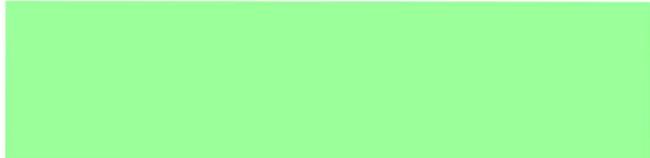




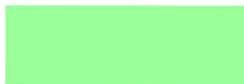
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **NOV 26 2014**

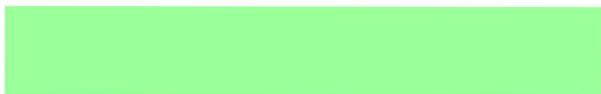
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

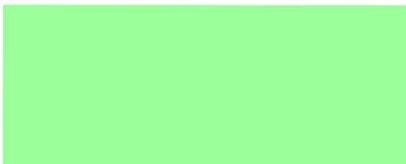
Petitioner:

Beneficiary:



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:

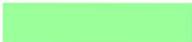
Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office



DISCUSSION: The Director, Texas Service Center ("the director"), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker (Form I-140), to classify the beneficiary as a multinational manager or executive 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, operates a "retail" business and claims to employ six individuals. It seeks to employ the beneficiary as its president/chief executive officer.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. On appeal, counsel for the petitioner asserts that the petitioner has demonstrated that the beneficiary satisfies the requirements necessary for approval of the petitioner's I-140 petition.

The record of proceeding before us contains: (1) the petitioner's Form I-140 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and a brief in support of the appeal. We reviewed the record in its entirety before issuing this decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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.

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Additionally, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged or will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act.

II. U.S. EMPLOYMENT

The issue on appeal is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

A. Facts

In the initial January 5, 2013 letter submitted in support of the petition, the petitioner noted that it is "in the business of retail trade along high-traffic locations, providing services related to vehicular needs, tobacco products, and household items." The petitioner provided its corporate documents showing it was incorporated in June [REDACTED]. The petitioner indicated that [REDACTED] a company whose registered office is situated in the Province of [REDACTED] owned 51 percent of the petitioner. The petitioner provided the beneficiary's responsibilities as the president and chief executive officer of the petitioner as follows:

- Serving as the key U.S. contact for the shareholders and directors of the parent company;
- Planning and developing the U.S. investment;
- 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;
- Overseeing managers who in turn supervise subordinate employees in running day-to-day operations;
- Executing or recommending personnel actions and establishing a management team to run daily operations;
- Negotiating and supervising the drafting of purchase agreements;
- Ensuring the marketing of products to consumers according to the parent company's guidelines;
- Overseeing legal and financial due diligence processes and resolving any related issues;
- Supervising all financial aspects of the company;
- Developing organizational 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 added that the "[b]eneficiary 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 director of Senior Manager – Operations [sic] and shareholders of the Parent Company." The petitioner added further that the "[b]eneficiary will plan and direct the management for the petitioner through its own employees, as well as contract employees who perform the legal and accounting duties. The petitioner attributed the percentage of time the beneficiary would spend on categories of duties as: 25% on management decisions; 20% on company representation; 20% on financial representation; 10% on supervision of the company's day-to-day operations; 15% on business negotiations; and 10% on organizational developments.

The petitioner also submitted an undated organizational chart depicting the beneficiary as president and chief executive officer overseeing a vice president and general manager, who in turn is over a sales and marketing manager, a retail supervisor and an accountant. The organizational chart further depicts an assistant retail manager who supervises two cashier/clerks and reports to the retail supervisor. The accountant is shown as over a bookkeeper position. The record of proceeding also included a second undated organizational chart. The second chart depicts a president/chief executive officer over a vice president and general manager, who in turn is over a retail supervisor, who is over an assistant retail manager, who is over three cashier/clerks. The vice president and general manager is also shown over a bookkeeper position. The petitioner does not offer an explanation for the differences in the two submitted organizational charts.

The petitioner also provided a document accompanying the second organizational chart listing the petitioner's employees by name, title, location and educational achievement.² The document listed ten employees and identified their work location as the [REDACTED].

The record further included a document that provided descriptions of duties for a president/managing partner, a general manager/vice president, a bookkeeper/accountant, a retail manager, an assistant manager, and a sales associate/clerk. However, the description of duties for the president/managing partner refers to "[REDACTED]s," as the parent company and a Mr. [REDACTED] as the president/managing partner, and also identifies positions with different titles than found on either organizational chart. As this document evidently relates to a different company and beneficiary, it has been accorded no probative weight in this proceeding.

The service center director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director outlined the type of evidence that could be submitted.

² This document indicates the company was founded in [REDACTED] in the State of Texas. The petitioner does not explain this date which contradicts the petitioner's Articles of Incorporation identifying the date of incorporation as June [REDACTED].

In response, the petitioner asserted that the beneficiary's duties are primarily executive and managerial. In a letter, dated August 15, 2013, the director of the foreign entity claimed that the beneficiary will function in a managerial capacity at the petitioner. He outlined the four elements of managerial capacity as defined above and stated the following:

[The beneficiary] will personally manage the overall organization, as well as several major essential components and functions of the organization, while serving in the position of President and CEO of [the petitioner.] In this position, [the beneficiary] will have the responsibility of managing and overseeing the entire operation of the company, and for ensuring the successful deployment of the parent company's business operations in the United States. He will direct business operations, plan and develop U.S. investments, oversee financial activities, and formulate business policies that will guide the company. [The beneficiary] will also be responsible for handling marketing and business development, a significant component of a company such as [the petitioner] that wishes to successfully expand in a new market. In performing these and other duties, [the beneficiary] will effectively manage the company as well as its major components.

In his position as President and CEO of [the petitioner], [the beneficiary] will be responsible for supervising and directing the activities of other supervisory and professional employees. [The beneficiary] will be responsible for establishing a team of subordinate managers to run the company's daily operations. [The beneficiary] will directly supervise these subordinate managers and will be responsible for regularly monitoring their progress. These duties clearly demonstrate that [the beneficiary] will be employed in a supervisory position over other supervisory and professional employees. Alternatively, [the beneficiary's] responsibility for managing the company's essential functions of business development, marketing, and financial operations further demonstrates the managerial nature of this position.

In the position of President and CEO, in which he will hold supervisory discretion over business functions and personnel, [the beneficiary] will have the authority to recruit and hire new employees to supplement the growth of the company. [The beneficiary] will be responsible for selecting and hiring any new employees, and for ensuring that these employees are properly trained. Additionally, [the beneficiary] will hold the authority to take disciplinary action or dismiss employees based on misconduct or other qualifying grounds, in order to ensure the efficient operation and integrity of [the petitioner]. Alternatively, [the beneficiary's] complete supervisory authority over the U.S. Company will place him in a senior level within [the petitioner's] hierarchy with respect to all of the essential functions that he will manage.

[The beneficiary's] capacity as President and CEO of [the petitioner] will place him in a position to exercise discretion over the operations, activities, and functions of the company. In addition to overseeing the hiring and discharging of employees, [the beneficiary] will have the authority to develop and implement company policies and objectives and to establish areas of program improvement or policy change. The policies and objectives to be developed

by [the beneficiary] will effectively establish routines and functional guidelines for the operations of the company. In addition, he will be responsible for further developing and implementing the company's business plan and developing plans for further expansion, both of which are critical to the successful expansion of the company. Further, he will be instrumental in negotiating and supervising the drafting of purchase agreements, developing trade and consumer market strategies, overseeing legal and financial due diligence processes, and coordinating the leasing of equipment and retail distribution facilities. These duties to be performed by [the beneficiary] in his position of President and CEO clearly demonstrate the scope of his employment.

The foreign entity reiterated that the beneficiary continues to establish the U.S. operations and that he is responsible for all planning, expansion, banking, budgeting, and marketing.

The petitioner's response to the RFE included a third organizational chart. This iteration depicts the beneficiary as president/CEO over a manager of the petitioner's [REDACTED] and [REDACTED].³ The manager is shown to supervise an assistant manager for each separate business. One assistant manager is depicted over three cashiers and a bookkeeper and one assistant manager is depicted as over two cashiers and a stocker. The petitioner also provided a document accompanying the organizational chart listing the petitioner's employees by name, title, location and educational achievement.⁴ Three of the cashiers and the stocker are identified by incomplete names. The petitioner submitted a document that further sets out generalized descriptions for the claimed positions within the petitioner's organization. The document identifies the positions as president/CEO, vice president/general manager, retail manager/assistant retail manager, and cashier/sales clerk.

The petitioner also submitted copies of its Internal Revenue Service (IRS) Form 941 Employer's Quarterly Federal Tax Return, for the first quarter of 2013, the quarter in which the petition was filed. The IRS Form 941 shows that the petitioner employed eight individuals and paid \$27,975 in wages, tips and other compensation. The transcript listing the employees for the 2013 first quarter identifies nine individuals. As the petitioner has not identified all of its employees with complete names it is not possible to accurately compare all the individuals listed on the petitioner's organizational chart with their quarterly wages for the first quarter of 2013. The IRS Form 941 confirms the employment of individuals in the positions of president/CEO (the beneficiary's position), the manager's position, one assistant manager, the bookkeeper, and two cashier positions. It is not possible to ascertain the title of the positions of the remaining individuals listed on the Form 941. The record also included an undated summary and projection of sales and payroll expenses report prepared by a bookkeeping and tax service.

The director reviewed the petitioner's submissions and determined that the petitioner had not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

³ The record does not include any documentary evidence establishing the petitioner's purchase or operation of an asset identified as [REDACTED].

⁴ This document indicates the company was founded in [REDACTED] in the State of Texas. The petitioner does not explain this date which contradicts the petitioner's Articles of Incorporation identifying the date of incorporation as June [REDACTED].

On appeal, the petitioner issue with the director's analysis of the beneficiary's duties for the petitioner and asserts that the beneficiary's duties are primarily "executive management" duties. The petitioner claims that the beneficiary spends the majority of his time on operational and policy management while the supervision of lower-level employees is relegated to managers and assistant managers of individual retail stores. The petitioner concludes: "[f]or all intent and purposes this evidence supports the description of [the beneficiary] as a functional manager."

B. Analysis

Here we seek to determine whether the petitioner provided sufficient evidence to establish that the beneficiary more likely than not will allocate his time primarily in the performance of tasks that are within a qualifying managerial or executive capacity.

In 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. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts that contribute to understanding a beneficiary's actual role within a given entity. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations. When considering the totality of the record, the petitioner has not described a position that will actually primarily encompass managerial or executive duties.

It is important to note that the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Preliminarily, we observe several material discrepancies in the documentation submitted in support of the petition. First, the petitioner provides three different organizational charts, each identifying different levels of responsibility and management hierarchy. Moreover, the petitioner states on the Form I-140 petition that it employs six persons and provides an IRS Form 941 that indicates it employs nine persons.⁵ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any

⁵ The petitioner does not provide a list of the employees specifying the number of hours and week(s) they worked for each of the three months included in the IRS Form 941 for the first quarter of 2013. Nor does the petitioner indicate when these individuals were hired and/or fired. Thus, the record is insufficient to corroborate the petitioner's actual number of employees and their roles within the petitioner's organization when the petition was filed.

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). Accordingly, the petitioner's actual organizational structure cannot be determined.

In addition, the petitioner, in the third organizational chart, identifies a new asset as part of the petitioner's organization. Yet, the record contains no documentation supporting the petitioner's purchase or operation purchase of this additional asset, evidently a second retail store. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Additionally, some of the employees initially identified as working at the petitioner's food mart, are now identified as working at the new asset. However, the record includes no evidence that the petitioner's claimed new asset had been purchased when the petition was filed. 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).

These inconsistencies directly relate to the scope of the petitioner's business. The lack of consistent information and documentation corroborating the petitioner's hierarchal structure and the positions the petitioner's employees hold, cast doubt on the nature of the petitioner's business. If USCIS fails to believe that an asserted fact stated in the petition is true, USCIS may reject that assertion. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, when considering the descriptions of the beneficiary's duties for the petitioner, we find the descriptions general. For example, the petitioner does not explain what duties are involved in "[p]lanning and developing the U.S. investment." Moreover, the record includes no documentation or any statements demonstrating how the beneficiary performed or will perform this duty. The petitioner indicates that the beneficiary will "[d]evelop[], organize[] and establish[] operations pertaining to the purchase, sale and marketing of merchandise for sale in the U.S. market." However, the petitioner does not identify the merchandise, if any, that the beneficiary will purchase, sell or market. In addition, the record does not include any evidence that the beneficiary performed or will perform this duty. Although the petitioner indicates that the beneficiary will identify, recruit and build a management team, the petitioner also claims that it already employs a manager and an assistant manager. Thus, it is not clear what the petitioner actually expects the beneficiary to do in the performance of this generally described duty. The petitioner does not identify the type of purchase agreements the beneficiary will negotiate and supervise. The petitioner fails to describe the specific duties associated with "[o]verseeing legal and financial due diligence" or "[s]upervising all financial aspects of the company."

In response to the director's RFE, the foreign entity did not clarify the duties of the position proffered here, but rather provided an additional generic and vague account of the beneficiary's expected duties. Essentially, the foreign entity recited broadly-cast business objectives and conclusory assertions regarding the beneficiary's employment capacity; however, the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide 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). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

Turning to the petitioner's claim that the beneficiary will primarily manage the organization through the supervision and direction of other supervisory and professional employees, we find the record does not support this claim.

The statutory definition of the term "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. 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. Section 101(a)(44)(A)(iii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iii).

In addition to the inconsistencies listed above, the record does not include a detailed description of the beneficiary's subordinates' duties sufficient to establish that these individuals are supervisory, managerial, or professional employees. The record includes generic descriptions of duties that do not convey what the individual in the position is doing. For example, the description of duties for the "manager" does not indicate he performs any supervisory duties, nor does the description explain what this individual manages, except to indicate generally that he "focuses more on smaller business operations within the company," "monitors consumer trends," and "address[es] customer satisfaction." There are no details that set out the actual tasks involved and there is no time component assigned to each of these duties. The brief, general description does not demonstrate that the position is a supervisory, managerial or professional position.⁶

⁶ In evaluating whether the beneficiary manages professional employees, we 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). Thus, the level of education required by the position, rather than the degree held by subordinate employee, is the focus of the determination. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that the employee is employed in a professional capacity as that term is defined above. In this matter, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties of its manager, assistant manager, bookkeeper, or cashier/clerks.

Similarly, the assistant manager's position is described generally. For example, the petitioner indicates that this "position requires dealing with analyzing consumer analysis and trends in order to make decisions regarding new products and services administered within the business." The petitioner does not explain who performs the consumer analysis or how the information for the analysis is gathered. In addition, the petitioner indicates that this person will conduct interviews and hire new employees, administer training sessions, create weekly work schedules and write performance evaluations. However, the petitioner does not provide any documentation corroborating these duties. Moreover, the record does not include evidence establishing what portion of the assistant managers' duties is devoted to any of the general tasks listed. The record is insufficient to establish that the assistant manager position primarily supervises or manages personnel or a function or is a professional position.

The record is insufficient to support the claim that the beneficiary is primarily a personnel manager as defined in the statute.

The record also does not include evidence establishing that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

Here, the petitioner has not clearly identified any particular function with specificity, has not articulated the essential nature of the function, and has not sufficiently established the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). We observe that the petitioner indicates that the beneficiary will be responsible for all the planning, expansion, banking, budgeting, and marketing. However, these tasks are operational and administrative tasks. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

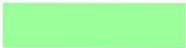
In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. For example, the petitioner does not provide evidence establishing that it employs individuals who perform the tasks associated with marketing the

business or who perform the financial tasks associated with operating a convenience store with a gas station or who perform the duties associated with expanding the business. Thus, the record is insufficient to establish that the petitioner employs individuals who will relieve the beneficiary from performing the non-qualifying tasks associated with planning, marketing, expansion, banking, and budgeting. Moreover, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, we cannot determine what proportion of his duties would be managerial or executive, nor can we otherwise deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The petitioner also has not established that the beneficiary performs in a primarily executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Other than paraphrasing the statutory definition of executive capacity in describing the beneficiary's claimed executive duties, the petitioner does not set out what actual executive tasks the beneficiary will perform. Again, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra*. Here, we again observe that the petitioner has not provided a consistent description of its organizational structure. To establish that a beneficiary performs primarily executive duties, the evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

We reiterate that inherent to the definition of executive capacity, 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. Here, the record indicates that it is more likely than not the beneficiary's subordinates perform the actual day-to-day tasks of operating the petitioner's convenience store and gas station. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The petitioner does not establish that the beneficiary performs duties that are primarily involved in directing the management or managing the organization, other than as a supervisor of non-professional, non-supervisory, or non-managerial employees.



We observe 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 section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In addition, a company's small size does not obviate the need to establish that a beneficiary is not primarily performing the duties of the organization. To establish such, the petitioner must fully and definitely describe the actual duties the beneficiary and his or her subordinates perform. Further, the petitioner must establish that the company currently has a reasonable need for the beneficiary to perform duties that are primarily in a managerial or executive capacity as those terms are defined in the statute. In this matter, the petitioner has failed to provide this essential evidence.

Upon review of the totality of the record, the petitioner has not established that the beneficiary's actual duties incorporate primarily executive or managerial functions. Accordingly, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

III. CONCLUSION

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, that burden has not been met.

ORDER: The appeal is dismissed.