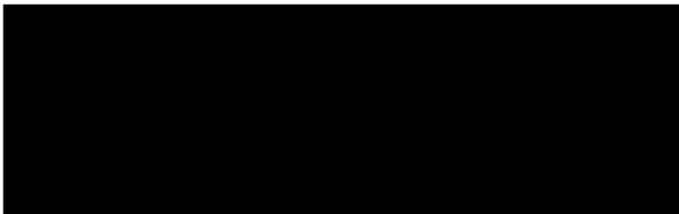




U.S. Citizenship
and Immigration
Services



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DATE: **DEC 28 2012**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

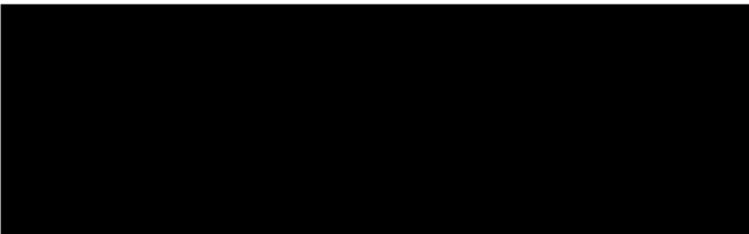
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

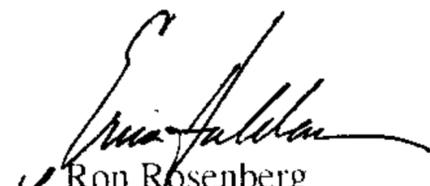


INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, states that it engages in the marketing and wholesale distribution of convenience store items and related products. The petitioner claims to be a subsidiary of AMN Builders, located in Karachi, Pakistan. The petitioner seeks to employ the beneficiary as its president/CEO for a period of two years.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a primarily 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 beneficiary acts as an executive and will not perform routine operational duties at the U.S. company. Counsel submits a brief and additional evidence on appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ 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.

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

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

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

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

II. THE ISSUE ON APPEAL

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 23, 2011. The petitioner stated on the Form I-129 that the beneficiary would be employed as president/CEO of the U.S. company and

indicated that the company had five employees as of the date of filing. In a letter dated August 17, 2011, the petitioner described the beneficiary's position as follows:

As President and CEO of [the petitioner], [the beneficiary] will be the key U.S. contact for the shareholders and directors of the parent company. [The beneficiary] will be employed at the highest position within the U.S. Company, and will oversee managers who supervise employees who run day-to-day operations, including having 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.

At [the petitioner], [the beneficiary] will hold the position of President and CEO. [The beneficiary] will have overall executive responsibility for developing, organizing, and establishing the purchase, sale, and marketing of merchandise for sale in the U.S. market. His other duties will include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) negotiating and supervising the drafting of purchase agreements; (iii) marketing products to consumers according to [the foreign entity's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sale terms, developing pricing policies and advertising techniques.

<u>Description of Duties</u>	<u>Time Spent %</u>
Management Decisions	40%
Company Representation	15%
Financial Decisions	10%
Supervision of day-to-day company functions	10%
Business Negotiations	15%
Organizational Development of Company	10%

* * *

[The beneficiary] will serve as President and CEO of our U.S. subsidiary, [the petitioner], and will continue to establish our U.S. operations. He is responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he hires and trains other managers and employees and is in charge of increasing the sales of the company. He is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

[The beneficiary's] employment as CEO/President will afford him complete authority to establish goals and policies and exercises [sic] discretionary decision-making authority based upon policies and procedures developed by shareholders. He will further assume sole

responsibility of all discretionary actions regarding profitable operations taken by this U.S.-based entity. [The beneficiary] will also supervise other professional and managerial employees, establish goals and policies for investment in the United States, and exercise wide latitude in discretionary decision-making under the mentoring of directors and shareholders of the Parent Company. The beneficiary's duties, therefore, are clearly "Executive or Managerial" in nature and are consistent with [the Act].

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2010 and the first and second quarters of 2011. In the third quarter of 2010 the petitioner had five employees and paid \$30,595.99 in wages, tips, and other compensation; in the fourth quarter of 2010 the petitioner had three employees and paid \$24,070.64 in wages, tips, and other compensation; in the first quarter of 2011 the petitioner had seven employees and paid \$23,169.56 in wages, tips, and other compensation; and in the second quarter of 2011 the petitioner had five employees and paid \$32,378.27 in wages, tips, and other compensation.

On October 7, 2011, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties; and (2) a list of all U.S. employees, including name, position title, position description, breakdown of the number of hours devoted to each of their job duties on a weekly basis, and educational credentials.

In response to the RFE, counsel for the petitioner described the beneficiary's position as follows:

As President and CEO of [the petitioner], [the beneficiary] will be the key U.S. contact for the shareholders and directors of the parent company. [The beneficiary] will be employed at the highest position within the U.S. Company, and will oversee supervisors and managers who supervise employees running day-to-day operations. [The beneficiary] will plan and direct the management of the Petitioner through its own employees, as well as outside contract employees who perform the legal and accounting duties. The beneficiary will be the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decisions *[sic]* making duties, which includes supervising managerial level employees. 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.

[The beneficiary's] position as President/CEO would be considered an Executive position for several reasons. A detailed assessment of the responsibilities of the required by the position of President/CEO of [the petitioner] demonstrates that this position indeed satisfies the requirements for an employment position to be considered as one with 'Executive Capacity'.

* * *

Executive Level:	President
	Vice President/GM
	Operations Manager

First Line Managers:	Accountant
	Sales/Delivery Manager
	Warehouse Manager
	Systems and Office Manager
Labor Staff:	Delivery/Stocker

* * *

The first line managers handle all the administrative functions. Vice President/GM, Accountant and Systems Manager are degreed individuals who report to the Beneficiary.

Counsel for the petitioner went on to provide position descriptions for the Vice President/GM, Accountants, and Systems Manager along with a breakdown of the percentage of time they devote to their duties. Counsel for the petitioner then continued to describe the beneficiary's position as follows:

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 directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Executive or Managerial" in nature and are consistent with [the Act]. Beneficiary 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 also submitted a letter describing the beneficiary's position just as described above. The petitioner did break down the above duties and vaguely expanded them in order to correlate them to the requirements for executive capacity.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as president/CEO supervising one vice president/general manager. The vice president/general manager supervises one operations manager who supervises one systems and office manager, one accountant, and one sales/deliveries manager. The sales/deliveries manager supervises the warehouse supervisor who supervises two contracted delivery/stockers. The petitioner also submitted a list of job duties for the eight positions identified on the organizational chart.

The director denied the petition on February 13, 2012, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director found that the job descriptions provided for the beneficiary's subordinates were vague and did not indicate who performs the sales function of the U.S. company. The director observed that the U.S. company claimed \$650,000 in sales the previous year, but there were no sales personnel listed on the organizational chart. The director further observed that this omission suggests that the beneficiary and his managerial subordinates would actually be providing the goods and services of the U.S. company.

On appeal, counsel for the petitioner reiterates the same description of the beneficiary's position discussed above and asserts that the evidence of record establishes that the beneficiary will be employed in an executive capacity.

He is serving as a President/CEO of [the petitioner]. His employment at the highest position within [the petitioner] has allowed him to oversee managers who in turn supervise employees who run day-to-day operations and assume 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. His direct involvement and incorporation with the parent company's direction, goals, and progress has positively affected the company's future aims and growing potential.

Over the course of his appointment as a CEO/President of [the petitioner], he will employ individuals with different levels that engage in multi-level business development, not only supervising upper and lower-level management. He will be responsible for team; (i) creating and improving policies, implementing beneficial and efficient business practices; (ii) promotion of products and services; (iii) developing the company's management; (iv) conferring with shareholders, clients, and vendors; and (v) adhering to government regulations set forth by federal and state governments. In addition, he also utilized present market trends and consumer habits to develop and implement marketing strategies, conducted analyses of current economic conditions and cost-effective strategies to offer quality without compromising the financial future of the company. To foster a greater clientele base, he also coordinates with management and accounting professionals, other executive-level persons, and outside auditors.

Business Contract Negotiations/Developing Trade and Marketing Strategies	30%
Financial Decisions/Due Diligence [sic]	40%
Expansion Incurring Expenses resolving financial issues	20%
Organizational development of company	10%

Executives are people who oversee other managers or professionals

[The beneficiary] is responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he hires and trains other managers and employees and is in charge [sic] of increasing the sales of the company. He is employed at the highest level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders.

* * *

As President of [the foreign entity's] United States subsidiary, [the petitioner], [the beneficiary] will be required to perform the following complex duties:

- Planning and developing the U.S. investment;
- Developing policies and objectives for the company;
- Supervising all financial aspects of the company;
- Developing, organizing and establishing operations for the purchase, sale and marketing of merchandise for sale in the U.S. market;

- Supervising and directing the work of the President/CEO, who will in turn be responsible for overseeing subordinate managers responsible for running daily operations;
- Identifying, recruiting and building a management team and staff with background in the U.S. retail market;
- Negotiating and supervising the drafting of purchase agreements;
- Developing trade and consumer market strategies based on parent company guidelines;
- Overseeing the legal and financial due diligence process and resolving any related issues;
- Negotiating pricing and sales terms and developing pricing policies and sales techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

* * *

[The beneficiary's] position as President would be considered a Managerial position for several reasons. A detailed assessment of the responsibilities required by the position of President of [the petitioner] demonstrates that this position indeed satisfies the requirements for an employment position to be considered as one with 'Managerial Capacity'.

On appeal, counsel submits the same organizational chart and list of duties for each of the U.S. company's employees as previously submitted.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are 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 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").

In the instant matter, counsel for the petitioner makes different claims at different times, sometimes claiming that the beneficiary is clearly an executive, pursuant to section 101(a)(44)(B) of the Act, and sometimes claiming that the beneficiary is clearly a manager, pursuant to section 101(a)(44)(A). A beneficiary may not claim employment 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.

On review, it appears that the beneficiary's job duties have evolved throughout the record. At the time of filing, the beneficiary's job duties were described as "identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market"; "negotiating and supervising the drafting of purchase agreements"; "marketing products to consumers according to [the foreign entity's] guidelines"; "overseeing the legal and financial due diligence process and resolving any related issues"; "developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]"; "developing and implementing plans to ensure [the petitioner's] profitable operation"; and "negotiating prices and sale terms, developing pricing policies and advertising techniques." On appeal, counsel for the petitioner provides a different list of job duties for the beneficiary, describing them as "creating and improving policies, implementing beneficial and efficient business practices"; "promotion of products and services"; "developing the company's management"; "conferring with shareholders, clients, and vendors"; and "adhering to government regulations set forth by federal and state governments." Furthermore, the petitioner's initial breakdown of the beneficiary's duties included, "management decisions 40%"; "company representation 15%"; "financial decisions 10%"; "supervision of day-to-day company functions 10%"; "business negotiations 15%"; and "organizational development of company 10%." The breakdown counsel for the petitioner submits on appeal includes, "business contract negotiations/developing trade and marketing strategies 30%"; "financial decisions/due diligence [*sic*] 40%"; "expansion incurring expenses resolving financial issues 20%"; and "organizational development of company 10%."

The inconsistent job duties and percentage breakdowns fail to establish that the beneficiary will be engaged in a primarily managerial or primarily executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president and CEO, the petitioner has not provided sufficient consistent information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or an executive. Although the petitioner submitted multiple position descriptions and lists of job duties for the beneficiary throughout the record, the petitioner failed to provide detailed explanations of the beneficiary's actual duties and failed to provide information concerning the amount of time the beneficiary devotes to each specific duty. In fact, the two percentage breakdowns provided by the petitioner broaden the beneficiary's duties more so than the position descriptions themselves. 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 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). Where the petitioner does attempt to clarify the beneficiary's duties, it simply paraphrases the statute for executive and managerial capacity at sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not

satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the current record, and the fact that the beneficiary's duties have evolved throughout the record, the AAO is unable to determine the actual duties of the beneficiary. Due to the inconsistent position descriptions and lists of job duties, it is impossible to determine whether the claimed managerial duties and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's multiple descriptions of the beneficiary's job duties do not establish what proportion of the beneficiary's duties are managerial in nature, what proportion are executive in nature, and what proportion are actually administrative or operational. *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. 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* § 101(a)(44)(A)(ii) of the Act.

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).

Here, although the beneficiary's direct subordinate, [REDACTED] the claimed vice president/general manager, holds a bachelor's degree, the job duties provided by the petitioner for the vice president/general manager position demonstrate that the position itself does not require a professional degree. The position description for the beneficiary's direct subordinate includes tasks that are not indicative of a managerial, supervisory, or otherwise professional position, such as "oversee production and distribution," "develop trade and consumer market strategies," "hir[e] appropriate personnel and leas[e] equipment and retail distribution facilities," "ensur[e] production, quantity, and quality control," "marketing and sales promotions," and "government relations and compliance." Additionally, the petitioner did not indicate the amount of time the vice president/general manager devotes to each of his duties. Thus, the petitioner has not established that the

beneficiary's direct subordinate requires a bachelor's degree, such that he could be classified as professional. Nor has the petitioner shown that this employee supervises subordinate staff members, other than in the *organizational chart, or manages a clearly defined department or function of the petitioner*, such that he could be classified as a manager or supervisor. Although the petitioner indicates that the vice president/general manager has one direct subordinate, the operations manager, the vice president/general manager's list of duties does not indicate that he supervises any subordinate employees. The vice president/general manager's position description does not list any duties related, directly or indirectly, to the supervision of subordinate employees. Thus, the petitioner has not shown that the beneficiary's direct subordinate employee is a supervisor, manager or professional, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the 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. While the petitioner has submitted an organizational chart depicting himself as president and CEO supervising a vice president/general manager who directly supervises an operations manager, the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational duties. The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as 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 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. § 214.2(l)(3)(ii). 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. Here, the petitioner did not indicate that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as those of a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he manages an essential function of the U.S. company.

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.*

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 beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although the petitioner claims that the beneficiary is an executive at the U.S. company, the only executive duties listed for the beneficiary merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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 one direct subordinate, a vice president/general manager, who supervises an operations manager with six additional employees. Due to the inconsistent position descriptions and lists of job duties for the beneficiary, and the extremely 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, although the petitioner's organizational chart depicts a total of seven employees subordinate to the beneficiary, the petitioner claimed only five employees as of the date of filing and reported five employees on its most recent IRS Form 941, filed in July 2011. The AAO is unable to determine which of the seven employees listed on the organizational chart were actually employed at the time the petition was filed. 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).

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. The AAO will uphold the director's determination that the petitioner has not established that the

beneficiary will be employed in a primarily managerial or an executive capacity in the United States. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer, [REDACTED]. 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).

Throughout most of the record, the petitioner claims that the foreign entity wholly owns the petitioning U.S. company. The petitioner submitted one stock certificate, dated December 30, 2002, indicating that [REDACTED] owns 1,000 shares of the U.S. company. The stock certificate indicates on its face that the U.S. company is authorized to issue 100,000 shares.

However, there are numerous discrepancies in the record which raise questions regarding the actual ownership and control of the petitioning company. The petitioner's initial evidence included a business plan which states that "[the beneficiary] has acquired majority shares of [the petitioner]," and implies that, although the petitioning company was established in Texas in 2002, the beneficiary had only recently acquired an interest in the company. This evidence contradicts the petitioner's claim that the foreign entity established the petitioner as its wholly-owned subsidiary in 2002. The petitioner's initial evidence also included a lease agreement dated February 2011 which identified Abdul Ghafoor as the company's owner.

On appeal, the petitioner submitted its 2011 IRS Form 1120S, U.S. Income Tax Return for an S Corporation. The Form 1120S, Schedule K-1 (which was omitted for the previously submitted IRS Forms 1120S for 2008 and 2010), lists [REDACTED] as the owner of 100% of stock in the petitioning company as of 2011 when the petition was filed. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is and has been owned by one or more individuals residing within the United States rather than by the foreign entity.

In this case, the inconsistent evidence presented to corroborate the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claim that the petitioner is a subsidiary of the foreign entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 591-92.

Due to the inconsistencies detailed above, the petitioner has not met its burden to establish that the petitioner has a qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. 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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.