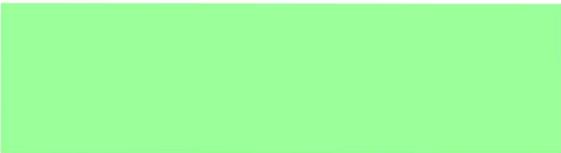
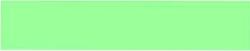


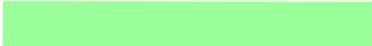
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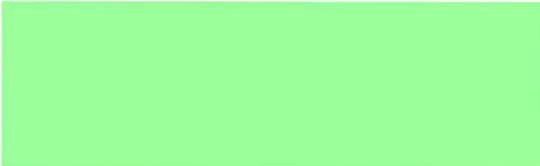


DATE: **JAN 24 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, operates two fast food restaurants and claims to be an affiliate of [REDACTED] located in Pakistan. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States. The petitioner now seeks to extend her status so that she may continue her employment in the position of President.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director's denial of the petition was against the weight of the evidence submitted and constitutes an abuse of discretion. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by 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.

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. U.S. Employment in a Managerial or Executive Capacity

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

A. Facts

The petitioner filed the Form I-129, on July 27, 2012. In a letter submitted in support of the petition, the petitioner indicated that it operates two fast food restaurants located in Houston, Texas and has 12 employees.¹

The petitioner indicated that the beneficiary serves in the position of President and performs the following duties:

Hiring and firing managers; supervising subordinate employees; overseeing preparation of sales and inventory reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budget and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers. Further the Beneficiary will also be responsible for locating and acquiring additional fast food locations.

¹ Although the petitioner initially identified the location of the two fast food restaurants as in Houston, Texas, the petitioner's letterhead lists its address as in [REDACTED]

In the performance of her duties, the Beneficiary will receive minimum supervision from the Board of Directors and the Beneficiary will exercise wide discretion and latitude in the performance of her duties.

As evidence of wages paid to employees, the petitioner provided copies of Internal Revenue Service (IRS) Forms W-2 issued to 17 employees in 2011, and a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2012 indicating that the company employed 10-18 employees during that time. The petitioner did not provide an organizational chart, an employee list, or other information regarding the staffing of the company.

On September 4, 2012, the director issued a request for evidence (RFE) instructing the petitioner to provide: (1) a comprehensive description of the beneficiary's duties; (2) a list of employees identifying each employee by name and position title; (3) complete position descriptions for all employees including a breakdown of the hours each employee devotes to specific duties on a weekly basis; and (4) IRS Form 941 for the second quarter of 2012.

In response, the petitioner submitted a letter dated September 23, 2012, in which it further described the beneficiary's areas of responsibility as follows:

Establish Sales and Marketing Goals:

More specifically, [the beneficiary] will be [d]eveloping and promoting marketing strategies as required by the environment. Deciding which markets will the Company penetrate and how; Developing future strategies in order to keep Company ahead of the competition; Work to integrate all business operations in such a way that maximize profitability and minimize cost[.] Based on this analysis, [s]he will set marketing goals for achieving sales of a certain dollar amount.

Set Employment and Organizational Policies:

Additionally, she will continue to be responsible for setting company policies relating to employment, productivity and financial matters. Furthermore, in her capacity, [s]he will be responsible for aiding in formulating and administering the policies of the organization, such as the number of employees required during each shift, their salary and minimum requirements for the job. She will also be responsible for reviewing new business locations by studying geographic locations and analyzing market needs, and giving recommendations to the Board of Directors on acquisitions or establishment of additional business locations.

Supervise Managers and Sub-ordinate employees:

[The beneficiary] will also be responsible for managing and supervising thirteen (13) employees who will be employed on a permanent basis. The Beneficiary will be responsible for the hiring and firing of these Managers and sub-ordinate employees, [k]eep track of job

specifications and employee satisfaction in order to gain maximum result from human resource. She will continue review and monitor with bookkeeper, expenditures to ensure that they confirm [sic] to budget limitations.

The petitioner also provided an employee list with the names, job titles, job duties and number of hours worked per week for each employee as of September 2012. The petitioner indicated that the beneficiary supervises one subordinate manager who works 32 to 35 hours per week and performs the following duties:

To manage staff, their duties, clock-in/clock-out timings and their payroll. To keep track of sales and send the periodic reports to the President. To keep track of Inventory that is when it is needed and how much is needed for the period. To make sure all activity is in compliance with the franchisor requirements. To make sure that customer is getting what is expected and that all standards of health and laws are maintained on the premises. To manage customer complaint if any and response [sic] accordingly. To be humble and cooperative for the customer service issues.

The petitioner indicated that its [redacted] franchise employs one cook (35 to 37 hours per week); one cashier/helper (25-30 hours per week); one cashier/stocker (25-30 hours per week), and a driver/helper (30-35 hours per week). The petitioner indicated that its [redacted] franchise employs three cooks (all working at least 30 hours per week); a cashier/cook (30-35 hours per week); a cashier/stock checker (18-22 hours); a cashier/helper (30-35 hours); and a cashier (32-38 hours).

The petitioner also provided copies of its IRS Form 941 and state quarterly wage reports for the second quarter of 2012. The quarterly report confirmed the employment of the beneficiary, the manager, three of the four [redacted] employees, and three of the eight [redacted] employees. According to the state quarterly wage report, the petitioner employed 15 to 20 employees during the quarter.

The director denied the petition on December 5, 2012, concluding that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity under the extended petition. In denying the petition, the director found that the petitioner submitted a vague description of the beneficiary's job duties that was insufficient to establish how she qualifies as a manager or executive within the petitioner's current staffing arrangement. Further, the director noted the discrepancies between the petitioner's employee list and the employee list accompanying the company's quarterly wage report for the second quarter of 2012. The director observed that the company appears to employ a part-time, non-professional staff. As such, the director concluded that the beneficiary could not qualify as a personnel manager on the basis of her supervisory duties.

On appeal, counsel for the petitioner, citing *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), states that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise. Counsel asserts that the petitioner regularly employs 12 to 14 workers who work an average of 25 to 30 hours per week, and that their employment conditions are typical for the petitioner's industry,

which does not require professional employees. In addition, counsel emphasizes that the beneficiary will in fact supervise one manager, who in turn, supervises the other employees.

Counsel further objects to the director's finding that the petitioner provided a vague description of the beneficiary's duties. Rather, counsel asserts that the beneficiary's duties are consistent with the duties of a "general and operations manager" as described in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, and fall within the statutory definitions of managerial or executive capacity.

In support of the appeal, the petitioner submits, *inter alia*: (1) a copy of its Texas quarterly wage report and IRS Form 941 for the third quarter of 2012; (2) pay stubs for all employees who worked in 2012; (3) a list of employees with job titles and average number of hours worked as of September 2012; and (4) an employee schedule for the period September 16 through September 29, 2012.

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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.*

The AAO concurs with the director's determination that the petitioner provided a vague position description that failed to explain what the beneficiary does on a day-to-day basis as the president of a company which operates two fast food restaurants. The petitioner stated that the beneficiary's duties are divided between setting employment and organizational policies, establishing sales and marketing goals, and supervising managers and subordinate employees. The petitioner indicated that the beneficiary will be "[d]eveloping and promoting marketing strategies," setting "marketing goals," "[d]eveloping future strategies," "setting company policies related to employment, productivity and financial matters," and "aiding in formulating and administering the policies of the organization." While such statements convey the beneficiary's level of authority in the company and general areas of responsibility, they offer little insight into the nature of her day-to-day duties, as the petitioner provided no specific examples of the tasks she will perform. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

While several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual day-to-day responsibilities. Regardless, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity. Beyond the required

description of the job duties, United States Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary. Factors considered include the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The 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." See section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). In addition, 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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

On appeal, the petitioner maintains that it operates two franchised fast food restaurants and regularly employs a total of 12 to 14 non-professional employees who work on average 25-30 hours per week. While the petitioner's staffing levels appear to vary somewhat from month-to-month based on the payroll evidence submitted, the claimed staffing levels are supported by the record. Based on the photographs provided, the two restaurants are located adjacently in the same strip mall but do not have shared facilities. In response to the RFE, the petitioner stated that it has one manager responsible for supervising staff in both restaurants and indicated that he works for 32 to 35 hours per week. The petitioner indicated that the [REDACTED] store has one cook, a driver, and two cashiers who perform other duties as necessary, and that the [REDACTED] store has three cooks, a dishwasher and four cashiers who perform other duties as needed. The petitioner did not claim to have designated store managers, assistant managers, shift leaders or other subordinate supervisory personnel working at either restaurant.

On appeal, the petitioner submits a work schedule indicating that the company has employees working from 9:00 a.m. until 10:00 p.m. seven days per week, although it did not differentiate between its two locations and it is unclear if both restaurants have the same operating hours. Nevertheless, based on this information the two stores are open for a total of up to 182 hours per week. The petitioner did not explain how a [REDACTED] restaurant that is open daily functions with a single cook who works less than 40 hours per week and only two cashiers and one part-time delivery driver. Further, the information provided on appeal indicates that the subordinate manager works 65 hours per week; however, when the petitioner responded to the RFE, it stated that this employee works no more than 35 hours per week. As the manager is the sole supervisory employee responsible for all the lower-level staff at two separate restaurants, this is a significant inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has indicated that the beneficiary is not involved in supervising the non-professional staff working at the restaurants as cooks, cashiers and dishwashers. However, the evidence as a whole does not support the petitioner's claim that the manager, who may work only 32-35 hours per week, is able to singlehandedly perform all first-line supervisory duties and other routine administrative, financial and clerical tasks associated with operating two restaurants. Thus, the petitioner has not established that the beneficiary, the only other individual in a claimed managerial or executive capacity, is relieved from performing these duties. In addition, the petitioner has not provided copies of the franchise agreements with [REDACTED] or [REDACTED]. Such agreements typically contain provisions regarding the franchisee's responsibility with respect to maintaining a designated manager on the premises. The petitioner has two restaurants with two different franchisors and only one manager. Based on the nature of the petitioner's businesses, the petitioner has not established that supervising one subordinate supervisor is the beneficiary's primary responsibility, or that the subordinate supervisor relieves the beneficiary herself from performing first-line supervisory duties. The petitioner has not established that the beneficiary qualifies as a personnel manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

On appeal, counsel states that one of the beneficiary's main responsibilities will be to search for new locations for expansion of the business and suggests that she would be responsible for managing this function. However, the petitioner provided no evidence, such as a business plan, documenting the company's immediate plans for expansion. The petitioner stated that the beneficiary's duties in this regard will include "reviewing new business locations by studying geographic locations," "analyzing marketing needs" and making recommendations to the board of directors. The petitioner did not indicate that any employees would assist the beneficiary with these research-oriented duties or explain how such duties qualify as managerial in nature. Further, the petitioner has not indicated how much of the beneficiary's time would be allocated to this area of responsibility. The evidence of record does not support a finding that the beneficiary will primarily manage an essential function.

Counsel's citation 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 even though he was the sole employee is noted. However, counsel has furnished no evidence to establish that the facts of the instant

petition are analogous to those in the unpublished decision. Moreover, 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.

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. See 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, the petitioner submits a generic job description for "Top Executives" published in the U.S. Department of Labor's *Handbook* and states that the beneficiary's duties are consistent with the responsibilities generally described therein. The petitioner's reliance on the *Handbook's* job description is misplaced. The relevant definition of "executive capacity" for the purposes of establishing the beneficiary's eligibility for L-1A classification is the definition at section 101(a)(44)(B) of the Act. Further, beyond the required description of job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary. As discussed, the petitioner's overly broad description of the beneficiary's duties indicates that the beneficiary is employed at the highest-level in the petitioning company and possesses the required level of authority. However, due to the lack of subordinate supervisory-level staff and the scope and nature of the petitioner's operations, the evidence does not establish that the beneficiary is relieved from involvement in supervising the day-to-day operations of the petitioner's restaurants, such that she can devote her time primarily to qualifying executive responsibilities.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), in support of the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS). Similarly, counsel has not furnished evidence that *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff is analogous to the facts of the instant petition. Further, with respect to *Mars Jewelers, Inc.* the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. USCIS has interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5. Rather, the AAO's conclusion is based on the petitioner's failure to provide a detailed description of the beneficiary's day-to-day tasks and the lack of subordinate supervisors to relieve the beneficiary from performing non-qualifying first-line supervisory tasks.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." However, the statute also requires the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing non-qualifying operational, administrative and first-line supervisory tasks.

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 her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. 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).

For the reasons discussed herein the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. Accordingly the appeal will be dismissed.

III. Qualifying Relationship

Although not addressed in the service center director's decision, a remaining issue in the present matter is whether the petitioner has established that it maintains a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims that it has an affiliate relationship with [REDACTED], which is described as a sole proprietorship in Pakistan owned by Mr. [REDACTED]. The petitioner stated that Mr. [REDACTED] is also its sole owner and submitted a copy of its stock certificate number one indicating that he owns all 1,000 authorized shares of the petitioning company. However, the petitioner also submitted a copy of its IRS Form 1120, U.S.

Corporation Income Tax Return, with IRS Form 1120X, Amended U.S. Corporation Income Tax Return, for 2011. The petitioner indicated at Part II of the Form 1120X that it was filing the amendment because "Overseas partner [REDACTED] who has 25% shares was not included in the originally e-filed tax return now in amendment. Return Schedule 'G' included." The petitioner indicated on the amended Schedule G, Information on Certain Persons Owning the Corporation's Voting Stock, that Mr. [REDACTED] owns 25% of the company's stock.

If Mr. [REDACTED] currently owns only 25% of the petitioner's stock, rather than 100% as stated elsewhere, the petitioner cannot establish that it has an affiliate relationship with the foreign entity based on common ownership and control by the same individual. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(I). 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. at 591-92. Based upon the unresolved inconsistency in the record, the petitioner has not established that it enjoys the claimed affiliate relationship with the beneficiary's foreign employer. Accordingly, the petition cannot be approved.

IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative 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.