



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 01 2013

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 limited liability company, states that it engages in retail trade. The petitioner claims to be a subsidiary of [REDACTED], located in India. The petitioner seeks to employ the beneficiary as the president/CEO of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity within one year of the approval of the petition.

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 "is the executive at the very highest levels of decision-making within [the U.S.] company." Counsel submits a brief and duplicate copies of previously submitted evidence in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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

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

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

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

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 8, 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 has seven current employees and a gross annual income of \$1.2M. In a letter dated August 2, 2011, the petitioner described the beneficiary's position as follows:

On a more specific level, his responsibilities involve first devising a hierarchal structure of multi-level managers and employees that will address all necessary facets of the company, the supervising of all managers and employees on both upper- and low-management, directing all executive functions of [the petitioner] while simultaneously protecting the investments of both the subsidiary and thus the parent company. In addition to ensuring profitability and efficiency of the businesses, [the beneficiary] will also take a broader approach in establishing the goals for the short- and long-term. Policies and procedures will need to allow room for growth and further diversification into the U.S. trade and retail market while incorporating the needs, priorities, and advice of [the foreign entity]. As a President/CEO, one of his major responsibilities involves being a liaison between the subsidiary and the parent company. . . .

Overall, [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, determining [the foreign entity's] future investments, conducting feasibility and market studies of future investments, advising owners of the Parent Company on where to further invest, supervising all financial aspects of the company and developing policies and objectives for the company. Although the parent company will retain complete control over its subsidiary's ultimate financial and managerial decisions, [the beneficiary] will also have the responsibility to map out consensual short and long-term goals, incorporating the input and advice of shareholders at [the foreign entity].

<u>Description of Duties</u>	<u>Time Spent %</u>
Management Decisions	30%
Company Representation	15%
Financial Decisions	20%
Business Negotiations	25%
Organizational Development of Company	10%

* * *

[The beneficiary's] employment as CEO/President will afford him complete authority to establish goals and policies and exercise 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 indicated that it was established on July 22, 2011 as a limited liability company "geared toward the retail of fuel, fast foods and automotive/household items." It indicated that it acquired a 60 percent ownership interest in another Texas limited liability company, [REDACTED] LLC, on August 1, 2011. The petitioner provided evidence that [REDACTED] paid wages to seven (7) employees during the second quarter of 2011, and evidence that it was operating a gas station and convenience store known as [REDACTED] in San Antonio, Texas.

On September 22, 2011, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a business plan for the new office including timetables for proposed actions to be taken during the first year of operations; (2) a detailed description of the beneficiary's duties; (3) an organizational chart for the U.S. company; and (4) a description of the staff at the U.S. office, including the number of employees and the wage paid to each, the job titles and duties with the percentage of time dedicated to each duty by each employee, and a description of the management and personnel structures of the U.S. company. The director also requested that the petitioner identify its anticipated start-up expenses and provide evidence of the size of the U.S. investment in the petitioning company.

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

[The beneficiary] will serve as the President and CEO of our U.S. subsidiary, [the petitioner] and will establish our U.S. operations and he will scope out additional retail locations and oversee the acquisition process. Once a retail location is purchased, he will be responsible for all the planning, expansion, banking, and budgeting. In addition, he will be responsible for putting a management team in place that will be responsible for hiring and training employees for each retail location. Once the U.S. Company is established and managers are put into place, [the beneficiary] will focus on the goals of the Company which is to expand its

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operations and investments. He will be hiring individuals who will be responsible for increasing the sales of the company based on [the foreign entity's] established guidelines. [The beneficiary] will be employed at the highest executive level and will have complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] will assume a large amount of responsibility on all discretionary actions taken by the U.S. entity to ensure its profitable operation.

Currently he is conducting feasibility studies for the anticipated purchase of another retail location. Once he identifies the business and enters into formal contract binding the Company, he will be involved in obtaining alcohol, tobacco and lottery permits and working legal professionals to ensure the integrity of the acquisition. He will also be working with his accountant and licensing agent to ensure that all transfers have been properly completed and reported. He will be responsible for putting together a reliable management team.

Additionally, [the beneficiary] will work with professionals such as accountants and lawyers in the operational aspect of the Company. He will oversee the 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].

* * *

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.

Counsel for the petitioner went on to provide the same percentage breakdown of the beneficiary's time and further allocated the beneficiary's time as follows:

<u>Description of Duties</u>	<u>Time Spent %</u>
Business Development	11%
Negotiate Contracts	18%
Management	21%
Company Representation	11%

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Financial Representation	14%
Supervision	7%
Business Negotiations	11%
Organizational Development	7%

* * *

Additionally, [the beneficiary] will supervise other professional and managerial employees i.e. the General Manager; he will 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]. The General Manager is a degreed individual. He will report directly to the Beneficiary and supervise first line managers.

Counsel further described the petitioner's staffing as follows:

- Executive Level:
 - President/CEO
 - Vice President/Director of Operations
 - General Manager
 - Management Analyst (open position)
 - Sales Manager (open position)
 - Accountant (outsourced)

- Administrative:
 - Administrative Assistant

- First Line Managers:
 - Purchase Manager
 - Store Manager

- Labor Staff:
 - Cashier/Clerks/Restaurant Staff (some open positions)

. . . The first line managers and purchase agent handle all the administrative functions. General Manager and Accountant are individuals who report to the beneficiary.

Vice President and Director of Operations will report directly to the Beneficiary.

The General Manager and the Accountant report directly to the Vice President.

Counsel for the petitioner went on to provide position descriptions for the General Manager and the Accountant 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. Beneficiary will be the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decision-making.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as president/CEO supervising one vice president/director of operations. The vice president/director of operations supervises one accountant, one administrative assistant, one sales manager, one management analyst, and one general manager. The general manager supervises one purchase manager and one store manager, who supervises cashiers and clerks and restaurant staff. The petitioner also submitted a list of job duties for the vice president and director of operations, general manager, store manager, purchase manager, outside accountant, cashiers and clerks, and restaurant staff, all identified on the organizational chart.

The director denied the petition on January 3, 2012, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive position within one year. In denying the petition, the director found that the petitioner failed to demonstrate that the beneficiary's subordinates will be employed in professional, managerial, or supervisory positions. The director further found that the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying duties within one year of approval of the petition.

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.

As a start-up company, [the beneficiary] will be directing the Petitioner's overall operations. [The beneficiary] is in the business of scoping out and purchasing retail locations and putting a management team in place for the location. [The beneficiary] is an executive employee overseeing the management of U.S. Operations. [The beneficiary] is not a first line manager and will not perform day-to-day work activities; instead he will oversee and direct the management and performance of key company goals and functions. [The beneficiary] will supervise the work of other supervisory, professional or managerial employees who are degreed individuals. [The beneficiary] is the executive at the very highest levels of decision-making within a company.

* * *

[The beneficiary] will serve as President/CEO and CEO of our U.S. subsidiary, [the petitioner], and will establish our U.S. operations and he will scope out additional retail locations and oversee the acquisition process. Once a retail location is purchased, he will be responsible for all the planning, expansion, banking, and budgeting. In addition, he will be responsible for putting a management team in place that will be responsible for hiring and training employees for each retail location. Once the U.S. Company is established and managers are put into place, [the beneficiary] will focus on the goals of the Company which is to expand its operations and investments. He will be hiring individuals who will be responsible for increasing the sales of the company based on [the foreign entity's] established

guidelines. [The beneficiary] will be employed at the highest executive level and will have complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] will assume a large amount of responsibility on all discretionary actions taken by the U.S. entity to ensure its profitable operation.

* * *

... [the petitioner] purchased 60% shares in [redacted] [sic] and its brand new retail operation [redacted] an operating retail gas station/convenience store started in May 2011. As indicated to the Service in Petitioner's business plan, the retail store has currently 7 individuals on pay roll (please note that in lower level positions, the number of employees may fluctuate from time to time) and projects to add additional employees to the Company within the year. Among the currently employed are the Vice President/Director of Operations, Administrative Assistant, General Manager, first-line managers and cashiers. . . . Just these employees by themselves evidence that [the beneficiary] will not be engaged in day to day activities that are non-managerial in nature.

* * *

As President/CEO of [the foreign entity's] United States subsidiary, [the petitioner] and TSV4 [sic], [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 Vice President/CEO [sic] and General Manager, 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/CEO would be considered a Managerial position for several reasons. A detailed assessment of the responsibilities required by the position of President/CEO of [the petitioner] and [redacted] demonstrates that this position indeed satisfies the requirements for an employment position to be considered as one with 'Managerial Capacity'. As mentioned above, an individual in a 'Managerial Capacity' for any company

personally manages the organization, department, subdivision, function, or component of the organization; 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; 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; and exercises discretion over the day to-day operations of the activity or function for the which the employee has authority. As detailed in the following sections, [the beneficiary's] position of President/CEO of [the petitioner] and [REDACTED] clearly satisfies these requirements.

* * *

. . . 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 required by the position of President/CEO of [the petitioner] and [REDACTED] demonstrates that this position indeed satisfies the requirements for an employment position to be considered as one with 'Executive Capacity'. A position with 'Executive Capacity' means an assignment within an organization in which the employee primarily directs the management of the organization or a major component of function of the organization; establishes the goals and policies of the organization, component, or function of the organization; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

* * *

Therefore, [the beneficiary] is an executive employee overseeing the management of U.S. Operations. [The beneficiary] is not a first line manager and is not performing day-to-day work activities; instead he is overseeing and directing the management and performance of key company goals and functions. [The beneficiary] is supervising work of other supervisory, professional or managerial employees who are degree individuals [*sic*]. [The beneficiary] is the executive at the very highest levels of decision-making within a company.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a managerial or executive position within one year of the beginning of operations for the United States business entity.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive

responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

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

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.*

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 "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"; "determining [the foreign entity's] future investments"; "conducting feasibility and market studies of future investments"; "advising owners of the Parent Company on where to further invest"; "supervising all financial aspects of the company"; and "developing policies and objectives for the company." In response to the RFE, counsel for the expanded the beneficiary's duties to meet those of an

executive and stated that the beneficiary will "supervise other professional and managerial employees i.e. the General Manager"; "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." Furthermore, the petitioner's initial breakdown of the beneficiary's duties included, "management decisions 30%"; "company representation 15%"; "financial decisions 20%"; "business negotiations 25%"; and "organizational development of company 10%." The breakdown counsel for the petitioner submits in response to the RFE includes, "business development 11%"; "negotiate contracts 18%"; "management 21%"; "company representation 11%"; "financial representation 14%"; "supervision 7%"; "business negotiations 11%"; and "organizational development 7%."

The expanded and 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 would devote 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 did attempt to clarify the beneficiary's duties, it simply paraphrased 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); *Avyr 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 what his actual duties would be and thus cannot classify them as managerial or executive. Due to the inconsistent position descriptions and lists of job duties, it is impossible to determine whether the claimed managerial duties and executive duties would constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform 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).

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner

has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

Here, the beneficiary's position and his general duties, and the petitioner's claim that it can and will be able to support a qualifying managerial or executive position within one year, are contingent upon the petitioner's claim that it holds majority ownership and management of [REDACTED] which operates a gas station and convenience store known as [REDACTED] in San Antonio, Texas. However, the petitioner has not submitted credible evidence to establish its purchase of a 60% interest of the alleged subsidiary company, [REDACTED]. In the instant matter, the petitioner submitted a "Membership Transfer Agreement" stating that the U.S. company purchased 60% of membership interest from [REDACTED] owner of [REDACTED]. The petitioner also submitted a document titled, "Company Resolution of Members Special Meeting" for [REDACTED] stating that the foreign entity owns a 60% membership interest in [REDACTED]. In addition, the petitioner provided a "Membership Certificate Number Three (3)" indicating that the foreign entity, rather than the petitioner, owns 600 shares (60%) of [REDACTED].

The petitioner did not provide any evidence of funds transferred to [REDACTED] for the purchase of 60% of membership interest in the company. The petitioner also did not provide any evidence that the foreign entity funded its operations in the United States or funded the purchase of [REDACTED]. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

These inconsistencies and omissions call into question the credibility and validity of the petitioner's claim of majority ownership and control of the operating subsidiary. The AAO finds that the record as presently constituted does not contain sufficient evidence to establish that the petitioner has acquired majority ownership and control of the existing business, [REDACTED] operating as [REDACTED]. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner's business plan indicates that the U.S. company has purchased 60% membership interest in [REDACTED] and plans to "establish at least two additional retail locations [over the next three years]." The petitioner fails to indicate its hiring plans for the first year beyond [REDACTED] and thus fails to establish that it would employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition.

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/director of operations, holds a bachelor's degree, the job duties provided by the petitioner for the vice president/director of operations position demonstrate that the position itself does not require a professional degree. Additionally, the petitioner did not indicate the amount of time the vice president/director of operations 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.

Although the petitioner's organizational chart and the description of the beneficiary's subordinate's duties indicate that the beneficiary may supervise subordinate supervisory employees, 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. Given the doubts raised by the petitioner's documentation evidencing its majority ownership and control of [REDACTED] it remains impossible to determine that the beneficiary will be performing primarily managerial duties. While the petitioner has submitted an organizational chart depicting the beneficiary as president and CEO supervising a vice president/director of operations who directly supervises various employees with managerial titles, 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 would be 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, counsel for the petitioner made a vague statement about the beneficiary's management of "several major essential components and functions of the organization" on appeal, but failed to articulate the beneficiary's duties as those of a function manager and did not provide a breakdown indicating the amount of time the beneficiary will devote to duties that would clearly demonstrate he will manage 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 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/director of operations, who supervises various employees with managerial titles who work for the petitioner's alleged subsidiary. 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.

Additionally, the petitioner's business plan indicates that the claimed subsidiary's retail location will be open 12 hours a day, six days a week, throughout the year and currently employs nine employees. According to the petitioner's organizational chart, the alleged subsidiary employs one store manager, one purchase manager, two cashiers and clerks and two restaurant staff. The petitioner also currently employs a president/CEO, vice president/director of operations, an administrative assistant, a general manager, and plans to employ one management analyst and one sales manager in the future. The petitioner's claimed subsidiary currently leases 2100 square feet of retail space, which, according to the lease, may be used as a "convenience store with gas station, kitchen, meat market, check cashing, deli and its related activities." The lease agreement does not indicate that there is office space available at the retail location for the management and administrative employees who are not directly involved in the retail business, not space to accommodate the planned expansion of two additional non-retail employees.

The AAO will uphold the director's determination that the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition. 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.