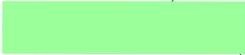


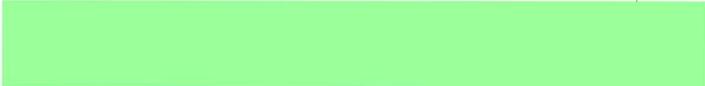


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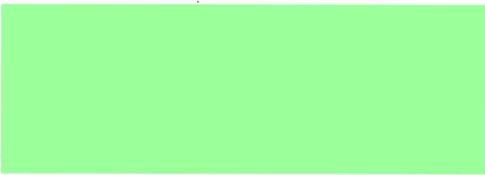


DATE: **DEC 09 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under 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 (AAO) in your case.

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

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant visa petition seeking to classify the beneficiary as an L-1A intracompany transferee employed pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), U.S.C. § 1101(a)(15)(L). The petitioner states that it operates a gas station and convenience store. The Form I-129, Petition for Nonimmigrant Worker, indicates that the petitioner has six employees and a gross annual income of \$1.9 million. The petitioner claims to be the subsidiary of [REDACTED] in Colombia and seeks to employ the beneficiary in the position of president for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed a Form I-290B, Notice of Appeal or Motion. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and provides additional evidence in support of the contention that the beneficiary's job duties fall within the statutory definition of executive capacity.

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. Managerial or Executive Capacity

The primary issue to be addressed is whether the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 18, 2012 seeking to employ the beneficiary as its president. The petitioner indicated on the petition that it was established in 2009 and has six employees.

In a letter dated December 14, 2012, the petitioner claimed that after identifying the United States as a key market for expansion, the beneficiary, in his capacity as president for the foreign parent company, was instrumental in the acquisition of a gas station located in [REDACTED] Florida. The petitioner stated that it has operated the gas station since August of 2011, and claims that due to the success of this venture the petitioner is currently in the process of acquiring a second gas station and intends to acquire an additional five gas stations in the future.

The petitioner further states that its goals include increasing its monthly sales volume of fuel by more than one hundred thousand gallons, and lowering operating costs by 10% over the new two years by implementing more efficient business models. The petitioner claims that to achieve these goals, it requires the beneficiary to assume the role of president of the U.S. entity. Regarding his proposed duties, the petitioner states:

[The beneficiary] will act as the President of [the petitioner]. He will report to the board of directors, and will oversee the performance of the Finance Director and Store Manager. [The beneficiary] will be responsible for the implementation of the corporate goals previously described, and supervision of management personnel. He will have hiring and firing power with respect to the recruiting of new employees that will be added to the team. He will set policies to ensure the implementation of corporate goals, and to execute corporate decisions made by the Board of Directors. He will be in charge of preparing the budget, and implementing policies to achieve the objectives of the company. He will review periodic financial statements prepared by Finance Director to ensure financial goals are met, and also will conduct quarterly evaluations of the reports prepared by the store manager, and implement a business development strategy designed by management.

The petitioner also provided an organizational chart illustrating the composition of the petitioner's workforce. According to the chart, the beneficiary in his capacity as president would report directly to the board of directors, and would directly supervise two individuals: [REDACTED] the finance director, and [REDACTED] the store manager. Ms. [REDACTED] in turn would oversee a day and a night supervisor, who in turn would oversee store associates.

The petitioner also submitted copies of its quarterly Florida and federal employer tax returns which indicated that it employed between four and nine full-time or part-time employees during the first three quarters of 2012 and seven employees as of September 2012.

On December 28, 2012, the director issued a Request for Evidence, ("RFE"), instructing the petitioner to provide additional evidence to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. Specifically, the director noted that the description of duties initially provided appeared to encompass a combination of both managerial and executive duties. The director requested evidence establishing that the proffered position satisfied all four criteria for either a managerial or executive employee, along with a more detailed description of the beneficiary's day-to-day duties including the percentage of time allocated to managerial or executive duties. The director also requested additional information regarding the company's current organizational hierarchy and staffing levels, along with the names, job titles, summary of duties, educational level, and salary for all employees. Finally, the director requested additional information pertaining to the gas station at which the beneficiary would work, including a floor plan showing work stations and warehouse space.

In response to the RFE, counsel for the petitioner addressed the director's questions. Counsel first took issue with the director's classification of the petitioner as "a gas station and convenience store," noting that the petitioner was actually engaged in the acquisition and development of gas stations. Specifically, counsel asserts that the petitioner "initially developed a single gas station and created a business model to be replicated in future gas stations." Counsel claims that once these gas stations are acquired, they will have their own managers and the beneficiary will not be involved in their day-to-day operations. Counsel further claims that, contrary to the director's statements in the RFE, the petitioner maintains a corporate headquarters from which it conducts these business dealings, and claims that the beneficiary will not work out of the gas station as previously stated on the Form I-129. In support of this contention, counsel submits evidence pertaining to the lease of a virtual office, and refers to additional evidence in the record demonstrating that the acquisition of a second gas station is currently in progress.

The response to the RFE also contains a letter from the petitioner, dated February 6, 2013, which provides an expanded overview of the beneficiary's duties. Specifically, the petitioner stated that the beneficiary will be employed as its Chief Executive Officer, and provided the following information:

ACTIVITIES	HOURS PER WEEK
Report to the Board of Director[s]	10 hrs
Oversee and Evaluate performance of Finance Director	7 hrs
Oversees and Evaluate performance of Store Managers	10 hrs
Design and oversees implementation of Corporate Goal	5 hrs
Review financial statements with Director of Finance	2 hrs
Review evaluation of sales reports prepared by store manager	3 hrs
Prepared and review budget	4 hrs
Attend networking activities on behalf of the company with vendors and providers	3 hrs
Design and oversees business development strategies	2 hrs
Research and Development of target markets for future location and expansion	5 hrs
TOTAL HOURS:	51 hrs

The petitioner further stated that the position involves the following responsibilities:

- Ensure the implementation of the [REDACTED]
- Disclose policies, set objectives and goals of the [REDACTED]
- Review, update and adjust policies and objectives of the [REDACTED]
- Achieve compliance with the requirements stipulated in contracts, the quality of the product or service.
- Increase the value of the assets of the organization.
- Ensuring legal and regulatory compliance of [REDACTED]
- Ensure the development of programs, plans, procedures concerning compliance [REDACTED]
- Ensure [REDACTED] resources.
- Ensure the proper functioning of Quality Committees, Industrial Safety, Occupational and Environmental Health.
- Formalize communications to all stakeholders (employees, partners, shareholders, community, authorities, suppliers, contractors) of the outcome of [REDACTED] management system. Accountability to interested groups.
- Approve documents of integrated [REDACTED] management.

- Hire or outsource goods and services.
- Start of works / Controlling, Stoppage and restart of works.

Finally, the petitioner listed the following position functions:

1. Legally represent the organization and its partners.
2. Create the jobs it deems necessary for the good service of the company, assign functions, set compensation, hire and fire, as well as decide on the waiver or license those employees.
3. Submit to the General Assembly and Board of directors the plans, development programs and procurement to be undertake[n] to fulfill the objectives and functions of the Company.
4. Breakdown of the budget of revenues and operating expenses, investment and periodic financial analysis of the company.
5. Provide to the Board of directors the budget execution analysis, the estimate of income as well as information about competition of the market.
6. Check and care the organization and administration of the Company, the collection and investment of funds and compliance with all legal and contractual obligations of the entity.
7. Appoint, employ, promote or remove, under force legal disposition, workers and employees of the company.
8. Submit annually to the consideration of the Board of directors, financial statements, reports on the progress of the company, the state of developed investment projects, initiatives, work plans and all the instructions and suggestions for the improvement and rationalization of industrial and administrative systems of the Company.
9. Delegate to other officers, the exercise one or more of its functions, provided that there is no express prohibition in the law or the rules or procedures of the Organization. The delegation that refers to the spending management require prior approval of the Board of directors.
10. Issue regulations, standards, systems, manuals and administrative internal procedures of the Company.
11. Adopt, guide and evaluate the [redacted] management based on ISO 9001, ISO 14001, OHSAS 18001, among other rules stipulating the Organization.
12. Report as required to the public and / or interested parts on the overall results of the implementations, developments or results of the [redacted] management based on ISO 9001, ISO 14001, OHSAS 18001[.]
13. Manage and control property and funds that are the heritage of the company and ensure the correct collection, application and investment of resources and existing goods.

14. Prepare and submit for consideration and approval of the Board of directors any amendments or changes to the bylaws of the organization, the organizational structure, the staff, the salary and Benefit system.
15. Promote, develop, authorize and direct the implementation of acts and processes of selling products and services that offers the Company.
16. Perform judicial or extrajudicial actions directly or through proxies, in defense of institutional interests.
17. Dictating the internal work Rules, the rules of Health and Safety and subject to approval by the Department of Labor and Social Security.
18. Ensuring Consolidation of Joint Occupational Health Committee of the Company.
19. Convene meetings of the Board of directors.
20. The other functions provided by law and regulations that relate with the organization.

The petitioner also submitted a new organizational chart, indicating that the beneficiary would eventually oversee four additional store managers once the acquisition of additional gas stations is complete. Regarding the current structure of the petitioner, the chart remained the same as the one originally submitted by the petitioner aside from the replacement of one store associate [REDACTED]

Finally, the petitioner submitted a copy of various lease agreements for a virtual office, executed by the petitioner's finance manager as early as October 2010. The petitioner, through counsel, contends that this is the actual work location of the beneficiary and not the gas station as originally claimed on the Form I-129 petition.

The director ultimately denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive position. The director found that the organizational chart did not demonstrate a personnel structure sufficient to support the employment of the beneficiary in a primarily managerial or executive capacity. The director also noted that, contrary to the petitioner's assertions, there did not appear to be a corporate office from which the beneficiary would work, since the terms in the virtual office lease imposed significant restraints on the petitioner's ability to access the facility. The director concluded that a position is not managerial or executive in nature by virtue of a title alone.

On appeal, counsel for the petitioner challenges the director's findings, and asserts that the duties as described are sufficient to establish the beneficiary's employment in a qualifying capacity. Specifically, counsel asserts that the proffered position is primarily executive in nature. Counsel also submits a letter from the lessor of the virtual office space which confirms that such space is ready for the petitioner's use at any time, thereby supporting the petitioner's contention that it maintains a corporate office. Counsel also submits additional documentation in support of the petitioner's continued efforts to acquire new gas stations in support of the contention that the petitioner is not merely a solitary gas station and convenience store with six employees.

B. Analysis

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 either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Although counsel on appeal contends that the beneficiary's position is exclusively executive in nature, the AAO will nevertheless evaluate the proffered position for compliance with the regulatory definitions of both managerial and 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 initial description of duties was brief, and identified both managerial and executive duties. The director notified the petitioner of this discrepancy and requested evidence demonstrating that the position met all four of the criteria of either managerial or executive capacity in the RFE issued on December 28, 2012. The petitioner provided a four-page discussion of the position of president in response to the director's RFE. However, the sections entitled "responsibility" and "position functions" appear to relate to a generic executive position at an entity other than the petitioner. For example, the "responsibility" section extensively discusses [REDACTED] responsibilities, which appears to refer to Health, Safety, Environmental and Quality Management standards routinely followed in corporate settings. These "responsibilities" have no relationship to the duties identified earlier by the petitioner in the initial letter of support and on the first page of this document, where a breakdown of the percentage of time for each duty is stated. Additionally, the "position functions" section is completely vague and seems to be discussing a general executive position in an unrelated industry. 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 answer a critical question in this case: What will the beneficiary primarily do on a daily basis? 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).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the 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.

Moreover, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits

classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

At the time of filing, the petitioner stated it operated one gas station and had six employees. In its letter dated December 4, 2012, the petitioner further claimed that the beneficiary would oversee the Finance Director and the Store Manager. In support of the petition the petitioner provided an organizational chart which, contrary to the petitioner's claims on the Form I-129 petition, identified ten employees: a finance manager; a store manager; a day supervisor; a night supervisor; and 5 store associates. A review of the petitioner's quarterly tax returns for the third quarter of 2012 confirms that, at the time of filing and as stated in the petition, only six of these claimed employees were on the petitioner's payroll.

In response to the RFE, counsel for the petitioner claims that "the beneficiary will directly manage and oversee the performance of approximately six professional and managerial employees, including the Director of Finance, and five store managers. Through these managers the beneficiary will indirectly oversee other [sic] 35 employees, including store supervisors and store associates. . . ." In sum, the initial description of the beneficiary's managerial duties identified two subordinate managers, and the second iteration of the job identifies approximately 40 subordinate employees, six of which the petitioner claims are managerial employees.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description, increased the extent of the beneficiary's claimed managerial authority, and significantly increased the petitioner's claimed staffing

levels.¹ Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

At the time of filing, the quarterly tax returns confirm that the store manager, day supervisor, and four of the store associates identified on the organizational chart were employed by the petitioner. The petitioner failed to submit evidence establishing that any of these subordinates are professional-level employees.² Although the organizational chart indicates that these employees are subordinate to the beneficiary, the petitioner failed to provide details regarding the duties of these employees and what, if any, managerial or supervisory authority they exercise over other employees.

In the December 4, 2012 letter, the petitioner claims that the beneficiary will oversee the finance manager and the store manager. The record contains no evidence that [REDACTED] the claimed finance manager according to the organizational chart, was employed by the petitioner at the time of filing. Although tax records confirm that the store manager, [REDACTED] was on the payroll when the petition was filed, the record contains no evidence describing the nature of her duties or the extent of any supervisory authority she may have. Merely bestowing a managerial title on an employee, without more, will not establish that that employee is a manager or supervisor.

¹ The AAO notes that the petitioner's claims regarding supervision of additional staff is related to its claims that acquisition of additional gas stations is currently in progress. As noted above, the petitioner must establish that the proffered position qualifies as a managerial or executive position at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

² In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is required for any of the positions subordinate to the beneficiary's.

The record contains a photograph of Ms. [REDACTED] along with the following overview of her duties:

The Store Manager is responsible for maintaining the store in order to ensure Customers and visitors have access to necessary supplies and accommodations[.] The Store Manager is responsible for maintaining customer service, maintaining cash controls, selling, purchasing and maintaining the store and services.

1. Achieving the overall Revenue Target
2. Achieving Department wise Targets
3. Keeping the costs within the cost budgets
4. Identifying opportunities for selling space

The only other discussion of the store manager's duties in the record is contained in the chart submitted in response to the RFE, which indicates that the beneficiary will oversee and evaluate her performance and oversee and evaluate sales reports she prepares. There is no documentary evidence or other contention by the petitioner that the store manager has supervisory or managerial authority over subordinate personnel. 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)). Thus, the petitioner has not shown that the beneficiary supervises and controls supervisory, professional, or managerial staff, as required by section 101(a)(44)(A)(ii) of the Act.

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 clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

In the present matter, the petitioner has not established that it will employ the beneficiary as a function manager. The petitioner has not identified or articulated an essential function that the beneficiary will

manage. The petitioner claims that the beneficiary oversees the entire organization. A petitioner cannot satisfy the regulatory requirements by making a blanket claim that the beneficiary is responsible for management of all functions of the business and therefore qualifies as a function manager.

The petitioner indicated that the beneficiary would be working a 51 hour work week. According to the chart submitted, the petitioner indicated that the beneficiary would perform the following duties: reporting to the board of directors; review financial statements with Director of Finance; review evaluation of sales reports prepared by store manager; prepare and review budget; attend networking activities on behalf of the company with vendors and providers; research and development of target markets for future location and expansion; and design and oversight of the implementation of business development policies. Some of these duties merely paraphrase the statutory definitions of managerial and executive capacity, while other duties indicate the beneficiary's involvement in providing the company's services. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1069-70 (9th Cir. 2008).

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The record contains no evidence that the petitioner employed the director of finance at the time of filing. Consequently, the claimed duties requiring the beneficiary's interaction with or supervision of the finance director must be discounted, thereby drawing further scrutiny by the AAO on the reliability of the petitioner's description of duties in general. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel for the petitioner contends that the proffered position is executive in nature. Counsel restates the duties listed on the chart discussed above, and claims that the beneficiary's "main" duties will be "oriented towards financial and corporate decision-making."

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they

"direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

On appeal, counsel paraphrases the regulatory definitions and repeatedly concludes that the beneficiary will be employed in a primarily executive capacity. The record, however, is devoid of evidence to support this contention. 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; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner has not demonstrated that the beneficiary would spend the majority of his time focused on the broad goals of the organization. The petitioner has not established that it has the subordinate staff in place to relieve the beneficiary from many day-to-day non-managerial tasks associated with operating the business. Instead, many of the tasks attributed to the beneficiary, as discussed above, indicate that he is involved in the day-to-day operations of the company, which include sales and marketing. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 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").

Finally, the director noted that the beneficiary's work location was uncertain based on the evidence in the record. On the Form I-129 petition, the petitioner stated that the beneficiary would work at [REDACTED] Florida, which is the address of the petitioner's gas station. In response to the RFE, the petitioner submitted a copy of a lease for virtual office space at [REDACTED] in [REDACTED] Florida. Noting that the lease contained restriction with regard to the amount of access allowed to the virtual office, the director concluded that the work location of the beneficiary could not definitively be confirmed.

On appeal, counsel for the petitioner submits a letter from the lessor of the virtual office, confirming that the petitioner is currently occupying [REDACTED] and that they have unrestricted access to the facility 24 hours per day, 7 days per week. The petitioner contends that this clarifies the actual work location of the beneficiary in response to the director's findings.

The AAO finds numerous problems with this contention. First, the petitioner is not a party identified on the virtual office lease. Instead, the lease identifies [REDACTED] an individual, as the lessee. Although the petitioner claims that Mr. [REDACTED] is the petitioner's director of finance, the record contains no evidence demonstrating that Mr. [REDACTED] was actually employed by the petitioner at the time of filing. Therefore, there is no indication that the virtual office space in question is actually leased by the petitioner. In addition, the letter from [REDACTED] Center Manager for the [REDACTED] the lessor of the virtual

office space states, that the petitioner is currently occupying [REDACTED]. The lease submitted into the record, however, is for [REDACTED]. Finally, a photograph of the office space accompanying the lease listed the suite number as [REDACTED]. 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).

As previously stated, the petitioner must establish eligibility at the time of filing. In this case, the petitioner identified the gas station located at [REDACTED] Florida as the work location of the beneficiary. In response to the RFE, the petitioner claims for the first time that the beneficiary will work at its corporate offices in [REDACTED] Florida, contrary to the claim on the Form I-129 petition. It is further noted that the required certification at Part 6 of the Form I-129, which the petitioner signed, under penalty of perjury, states "that this petition and the evidence presented with it is all true and correct." If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The contradictory claims regarding the work location of the beneficiary, as well as the existence of the petitioner's claimed corporate office, raise questions regarding the validity of the claims made by the petitioner in these proceedings. 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. at 591.

Based on the evidence furnished, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.