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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 2 3 2013 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
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:

SELF-REPRESENTED

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 AAO will dismiss the appeal.

The petitioner seeks to employ 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 is a Florida corporation established in August 2010. It is in the business of "sale, service and repair of cell phones and communications products." The petitioner claims to be a subsidiary of [redacted] based in Pakistan. The United States Citizenship and Immigration Services (CIS) previously granted the petitioner a visa in the L-1A classification on behalf of the beneficiary for him to open a new office. The petitioner applied to extend the beneficiary's status in order for him to serve an additional two years in the position of President.

The director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity. The director's finding was based on the conclusion that the beneficiary will work as a first-line supervisor and the petitioner's other employees are not professionals. In addition, the director found the petitioner failed to establish the requisite qualifying relationship, relying in part on the finding that the petitioner is a franchise.

The petitioner filed a motion to reconsider, arguing that the director incorrectly applied the law in concluding that a franchise could not establish a qualifying relationship.

The director granted the petitioner's motion and reconsidered the petition. The director found that the petitioner successfully established the necessary qualifying relationship between the petitioner and the foreign entity. The director again denied the petition, however, finding the petitioner had still not shown that the beneficiary will be employed in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO. On appeal, the petitioner submits a brief and additional evidence. The documents submitted include an unpublished AAO decision sustaining the appeal of an L1B specialized knowledge petition. The petitioner contends that the beneficiary qualifies as a manager because he is not a first line supervisor, but rather, has subordinate supervisory employees.

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.

Further, the regulation at 8 C.F.R. 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

> (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
>
> (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
>
> (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
>
> (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The director denied the petition, in part, based on a finding that the petitioner would not employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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 director denied the instant petition, finding that the petitioner failed to show it would employ the beneficiary in a primarily managerial or executive capacity.

The petitioner stated it is in the business of selling, servicing and repairing cell phones and communications products. It claimed to have seven current employees. The petitioner stated it is a subsidiary of the Pakistani company, [redacted] which is its 51% owner. According to the petitioner, the foreign entity employed the beneficiary as Director- Sales & Marketing from 2004 until his transfer to the United States. While working for the foreign entity, the petitioner managed the sales executives, office assistant, manager, storekeepers, and technicians. He reported only to the business owner. The petitioner stated the beneficiary has a Bachelor's degree in Commerce from [redacted] in Pakistan.

For the beneficiary's proposed position of President, the petitioner listed the following duties, with the percentage of time that each will require:

- Establishment of Goals, Policies, Direction 20%
- Strategic Planning 20%
- Budgeting and Financial Matters 20%
- HR and Staffing Matters 10%
- Product and Service Planning 15%
- Sales & Marketing Initiatives 15%

Accompanying its Form I-129, Petitioner for a Non-immigrant Worker, the petitioner submitted numerous documents. These included the beneficiary's resume, a business plan for the petitioner, the petitioner's organizational chart, the petitioner's quarterly wage reports for the first, second, and third quarters of 2011, and photographs of the petitioner's store.

The petitioner's organizational chart shows the beneficiary as the President, Treasurer, and General Manager with a salary of $36,000. Below the beneficiary is the Store Manager, with a salary of $18,000, below whom is the Supervisor, with a salary of $12,000. Below the Supervisor are four Sales Clerks who receive salaries of $7,500, $7,620, $2,000 and $2,000.

The director issued a Request for Evidence (RFE) instructing the petitioner to provide, *inter alia*, additional information regarding the duties of the beneficiary and the petitioner's other employees, such as the hours necessary for each of the employees' tasks.

In response to the RFE, the petitioner submitted a brief and additional evidence. In the brief, counsel reasoned that the petitioner has shown the beneficiary will work in an executive or managerial capacity because the beneficiary:

> directs the management of the organization and establishes the goals and policies of the organization (or function); he also exercises wide latitude in discretionary decision-making. There is no one else who can possibly execute company decision because he is the owner/manager/executive and he has the final word on all company decisions. [The beneficiary] also meets the definition of "manager" under INA 1091(a)(44) in that he ***primarily***: manages the organization; he has ***authority*** to hire and fire; he functions at a senior level within the hierarchy and exercises discretion over day-to-day operations of the activity or function.

(emphasis in original). Counsel further stated that the beneficiary is responsible for negotiating contracts and performing financial and economic analyses. He cited to an unnamed non-precedent AAO decision and stated "the Service approved a petitioner for essentially a one-man operation."

The petitioner also submitted job descriptions for each of the positions listed on its organizational chart. Under the description for the beneficiary's proposed position of President/Owner, the petitioner expanded on the previously stated duties. To the first duty of "Establishment of Goals, Policies, Direction," which will require 20% of the beneficiary's time, the petitioner added that this means the beneficiary:

- Develops and executes long term strategies[;]

- Directs and coordinates activities of the organization to obtain optimum efficiency and economy of operations and maximize profits[;]

- Plans and develops organization policies and goals, and implements goals through subordinate administrative personnel[;]

- Responsible for directing a team of (Salesmen, Store Manager and Supervisor) to ensure the attainment of established sales objectives[;]

- Directs and employs a sales force network capable of marketing and selling wide verity [*sic*] of wireless product line[;]

- Engage in negotiations of business contracts with wireless distributors, establishing business alliances[.]

As related to strategic planning, which will require 20% of the beneficiary's time, the petitioner stated the beneficiary has been looking at prospective locations to open a second store. Budgeting and financial matters, which will also require 20% of the beneficiary's time, will include overseeing the monthly budget, setting up sales targets for employees, and conducting sales analyses. The beneficiary will spend 10% of his time on human resources and staffing matters, which include authorizing the hiring and firing of employees, revising managers' employee reports, and directing the petitioner's accountant. The petitioner also stated that the beneficiary will spend 15% of his time on product and service planning, which will involve directing and coordinating promotion of the petitioner's services. As an example of this, the petitioner indicated that the beneficiary will attend the [redacted] show. Lastly, the beneficiary will spend 15% of his time on sales and marketing initiatives, which will include directing the sales team, developing promotional and advertising activities, and overseeing POP display strategies. As an example of this, the petitioner stated that, based on a marketing analysis, it concluded that a website is mandatory for sales purposes. It therefore submitted an email confirmation of registration with GoDaddy.com for the domain name [redacted]

According to counsel's brief, the petitioner submitted "contracts between providers/ suppliers and [the petitioner]. These contracts were negotiated, analyzed and signed by [the beneficiary] on behalf of the company." The "contracts" submitted include applications for a business bank account and credit card, as well as what appears to be an application for a credit card machine. Both are signed only by the beneficiary and not the other party involved in the application.

The petitioner also submitted a [redacted] in which it had filled out a form to be a [redacted] sub-dealer of T-Mobile wireless provider services. The petitioner submitted Exhibits A-2 through A-4 of the agreement. All pages are initialed in the lower right-hand corner by a representative of the premier dealer.[1] The agreement is signed by the beneficiary, but not by a representative of T-Mobile, nor a representative of the dealer, [redacted]

The contract limits its sub-dealers' abilities to advertise T-Mobile products and services without the express written consent of T-Mobile: "Sub-Dealers shall not use Company's trademarks or logos on any web-page or web-site, and shall not promote Company's Wireless Service or Equipment on any web-page or web-site, without Company's prior written approval."

The agreement further specifies:

> Accordingly, neither Dealer, its Personnel, Sub-Dealers nor any sales representative acting on Dealer's behalf shall promote or sell the Equipment or the Wireless Service through telephone sales or telemarketing activities, direct mail activities, broadcast faxing activities, catalog sales activities, Internet Sales

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[1] As the initials are signed, they are illegible.

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> Activities (as defined below), text messaging to consumers, or any other similar direct sales method.

The petitioner also provided an application with [redacted] which appears to be for processing prepaid minutes for different wireless providers. The application lists the different rates of commission paid to the petitioner for the sale of minutes with each of the different providers.

The petitioner submitted copies of numerous emails from T-Mobile sent to [redacted] about product and service information and updates for its dealers.

The petitioner also submitted pictures of the inside and outside of its store location. A sign on the outside of the store reads [redacted] An advertising brochure from [redacted] lists five locations, one of which is the petitioner's address at [redacted] The other four locations have been crossed out with a black marker. The advertisement states that [redacted] offers phone repair, phone unlocking and monthly cell phone service plans without a contract. It lists the available providers as [redacted] The petitioner also provided brochures for [redacted]

The petitioner provided job descriptions for the three positions held by its other employees. Directly below the President is the Manager, who works 40 hours per week. The petitioner stated that the Manager reports to the President and supervises a Supervisor and four Sales Associates/ Clerks. It listed the Manager's duties as follows:

- Manage the day to day operations of the business;
- Develop, implement and monitor a store prospecting [*sic*] plan to increase sales;
- Facilitate and participate in weekly staff training/ educational sessions to increase knowledge, create high levels of motivation, and inspire team to achieve results;
- Establish and monitor store work schedules and staffing issues to effectively manage payroll expenses;
- Analyze various business reports for trend analysis and strategic planning purposes;
- Proactively recruit and oversees training of new employees;
- Monitor and coach performance and recommend disciplinary action as required;

- Authorizes purchases and manages inventory and assets;

- Manage the store's controllable categories on the store's profit and loss statement, protecting company's assets;

- Effectively evaluate customers' potential needs for wireless services and products and make appropriate recommendations;

- Demonstrate a strong understanding and enthusiasm of multiple wireless carriers' products and services, promoting and selling wireless products and services to customers;

- Maintain a high level of understanding of multiple wireless carriers' products and pricing of models, as well as each carrier's competitive advantages;

- Assure proper appearance and functionality of POP displays and electronic equipment;

- Consistently meet and exceed sales goals within the guidelines established;

- Report daily on the number of customer contacts, closes sales and other metrics as required;

- Resolves and reports store issues, challenges or success in a timely manner;

- Participate in required training, conference calls or other related events as instructed;

- Strive to delivers a superior experience to the customer every day, maintaining a "can do it" attitude.

The petitioner also provided information regarding the position of Supervisor. The Supervisor works 40 hours per week, reports to the Manager and President, and supervises the four Sales Associates/Clerks. The petitioner listed the Supervisor's responsibilities as follows:

- Serve as Manager on Duty when Manager is off;

- Assist the Store Manager in activities that bolster growth;

- Assists Manager in maintaining inventory in an adequate level;

- Inspire, motivate, and lead team;

- Provide overall store management, supervision, and policy implementation;
- Drives sales and profit through leadership, training and development of the store team, execution of non-negotiable standards of operation, cost control, and asset protection;
- Provide a high level of technical customer service support at a Device Support Center;
- Meet sales goals for non-commissioned up-selling of accessories and enhanced features;
- Meet productivity goals while still performing various assigned duties;
- Establish strong rapport and trust with customers, both internal and external;
- Program, troubleshoot and test cell phones and accessories;
- Track and maintain inventory;
- Complete and submit reports in a timely manner;
- Instruct customers on proper use of cell phones and equipment;
- Accurately document customer interactions in multiple platforms;
- Perform opening and closing duties within the Device Support Center;
- Serve as a key member of security breach response team;
- Assist Manager with weekly store meetings and communications.

Lastly the petitioner provided information regarding the position of Sales Associate/ Clerk and named the four individuals that currently hold the position. Sales Associates work 19 hours per week, report to the Supervisor, and do not have any direct reports. The petitioner also listed their specific responsibilities, which include typical sales associate and cashier functions.

The director initially denied the petition, finding that the petitioner failed to show it will employ the beneficiary in a primarily managerial or executive capacity. In addition, the director found that the petitioner failed to show the requisite qualifying relationship because the petitioner is a franchise.

The petitioner filed a motion to reconsider, contending that the petitioner's status as a franchise did not prohibit it from establishing the necessary relationship between it and the foreign entity. In support of this position, the petitioner cited *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986).

The director granted the petitioner's motion to reconsider the petition. Upon reconsideration, the director found that the petitioner had satisfactorily shown the requisite qualifying relationship between the petitioner and the foreign entity. However, the director again denied the petition, finding that the petitioner failed to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner states: "The organization business [*sic*] needs does not require first line supervisor to be degreed professional rather [*sic*] experienced professional. Beneficiary directs manager to perform tasks through other subordinate employees." It attaches a copy of an article regarding an AAO decision sustaining an appeal of an L1B petition denial.

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary will work in a primarily managerial or executive capacity.

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

When examining the managerial or executive 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 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.* In addition, the definitions of executive and managerial capacity have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As an initial matter, an examination of the list of the beneficiary's proposed job duties does not reveal sufficient detail regarding what the beneficiary will do on a daily basis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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 actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

In the RFE issued, the director instructed the petitioner to provide a more detailed description of the petitioner's job duties. For the duty of "Establishment of Goals, Policies, Direction," the petitioner added that this means the beneficiary will develop and execute strategies, direct and coordinate activities to maximize efficiency, plan and develop policies and goals, direct the team of employees and salespeople, and negotiate contracts. Although these terms expand on the previously listed duty, they still fail to provide an adequate level of specificity in that they do not provide any detail or explanation regarding what the petitioner will actually do on a daily basis. Again, the actual duties themselves reveal the true nature of the employment. *Id.*

In support of the statement that the beneficiary will be responsible for negotiating contracts, the petitioner provided Exhibits A2 through A4 of a [redacted] "Premier Dealer Agreement" with T-Mobile. The exhibits show the petitioner filled out forms to become a sub-dealer for T-Mobile's services. The agreement does not contain the signatures of either the premier dealer or T-Mobile, both of which appear to be necessary to make the agreement a valid contract. The petitioner did not include the full Premier Dealer Agreement or other evidence of arrangements made between the dealer and T-Mobile. As a result, it is unclear whether valid agreements exist and, if so, what the terms of those existing agreements are. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

To the extent that the petitioner claims the beneficiary negotiated business contracts, such a claim is not supported by the evidence in the record. As previously indicated, the applications provided are not signed or approved by other parties. In addition, they appear to be standard form contracts or applications that do not require negotiation by applicants, in this case the petitioner. 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*, *supra*.

In support of its claim to be a dealer of T-Mobile services, the petitioner provided an advertising brochure and copies of emails that appear to have been sent to T-Mobile dealers. The petitioner also submitted an advertisement and copies of emails indicating it is an authorized [redacted] retailer. However, it did not provide evidence of any agreements with [redacted].

In response to the RFE, the petitioner also added that "Strategic Planning," which will require 20% of the beneficiary's time, will involve efforts to open a second store. In support of this, the petitioner submitted a letter and agreement from a realtor indicating that the realtor is looking for real estate for the petitioner.

For "Budgeting and Financial Matters," which will require 20% of the beneficiary's time, the petitioner added that this means overseeing the monthly budget, setting up sales targets for employees, and conducting sales analyses. However, the petitioner did not explain how the beneficiary will "oversee" the budget. Similarly, it did not give any examples of employee sales targets, what they will entail, or how they will be calculated. Lastly, the petitioner did not explain what it means by a "sales analysis" and how the beneficiary will conduct such a study. Thus, although the petitioner provided additional description, the statements are insufficiently detailed and fail to articulate what the beneficiary will actually do when performing this duty.

According to the petitioner, the 10% of the beneficiary's time spent on "HR and Staffing Matters" will include authorizing the hiring and firing of employees, revising manager's employee reports, and directing the petitioner's accountant. The petitioner did not explain how the hiring and firing of employees will translate into a regular part of the beneficiary's job given the petitioner's small staff of seven total employees including the beneficiary. Furthermore, in its business plan, the petitioner projects the funds necessary for salaries based on the continuation of seven employees for the next two years. In addition, the petitioner provided no explanation regarding the managers' "employee reports," such as who will make them, their subject matter, and how often they will be made.

The petitioner also claimed that the beneficiary will spend 15% of his time on "Product and Service Planning," which will involve directing and coordinating promotion of the petitioner's services. As an example, the petitioner indicates that the beneficiary is attending the CTIA—The Wireless Association show. The beneficiary will also spend 15% of his time on "Sales & Marketing" initiatives. As an example, the petitioner stated that the beneficiary has started a website. As indicated in the application to be a sub-dealer with T-Mobile, however, the petitioner's advertising and promotional authority, at least as related to T-Mobile Services, are severely restricted. The agreement with T-Mobile indicates that the petitioner must get prior written consent from T-Mobile before engaging in web-based or in-person advertising of any T-Mobile services. The petitioner has therefore failed to establish that it has the legal authority to conduct promotion or marketing of their services, both of which are explicitly listed as proposed duties of the beneficiary. As a result of these inconsistencies, it is unclear what the beneficiary will do with the combined 30% of his time devoted to service promotion and advertising.

As the above analysis shows, the petitioner's description of the beneficiary's proposed duties do not contain a sufficient degree of credible detail regarding the beneficiary's daily activities with the company. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, *supra*. As a result of the lack of specificity, the AAO cannot properly evaluate the petitioner's duties and, as a result, cannot conclude that the duties are primarily managerial or executive in nature.

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*).

On appeal, the petitioner argues that the director incorrectly bases the denial on the finding that the petitioner's employees are not professionals. The petitioner contends that the director's reasoning is flawed because the beneficiary will not be acting as a first line manager, but rather, he will delegate matters to the two managers below him. These managers will in turn instruct their subordinate employees.

As a preliminary matter, the AAO agrees with the director's finding that the petitioner has failed to show it employs professionals. There is no evidence that a post-secondary degree is required to enter the field of salesman or manager of the petitioner's store. Furthermore, the petitioner does not contend that its employees are professionals.

The remaining issue with regard to the beneficiary's managerial capacity is therefore whether the beneficiary will primarily act as a first-line supervisor directly managing employees, or whether he will primarily manage subordinate supervisors.

Although the petitioner refers to two of the beneficiary's subordinate employees as Manager and Supervisor, the petitioner's only other employees are four part-time sales clerks. The clerk job description indicates that they each work 19 hours per week. As a result, two clerks work a combined 38 hours per week, or the approximate amount worked by one full-time employee. This means the petitioner's four part-time clerks are the equivalent of two full-time employees.

The petitioner presented conflicting evidence regarding the amount of time worked by the petitioner's Supervisor. The petitioner stated that both its Manager and Supervisor work 40 hours per week. On its organizational chart, the petitioner stated the salary for the Store Manager is $18,000 and the salary for the Supervisor is $12,000. In 2010, the federal minimum wage was $7.25. Yearly full-time employment at this rate would result in an annual salary of approximately $15,000. Based on these calculations, it is unclear how the petitioner can legally employ the Supervisor full-time at the stated salary of $12,000. 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*, *supra*.

Inconsistencies also exist with regard to the petitioner's other employees. According to the W-2 wage reports, the petitioner had five employees for the first two quarters of 2011. The wages paid to each of these five employees is identical for all three quarters of 2011. In September 2011, the final month of the final quarter for which wage reports were produced, the petitioner added two employees who each received $5,000 that month. These two additional employees are listed on the petitioner's organizational chart as sales clerks with an annual salary of $2,000 each. The chart therefore conflicts with the petitioner's quarterly wage report, which shows them receiving $5,000 each in a single month. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

In response to the RFE, the petitioner provided the job duties of the beneficiary's two claimed supervisory subordinates: the Manager and the Supervisor. The job description for the Manager indicates that both the Supervisor and clerks report to him. However, the clerks' job description states that they report to the Supervisor, not the Manager. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.* The AAO notes that, although specifically requested in the RFE, the petitioner did not provide the hours that the Manager and Supervisor dedicate to each stated duty.

Upon examination, the Manager's duties lack sufficient specificity. The petitioner stated that the Manager manages the day-to-day operations of the business and develops, implements, and monitors the store's plan to increase sales. These duties are vague and fail to convey concrete actions. The title Manager itself implies that the position involves managing the store, however, the petitioner is required to describe what such management entails. Similarly, developing, implementing, and monitoring the petitioner's "plan" does not explain what the Manager will actually do to implement such a plan. The petitioner stated that the Manager effectively evaluates customers' potential needs and makes recommendations, however, the petitioner does not explain how the Manager does this. The Manager must also demonstrate and maintain a high level of understanding of the multiple services the petitioner offers. However, the petitioner did not specify how he does this. The Manager participates in required training, conference calls, or other related events, however, the petitioner provided no information indicating that the petitioner has any trainings, conference calls, or related events. The manager must also consistently meet and exceed sales goals within the guidelines established. Such a statement, however, does not describe a job duty, but rather a result. The petitioner failed to state what the sales goals are and how the Manager will meet and exceed them. The remaining duties listed for the position of Manager contains similar shortcomings.

For the position of Supervisor, the duties listed are similarly nonspecific. The Supervisor assists with several of the Manager's duties. However, as the Manager's duties are themselves vague and undetailed, the derivative duties of the Supervisor are also unclear. The Supervisor provides overall store management, supervision, and policy implementation. He also drives sales and profit through leadership, training, and development of the store team, as well as through execution of standards of operation. It is unclear what these mean in terms of concrete actions. The petitioner stated that the Supervisor serves as a key member of the security breach response team, but the petitioner does not indicate anywhere else in the petition that it has a security breach response team, nor does it describe what such a team is. The Supervisor also analyzes business reports and manages the store's controllable categories on the profit and loss statement. However, the petitioner failed to provide information about business reports or controllable categories. Similar shortcomings exist for the Supervisor's remaining duties.

In addition to the vagueness of the job duties, the small size of the petitioner's staff is problematic. 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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who 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., Family Inc. v. USCIS*, 469 F.3d 103 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See id.*

The petitioner provided evidence of one full-time employee per manager. The evidence must substantiate that the duties of the beneficiary and his subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In this case, the petitioner has failed to provide an adequate basis for the titles given to its employees. Such a limited staff is not, without more, sufficient to justify two subordinate manager or supervisor titles. This is particularly so given that the beneficiary's job duties fail to specifically allege that his duties involve the supervision or oversight of the subordinate supervisors. The petitioner will therefore be considered a first-line supervisor. As a first-line supervisor who does not supervise professionals, the beneficiary's supervisory activities are not managerial in nature, as that term is defined under the Act.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the staffing structure of the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent. However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008). The petitioner must therefore demonstrate that the beneficiary will spend more than 50% of his time acting in a qualifying capacity. According to the petitioner's list of the beneficiary's proposed job duties, the petitioner does not claim that the beneficiary would spend more than half of his time supervising the petitioner's managers.

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 detailed position description that clearly explains 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 this case, the petitioner has failed to articulate a specific function that the beneficiary will perform. In reviewing the beneficiary's alleged duties, the petitioner does not claim that the beneficiary will spend his time primarily performing tasks associated with a specific function. The petitioner has therefore failed to demonstrate that the beneficiary will be employed as a function manager.

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.*

Counsel for the petitioner asserts that the beneficiary "exercises wide latitude in discretionary decision-making," and states that "there is no one else who can possibly execute company decision because he is the owner/manager/executive and he has the final word on all company decisions." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Similarly, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, *supra*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In the instant case, the beneficiary may have a sufficient degree of authority over some aspects of company operations. However, the evidence submitted indicates that the petitioner does not have latitude with regard to all of his claimed duties. For example, the petitioner stated that the beneficiary will spend a combined 30% of his time on service promotion and advertising. Yet, the agreements provided by the petitioner relating to T-Mobile products and services indicate significant restrictions on the petitioner's ability to advertise. In addition to this problematic lack of authority, it appears that many of the petitioner's duties do not encompass the degree of executive-level involvement initially implied by the petitioner. As noted above, examples of the contracts that the petitioner supposedly negotiated all appear to be blanket contracts or applications that the beneficiary has merely filled out. 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).

Most significantly, the lack of specificity in the beneficiary's listed duties, discussed in detail above, means the petitioner has failed to satisfy its burden of proof regarding the nature of the beneficiary's position. On review, the totality of the evidence in the record does not support the petitioner's contention that the beneficiary will be primarily engaged in managerial or executive level activities. For these reasons, the appeal is dismissed.

On appeal, counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

IV. Conclusion

The petition will be denied and the appeal dismissed due to the petitioner's failure to demonstrate that he will be employed in a primarily managerial or executive capacity. 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.