, and will oversee the operations of [redacted] which includes a Truck Stop & Grocery Store, Restaurant, and a Motel on the premises of [redacted]. She will supervise upper level managers who operate the daily activities of the business (restaurant manager, the gas station and grocery store manager, and the motel manager).

[The beneficiary] is responsible for all our planning, expansion, investment, budgeting, and marketing. In addition, she will hire and assign other managers and employees and will be in charge of increasing the sales of the company. She will be employed at one of the highest executive levels and will have complete authority to establish goals and policies and exercises [sic] discretionary decision-making authority based upon policies and procedures developed by President and other shareholders. [The beneficiary] will assume sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation. Under [the beneficiary's] supervision, Petitioner expects to experience increase in the number of employees, significant growth in cash flow, and presence of significant customers creating a demand to employ [sic] a fulltime permanent executive.

Breakdown of Percentage of Time to be Spent on each Duty:

- Responsible for managing and supervising managers who will report directly to her. (15% Time Spent)
- Establishing sales and marketing goals, setting company policies relating to employment and product pricing. (20% Time Spent)
- Reviewing activity reports and financial statements to determine the progress of the business and make recommendations to President and Vice President. (25% Time Spent)
- Aiding in formulating and administering policies of the organization and having final authority on all business activities with limited involvement of President and Vice President. (20% Time Spent)
- Reviewing new business locations and making recommendations to the Board of Directors on potential acquisitions or establishment of new retail locations. (10% Time Spent)
- Hiring and firing of managerial staff[.] (10% Time Spent)

[The beneficiary] will supervise other professional and managerial employees, establish goals and policies for the U.S. investment, and exercise wide latitude in discretionary decision-making under the direction of President, directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Executive or Managerial" in nature and are consistent with [the Act].

The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2009 indicating that it had 10 employees and paid \$30,824.99 in wages, tips, and other compensation. According to the petitioner's Texas Employer's Quarterly Report for the same quarter, the petitioner reported four employees in April 2009, 11 employees in May 2009 and 10 employees in June 2009. The petitioner also submitted the company's Wage Report History, which summarizes its quarterly filings with the Texas Workforce Commission. The petitioner reported paying \$0.00 in wages for the months of July 2008 through March 2009. The petitioner did provide copies of checks purportedly paid to employees in the first quarter of 2009, but did not explain why such wages were not reported to the State of Texas.

The petitioner provided an organizational chart for the U.S. company depicting a total of 23 employees, including the beneficiary. The beneficiary is depicted as the vice president of operations, reporting to the vice president, who reports to the president. The chart shows that the beneficiary supervises the manager of Siesta food store with one un-named subordinate staff and the manager of [REDACTED] who, in turn, supervises the manager of [REDACTED] with nine subordinate staff and the manager of [REDACTED] with six subordinate staff.

The petitioner further provided a list of job duties for the four employees claimed to be directly supervised by the beneficiary at the U.S. company. These employees included the managers of [REDACTED] the [REDACTED]. Only two of these four individuals, the manager of [REDACTED] and the restaurant manager, received wages during the second quarter of 2009, according to the company's Texas Employer's Quarterly Report. The restaurant manager earned quarterly wages (\$2,000) commensurate with part-time employment.

On April 15, 2011, the director issued a notice of intent to deny the petition. The director requested that the petitioner submit additional evidence to establish: (1) that the beneficiary was employed in a managerial or executive capacity abroad; (2) that it has a qualifying relationship with a foreign entity; (3) that it has been doing business in the United States for one year; and (4) that the beneficiary's proposed position at the U.S. company will be a managerial or executive assignment.

In response to the notice of intent to deny, counsel for the petitioner described the beneficiary's duties at the U.S. company as follows:

[The beneficiary's] position as Vice President of Operations would be considered a Managerial position for various reasons. A detailed assessment of the responsibilities required by the position of Vice President of Operations for the Petitioner demonstrates that this position indeed satisfies the requirements for an employment position to be considered as one with 'Managerial Capacity'. A position with "Managerial Capacity" means an assignment within an organization in which the employee primarily:

1. **Manages the organization, department, subdivision, functions and/or components.** (Establishing sales and marketing goals, setting company policies relating to employment and product pricing –20% Time Spent) (Reviewing activity reports and financial statements to determine the progress of the business and make recommendations to President and Vice President –25% Time Spent)

* * *

- 2. **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.** (Responsible for managing and supervising managers who will report directly to her –15% Time Spent)

* * *

- 3. **Has the authority to hire and fire subordinate employees, or if no other employee is directly supervised, functions at a senior level within the organization hierarchy or with respect to the function managed.** (Hiring and firing of managerial staff directly subordinate to [the beneficiary] –10% Time Spent)

* * *

- 4. **Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.** (Aiding in formulating and administering policies of the organization and having final authority on all business activities with limited involvement of President and Vice President –20% Time Spent) (Reviewing new business locations and making recommendations to the Board of Directors on potential acquisitions or establishment of new retail locations –10% Time Spent)

* * *

[The beneficiary] will supervise other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Managerial" in nature and are consistent with [the Act].

[The beneficiary's] direct subordinates will be the department managers She also worked with the company's Accountant. The Accountant is a professional. The Managers have over 20 years of management experience. These department managers manage store managers and staff who are responsible for day-to-day functions.

Executive/Owner: President [redacted]
 Vice President Acquisitions [redacted]

Managerial Executive: General Manager [redacted]

Professional: Accountant (outsourced to [redacted])
 First Line Managers Manager: [redacted]

Second Line Managers:

Day-to-Day Workers: Staff (i.e. Kitchen workers and Cashiers)

The petitioner provided a list of job duties for the "Manager, [REDACTED]" "Manager, [REDACTED]", "Manager, [REDACTED]" and "Manager, [REDACTED]"

The petitioner submitted its IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2010 indicating that [REDACTED] paid \$98,187.77, Siesta paid \$10,038.47, and [REDACTED] paid \$90,890.12 in wages, tips, and other compensation. The petitioner reported \$173,974 in salaries and wages on its IRS Form 1120, but indicated on its Form W-3 that it paid \$199,116.36. The petitioner also submitted copies of its Texas Employer's Quarterly Reports for all four quarters 2010 and the last two quarters of 2009. The petitioner reported 13 employees as of September 2009. The petitioner paid total wages of \$154,285 in 2009.

In the Notice of Intent to Deny, the director had also noted that the petitioner claimed to employ only 10 employees and that it appeared that the majority of them were part-time employees. Accordingly, the director asked that the petitioner explain how the support staff is sufficient to relieve the petitioner's managerial staff from involvement in the day-to-day operations of the several businesses the company operates. In response, the petitioner explained that the company was impacted by Hurricane Ike in September 2008 and that one of its locations was undergoing renovations for much of 2009, thus impacting its normal business operations and payroll.

On the basis of this information, the director initially approved the petition on June 29, 2011.

On March 13, 2012, the director issued a notice of intent to revoke the approval of the petition based on a finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director observed that the record lacked sufficient evidence to determine that the beneficiary would be functioning primarily within a qualifying managerial or executive capacity. The director further observed that while the beneficiary is claimed to supervise the managers of [REDACTED]

the evidence does not clearly establish that the beneficiary's direct subordinates are professional, managerial, or supervisory employees based on their described job capacities. In addition, the director observed that the petition lacked sufficient evidence that the firm's staffing would be of sufficient size and composition to support an executive or managerial position.

In response to the notice of intent to revoke, counsel for the petitioner provided the following description of the beneficiary's duties at the U.S. company:

As Vice President of Operations, [the beneficiary] is responsible for:

- Planning and developing the operations of the U.S. entity;

- Developing, organizing and establishing operations pertaining to the purchase, sale and marketing of merchandise for sale in the U.S. market;
- Identifying, recruiting and building a management team and staff with background and experience in the U.S. retail market;
- Executing or recommending personnel actions and establishing a management team to run daily operations;
- Ensuring the marketing of products to consumers according to the parent company's guidelines;
- Developing operational policies and objectives;
- Developing trade and consumer market strategies based on guidelines formulated by the parent company;
- Negotiating prices and sales terms and formulating pricing policies and advertising techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

The petitioner provided a breakdown of the beneficiary's duties that was essentially identical to the description it had submitted in response to the notice of intent to deny. The petitioner stated that the company had approximately 17 employees at the time of its response to the notice of intent to revoke.

The petitioner provided a new organizational chart, updated April 1, 2012, which included 21 employees. The beneficiary is depicted as the vice president of operations, reporting directly to the president; lateral to the beneficiary is the vice president of acquisitions, also reporting directly to the president. The new chart shows that the beneficiary directly supervises the "general and operations manager," who then supervises the manager of [REDACTED], the manager of [REDACTED] and the manager of [REDACTED] (convenience store). The manager of [REDACTED] supervises one assistant manager, one cashier, one kitchen staff/cashier, and three kitchen staff; the manager of [REDACTED] supervises five cashiers; and the manager of [REDACTED] supervises three cashiers.

The petitioner further provided a new list of job duties for the "President," "Vice President Acquisitions," "Vice President Operations," "General and Operations Manager," "Accountant," the three individual "Managers," the "Assistant Manager," and the "Kitchen Staff, Cashiers and Clerks."

The petitioner submitted a payroll summary dated March 20, 2012 to April 12, 2012 listing 17 employees, including the beneficiary. The petitioner also submitted its IRS Form 941 for the first quarter of 2012 indicating that it had 14 employees and paid \$40,584.38 in wages, tips, and other compensation.

The director revoked the approval of the petition on May 24, 2012, concluding that the petitioner failed to establish that the position offered to the beneficiary in the United States is in a qualifying managerial or executive capacity. In revoking the approval, the director found that the petition lacked sufficient evidence that the firm's staffing will be of sufficient size and composition to support and executive or managerial position. The director further found that the petitioner's description of the beneficiary's job assignment did not clearly convey that the beneficiary would devote the primary part of her time to qualifying duties. The director also observed that the beneficiary's direct subordinates are not performing primarily in professional, managerial, or supervisory capacities.

On appeal, counsel for the petitioners asserts, "it is very clear that the beneficiary . . . will supervise other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the director of directors and shareholders of the Parent company." Counsel asserts that the petitioner met its burden to establish that by a preponderance of the evidence that the beneficiary will be employed in a qualifying managerial or executive capacity. Counsel submits duplicate copies of its response to the notice of intent to deny and notice of intent to revoke.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in the United States in a primarily executive or managerial capacity. The petition was approved in error and the director had good and sufficient cause to issue a notice of intent to revoke.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). 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, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner'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 petitioner's business, and any other factors that will contribute to a complete understanding of 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 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").

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in a primarily managerial or executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate how these duties qualify her as a manager or executive. Here, the petitioner characterized the beneficiary's role as vice president of operations noting that she will: "supervise upper level managers who operate the daily activities of the business (restaurant manager, the gas station and grocery store manager, and the motel manager)"; "hire and assign other managers and employees and will be in charge of increasing the sales of the company"; "have complete authority to establish goals and policies and exercise discretionary decision-making authority"; and "assume sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation." The petitioner failed to identify the specific duties the beneficiary would perform with respect to any of these areas of responsibility. 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).

In response to the notice of intent to deny and the notice of intent to revoke, counsel for the petitioner submitted the exact same list of broad job duties with accompanying percentages of time the beneficiary spends performing those duties, noting that she will: "[e]stablish sales and marketing goals, setting company policies relating to employment and product pricing (20% Time Spent)"; "[r]eview activity reports and financial statements to determine the progress of the business and make recommendations to President and Vice President (25% Time Spent)"; "[be] [r]esponsible for managing and supervising managers who will report directly to her (15% Time Spent)"; "[h]ir[e] and fir[e] managerial staff directly subordinate to [the beneficiary] (10% Time Spent)"; "[a]id in formulating and administering policies of the organization and having final authority on all business activities with limited involvement of President and Vice President (20% Time Spent)"; and "[r]eview new business locations and mak[e] recommendations to the Board of Directors on potential acquisitions or establishment of new retail locations (10% Time Spent)." These general statements fail to offer any clarification to the petitioner's original position description and fall considerably short of clarifying the beneficiary's duties and how those duties qualify the beneficiary as an executive or a manager. 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. Although counsel for the petitioner delves into each component of the statutory definition of managerial capacity, she merely restates the general responsibilities within the corresponding section of the statute and fails to provide further insight as to the beneficiary's actual tasks in carrying out those duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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.¹ 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

¹ In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

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).

At the time of filing, the petitioner stated that the beneficiary will supervise the manager of [REDACTED], the manager of [REDACTED], the manager of [REDACTED], and the manager of [REDACTED]. In response to the notice of intent to revoke, the petitioner provided a new organizational chart indicating that the vice president of operations has one direct subordinate, the "general and operations manager," who oversees the managers of the petitioner's various businesses. The petitioner also submitted new job duties for each of the beneficiary's subordinates; however, this new organizational chart and operational hierarchy cannot be considered as a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Based on the original list of job duties provided for each of the beneficiary's claimed subordinates, the petitioner did not establish that the beneficiary's subordinates are supervisory, professional, or managerial, other than in position title alone. For example, the petitioner stated that the convenience store managers are responsible for performing routine duties such as taking inventory, preparing merchandise displays, reconciling daily cash register receipts, and record-keeping. Further, the petitioner did not adequately describe the personnel structure of the four separate operating components the beneficiary is claimed to manage. It initially identified the majority of its employees only as "staff" and did not indicate how non-managerial work is distributed within the stores, travel plaza, motel or restaurant. In response to the notice of intent to revoke, the petitioner described some of the "staff" as cashiers or kitchen staff and provided a brief description of job duties for "kitchen staff, cashiers and clerks."

In addition, the petitioner did not establish that each of the operating components of the company were fully staffed with employees to perform the operational, administrative and day-to-day functions of each respective business. The petitioner submitted an organizational chart at the time of filing which identified 23 employees. The petitioner stated on the Form I-140 filed on October 1, 2009 that it had 10 employees at the time the petition was filed and did not attempt to reconcile this statement with the submitted organizational chart. Comparing the petitioner's Texas Employer's Quarterly Report for the third quarter of 2009 with the concurrently filed organizational chart, it is possible to verify the employment of three restaurant staff, three [REDACTED] staff, the [REDACTED] manager, and the Vice President of Acquisitions. There is no additional overlap between the names identified on these two documents. The petitioner did not report any wages paid to the manager or staff of the [REDACTED] or evidence of wages paid to the restaurant manager during the third or fourth quarters of 2009. The AAO acknowledges the petitioner's claim that it was impacted by Hurricane Ike in the last quarter of 2008, but a review of the petitioner's quarterly wage reports for 2009 and 2010, along with information provided regarding the company's quarterly wage filing history suggests that the company's staffing levels had returned to normal by the time the petition was filed. The record reflects that the petitioner reported 10 or fewer employees for five months during 2010, so it cannot be determined that the 10 employees reported at the time of filing was low due to a residual impact from the hurricane.

The record reflects that the petitioner's number of employees varies from month to month, but there is no evidence that the company has employed 23 employees at any given time, and certainly not at the time of filing or at any time since then. Therefore, the organizational chart provided at the time of filing is inconsistent with other evidence in the record pertaining to the company's staffing levels. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, as noted above, the petitioner indicated that it had a staff of only 10 at the time the petition was filed and has not indicated how this staff was distributed among its multiple stores, its motel and travel plaza, and its restaurant. Given that the organizational chart provided at the time of filing identified 10 staff working in the restaurant alone, the petitioner has not established that the beneficiary's direct subordinates, or the beneficiary, would be relieved from involvement in the company's day-to-day operations.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates, based on the staffing levels at the time of filing, perform the actual day-to-day tasks of operating a motel, multiple retail stores and a restaurant. 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 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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In the instant matter, the petitioner has not established that the beneficiary will be employed as a function manager. Although counsel for the petitioner states, in response to the notice of intent to deny, that "[the beneficiary] will also be managing the essential functions of the business development and operations, which will determine the future success of the Company[.]" the petitioner does not make that claim elsewhere in the record. Additionally, the petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate she manages an essential function of the U.S. company. In fact, according to the list of duties submitted on appeal, the beneficiary spends only 10% of her time on "[r]eviewing new business locations and making recommendations to the Board of Directors on potential acquisitions or establishment of new retail locations." Accordingly, the evidence in the record does not support the claim that the beneficiary will manage the essential function of business development and operations for the U.S. company or that she will otherwise primarily perform the duties of a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be 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.* The petitioner in this case claims that the beneficiary performs in a managerial capacity. Here, the petitioner has not established that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on oversight of the day-to-day operations of its existing convenience stores, restaurant, travel plaza and motel, and its personnel.

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner indicates that the beneficiary has four direct subordinates, a manager of [REDACTED], a manager of [REDACTED], a manager of [REDACTED], and a manager of [REDACTED] who supervise additional employees. Due to the broad position descriptions and lists of job duties for the beneficiary, and the short and vague description of job duties provided for the beneficiary's subordinates, it remains unclear how the subordinates will relieve the beneficiary from performing other non-qualifying administrative and operational duties. Further, the evidence does not establish that all of the beneficiary's direct subordinates were actually employed as of the date of filing, and, as discussed above, the petitioner has not adequately explained how the petitioner's claimed staff of 10 to 13 total employees would be able to perform the day-to-day operations of a restaurant, a motel, a truck stop/travel plaza and two convenience stores without the involvement of its six claimed managerial employees.

Based on the petitioner's failure to provide a detailed description of the beneficiary's actual job duties and the failure to provide a consistent and credible description of its organizational structure, it has not established

that the beneficiary would be employed in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.