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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

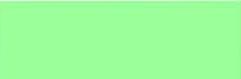


U.S. Citizenship
and Immigration
Services



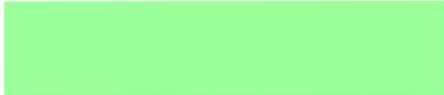
DATE: **JUN 16 2014**

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,

Ron Rosenberg

Chief, Administrative Appeals Office

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as a 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 operating a gas station and convenience store. The petitioner states that it is an affiliate of the beneficiary's Venezuelan employer. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for two years.¹

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

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 asserts the director abused her discretion in finding that the evidence did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The petitioner 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, Petitioner for a Nonimmigrant Worker, 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.

¹ Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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(1)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

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

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

Finally, 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. Section 101(a)(44)(C) of the Act.

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

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations as a new office in the United States.

A. Facts

On July 29, 2013, the petitioner filed the Form I-129 stating that the beneficiary will be employed as general manager of a gasoline and convenience store business which was incorporated on March 13, 2013. The petitioner stated that it had seven employees.

On Form I-129, the petitioner described the beneficiary's proposed duties as follows:

As General Manager at [the petitioning company], [the beneficiary] will be responsible for making the following managerial decisions, including: contracts and services performed by the company; strategies relating to policy matters which requires an analysis of possible alternatives such as opening of a new branch; policies of the company; selection of the banking and financial institution which can best serve the necessities of the company, among others.

In a letter accompanying the Form I-129, the petitioner stated that the beneficiary would control the work of other supervisors and professional employees and that 100% of her time would be dedicated to performing managerial duties. The petitioner indicated that her typical managerial responsibilities would include the following:

1. Purchase, cell [*sic*], cede, transfer, encumber, lease, contract, negotiate, acquire or encumber personal or real property, and rights of any type.
2. Assign, endorse, accept, issue, and in general, execute any type of operations on checks, bills of exchange, promissory notes or any commercial paper.
3. Constitute mortgages, solely to guarantee obligations in favor of the company.
4. Constitute commercial factors and assign their faculties.
5. Exert the whole representation of the company judicial or extra judicially, to sustain and defend in front of third parties the rights and interest of the company.
6. Supervise and exercise direction over professional subordinate employees who perform day-to-day work with authority to hire and fire employees.

In the same letter, the petitioner also provided the following breakdown of duties with the number of hours that the beneficiary would allocate to task:

- Manager [*sic*] the entire U.S. organization. Direct and coordinate activities and operation of the U.S. Company including developing the U.S. investment, executive and personnel actions – 10 hours per week.
- Oversee all financial aspects of the company and set strategic policies and objectives – 3 hours per week.
- Plan, formulate and implement administrative and operational policies and procedures - 3 hours per week.
- Prepare annual budgets and ensure that company revenues and expenditures fall withing [*sic*] budgeted amounts – 2 hours per week.
- Coordinate and supervise the departments in the company that will execute the business strategies – 2 hours per week.
- Coordinate and direct the accounting and administration processes of the company for the purpose of maintaining homogenous and cohesive policies to guarantee financial success – 3 per week.
- Ensure that the managerial procedures and policies of the company abide by all current laws and regulations – 3 hours per week.
- Establish the procedures for implementing the payroll process and company benefits in compliance with all laws and regulations – 2 hours per week.

- Analyze current regulations and their affect in the company's economic and financial policies – 2 hours per week.
- Oversee the Office Manager – 5 hours per week.
- Supervise and exercise total direction over subordinate employees who perform the day-today [*sic*] work with authority to hire and fire the employees – 5 hours per week.

The petitioner's letter included position descriptions for an office manager [REDACTED] a sales manager [REDACTED] and four cashier/stock clerk/maintenance employees. The petitioner stated that the office manager has a bachelor's degree in business administration and is responsible for: supervising "all work units within an office"; supervising a subordinate supervisor and other staff; assisting the general manager with developing policies, and developing changes in procedures, practices, and work flows; performing personnel administrative tasks and conducting staff meetings; preparing manuals describing procedures and standards; preparing reports for the general manager; and serving as a point of contact for office activities.

The petitioner indicated that the sales manager has a bachelor's degree and is responsible for resolving customer complaints, monitoring customer preferences, directing and coordinating sales activities, determining price schedules and discount rates; projecting sales based on operational records; consulting with the office manager to plan advertising services and "to secure information on equipment and customer specifications"; representing the company at trade association meetings to promote products; planning and directing staffing, training and performance evaluations; conferring with potential customers regarding product needs and advising customers on types of products to purchase; overseeing sales assistants, and assessing marketing potential of new and existing store locations.

Finally, the petitioner indicated that the "cashier/stock clerk/maintenance" employees perform inventory, monitor orders to ensure supplies are received, negotiate prices, order and receive materials and supplies, maintain records of product demands, pick up material and convey to storage or to platforms for delivery, check merchandise received against purchase orders, prepare and maintain requisitions, process purchase orders, perform cleaning and minor maintenance work, and assist in taking periodical inventories. The petitioner did not indicate that any of these employees perform the duties of a retail store cashier.

The petitioner explained its hiring plan as follows:

The beneficiary will be initially in charge of one (1) subordinate supervisor/professional employee, the Office manager, who in turns [*sic*] will have (1) one subordinate employee beneath him, which will relieve the beneficiary of having to take care of any day to day operations. In the course of her first year as General Manager of the company, [the beneficiary] plans to hire (4) employees and two (2) more for the third year of operations, then one (1) more for the fourth year, for a total of seven (7) subordinate employees by the en [*sic*] of the fourth year.

The petitioner's organizational chart depicted seven employees with the beneficiary at the top of the hierarchy as the president/general manager. Directly subordinate to the beneficiary is an "Administrator" position filled by [REDACTED] and directly subordinate to him is a "Supervisor" position filled by [REDACTED] both individuals are listed as having high school degrees. Subordinate to the supervisor are four named cashier/maintenance/sales employees.

The petitioner submitted a business plan which indicates that the company will operate 24 hours a day, Monday through Sunday and that it had leased an existing store and gas station. The petitioner's business plan also indicates that it will operate a warehouse for storage of inventory; however, there was no evidence of a leased warehouse submitted as part of the record. The petitioner's business plan reported a plan to hire five employees, but since the plan appears to have been written in 2012, the evidence indicates that these employees had been hired at the time of filing. According to the business plan "the General Manager will perform the bulk of duties required to operate the business activities."

The petitioner provided payroll information to corroborate that all of the employees on the organizational chart were paid for their services during the week ending June 5, 2013. The petitioner also provided a lease agreement, a fictitious name registration indicating that it was doing business as [REDACTED] " and photographs depicting the interior and exterior of a convenience store with a gas station.

The director issued a Request for Evidence (RFE) instructing the petitioner to provide additional information including documentation to show that the new office will support an executive or managerial position within one year of the petition's approval. The director also requested evidence of the petitioner's business such as: (1) the proposed number of employees and their positions; (2) the amount of the U.S. investment; (3) an explanation of the financial ability of the foreign company to pay the beneficiary and commence doing business in the United States; and (4) an explanation of how the business will support a managerial or executive position within one year.

The petitioner responded in an August 21, 2013 letter and reiterated the same duty descriptions as previously provided. The petitioner provided a payroll summary depicting its employee hours and pay for twelve weeks spanning June 7, 2013 through August 23, 2013. The four individuals identified as cashiers/stock/maintenance employees worked an average of just over 145 total hours per week; the lowest number of combined hours worked in one week was 113 and the highest was 153.5. As noted above, the petitioner indicated that its business is open 24 hours daily or 168 hours per week. The petitioner also provided copies of its recent bank statements, as well as its balance sheet and profit and loss statement for the period March 1 to July 13, 2013.

The director denied the petition finding that the beneficiary will primarily serve as a first line supervisor of non-professional employees rather than in a qualifying managerial or executive capacity within one year. The director observed that the petitioner submitted inconsistent information regarding the educational credentials held by the beneficiary's subordinates and had not established that have completed bachelor's degrees. The director concluded that "the description of the proposed duties, the lack of personnel and the size and scope of the new business suggest that the [beneficiary's] actual daily activities will not be primarily managerial."

On appeal, counsel acknowledges that the petitioner submitted inconsistent information regarding the educational level attained by the beneficiary's subordinates and confirms that they are high school graduates, not college graduates as indicated at times in the record. Counsel explains that there was an error in translating this information from Spanish to English. Nevertheless, counsel asserts that the company requires professional personnel such as "engineers, attorneys, specialized mechanics and accountants" in the United States and in Venezuela and that these employees will be supervised by the beneficiary. Counsel asserts that the director's failure to consider the beneficiary's role within the overall organization was a gross error.

Counsel notes that the director's decision was focused on the beneficiary's supervision of non-professional personnel, and emphasizes that such duties will account for only 10% of her time. Counsel asserts that the director's decision "fails to show that [s]he consider [sic] the other 90% of the beneficiary's duties a majority of which are directly related to managing a major component of petitioner's business." Specifically, counsel suggests that the beneficiary will perform as a functional manager, noting "[t]he Beneficiary manages the essential function of developing the corporation presence in the United States, a role which reasonably requires her to rely on support from the parent's company staff whose duties directly relate to the objectives and goals of the U.S. office."

Counsel asserts that the director gave "excessive importance" to the company's size and number of employees and the U.S. company's staffing levels, "rather than the larger organization which includes the company in Venezuela." Counsel asserts that the beneficiary is "charged with managing the implementation of all goals, policies, strategies, and objectives pertaining to the import and distribution eventually of the parent company's specialized products and presence in the U.S. market and high-level planning for the new U.S. subsidiary's further expansion."

In support of the appeal, the petitioner submits a lease agreement dated April 17, 2013 between [REDACTED] LLC doing business as [REDACTED] and [REDACTED] Inc. that is signed by the beneficiary as president of [REDACTED] LLC. The petitioner did not provide an explanation or evidence of its relationship, if any, with this limited liability company. This lease is also for a gas station and convenience store business and indicates at page 4 that the "Lessee, specifically [the beneficiary] shall be available on site or via phone to resolve any issues that may arise." The petitioner does not indicate how much of the beneficiary's time will be allocated to this separate business.

As evidence of the beneficiary's supervision of independent contractors, the petitioner submits a letter from [REDACTED] who states that he is the petitioner's accountant, and a letter from [REDACTED] of [REDACTED] Inc., the petitioner's lessor and fuel supplier. Mr. [REDACTED] states that the beneficiary "is directly responsible for the lease and marketing agreements requirements, employee contracts, payroll, bank accounts, and payment of utilities and products of inventory for the business currently operating" and indicates that the beneficiary "is the person dealing with all the business clients and suppliers." The petitioner also provides letters and supporting evidence from contractors used by the foreign entity, including an accounting firm and a labor relations advisor.

B. Analysis

Upon review, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity for the United States petitioner within one year.

When examining the executive or managerial capacity of the beneficiary, we 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.* Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary. In a case involving a new office, this includes the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

In this matter, the petitioner provided two proposed duty descriptions for the beneficiary, both of which contained very broad terms that failed to convey any understanding of what she would do on a day-to-day basis as the general manager of a company that operates a gas station and convenience store. The "typical managerial responsibilities" listed for the beneficiary included six areas of responsibility such as "constitute mortgages," "constitute commercial factors and assign their faculties," and "exert the whole representation of the company judicial or extra judicially." These duties are poorly defined and bear no clear relation to the petitioner's new gas station business.

The petitioner's second description, submitted simultaneously with the first, included eleven broadly-drawn responsibilities and each responsibility was assigned an hourly allocation of the beneficiary's work week. These duties were also vague, and included such tasks as "coordinate and direct the accounting and administration processes of the company," "plan formulate and implement administrative and operational policies," "set strategic policies and objectives," "coordinate and supervise the departments in the company," "ensure that the managerial procedures and policies . . . abide by all current laws," "analyze current regulations," and "direct and coordinate activities and

operation." These two duty descriptions are different yet the second description accounts for an entire 40 hour work week. It is unclear how the first description of the beneficiary's "typical managerial responsibilities" can be reconciled with the second description, although both descriptions were provided in the same letter. 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).

Even if the beneficiary's duties were limited to the petitioner's second description which allocated 100% of the beneficiary's time into hourly increments, the second description is vague and too broad to provide insight into how the beneficiary would actually spend her day. We cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, evidence provided on appeal, specifically the letter from [REDACTED], introduces job duties which were not included in either of the petitioner's position descriptions for the beneficiary. For example, Mr. [REDACTED] states that the beneficiary is "dealing with all the business clients and suppliers" and is directly responsible for employee contracts, payroll, bank accounts, payment of utilities, and product inventory. While these administrative and operational duties may be typical for a retail store manager, they are not consistent with the high level managerial or executive capacity duties defined in the statute, nor are they consistent with the duties the petitioner attributed to the beneficiary.

In addition, some of the beneficiary's listed duties and information provided in its business plan is not consistent and raises questions regarding the credibility of the job description. For example, the petitioner stated that the beneficiary will "[c]oordinate and supervise the departments in the company that will execute the business strategies," and "[c]oordinate and direct the accounting and administration processes of the company." Although the duty description suggests a complex operation that includes departments, a warehouse and multiple offices, the evidence established that the petitioner had secured one gasoline station and a related convenience store staffed by a total of seven people including the beneficiary, an administrator, a supervisor and four clerks. The petitioner documented no plans for expansion beyond this structure during the first year of operations.

Furthermore, the petitioner's business plan noted that the petitioning business "is located to perform its activities in a warehouse in [REDACTED] FL" and "[t]he office will be completed with all the technologies to compete and operate in the current market." Further, the petitioner stated that "[t]he warehouse will have plenty of space available to hold the inventory of parts and supplies." The business plan also contains references to offering customers "superior customer service throughout the warranty phases of each product," and states that the company's mission is "constantly striving to supply what the upholstery customer is asking for." None of these statements are consistent with the evidence submitted, as the petitioner does not have a warehouse or an inventory of parts and it is not selling upholstery or products under warranty.

Therefore, while several of the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the inconsistencies in the record and the lack of specificity raise questions as to the beneficiary's actual proposed responsibilities. Further, on appeal the petitioner submits evidence indicating that the beneficiary is also the president of a company called [REDACTED] LLC," which leases and operates a gas station and convenience store doing business as "[REDACTED]" Although an expense related to "[REDACTED]" is listed in the petitioner's business plan, petitioner has previously offered no information regarding this business or its relation to the petitioning company. Therefore, it is unclear whether or how much time the beneficiary would allocate to the business operated by [REDACTED] LLC, or how this additional responsibility would impact her role with the petitioner.

Overall, the position descriptions alone are insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the United States company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

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).

The petitioner indicates that it will operate a gasoline station and convenience store and that the beneficiary will manage a subordinate administrator (also referred to as an office manager) who in turn will manage a supervisor (who is also referred to as a sales manager). On appeal, counsel clarifies that both of these employees are high school graduates. In evaluating whether the beneficiary manages professional employees, we 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 petitioner has not established that the beneficiary's immediate subordinates are professionals.

Counsel claims on appeal that the beneficiary will manage professional independent contractors working for both the U.S. and foreign entities, including accountants, attorneys and engineers. The

petitioner did not mention these contractors prior to the appeal and has not included them on any organizational chart. While the petitioner has provided evidence of services provided by these staff, the petitioner has not established that the beneficiary will be primarily supervising these workers or that they will relieve her from involvement in the day-to-day operations of the petitioner's business.

The petitioner's organizational chart indicates that the beneficiary would supervise at least one supervisor, [REDACTED], the "administrator" or "office manager." The petitioner indicated that he will oversee "the activities performed in all work units within an office, including office management, implementation of procedures, collection and reporting of statistics, and accounting functions." None of the duties attributed to this position clearly relate to the petitioner's gas station and convenience store business, therefore the job description has little probative value and does not establish Mr. [REDACTED]'s role as a supervisor. The petitioner also did not explain the discrepancy between the "administrator" title versus the "office manager" title given to this employee. There was a similar discrepancy in the job duties assigned to the petitioner's cashiers, as the petitioner did not indicate that anyone would be responsible for operating a cash register or performing any retail sales transactions.

The petitioner's evidence must substantiate that the beneficiary's duties and those of his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles and duties are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's six subordinates perform the actual day-to-day tasks of operating the gas station and convenience store which the petitioner indicates is open for 24 hours per day. Therefore, the beneficiary does not qualify as a manager based on her supervision of subordinate personnel.

On appeal counsel states that the director "mischaracterized the nature of the Beneficiary's responsibilities and disregarded her placement within the corporate group's organizational hierarchy." Counsel adds that the beneficiary "manages the essential function of developing the corporation presence in the United States" and adds that the beneficiary must "rely on support from the parent's company staff whose duties directly relates to the objectives and goals of the U.S office." Counsel contends that the "Director inadvertently overlooked this staff in the ultimate decision." In this matter, the petitioner provided insufficient evidence to establish that the beneficiary will oversee any employees for the foreign company. The petitioner claimed to have seven employees and did not assert a reliance on contractors, outside employees, or individuals employed with the foreign company. Furthermore, the nature of this gasoline station and convenience store does not support counsel's assertion that the beneficiary necessarily relies on support from the foreign company, which also operates a single gas station and convenience store. Counsel's statement on appeal that the companies operate in close coordination and that the beneficiary is responsible for "implementation of all goals, policies, strategies and objectives pertaining to the import and distribution . . . of the parent company's specialized products" is not

supported by any evidence. 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).

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(I)(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); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function as it has not established that her job duties will be primarily managerial in nature. Furthermore, the petitioner previously indicated that the beneficiary will manage the U.S. company and did not claim that the U.S. store is a function or component of the international organization, which includes one other store located in Venezuela that is operated independently. Again, the petitioner has not established that the foreign entity's retail store employees contribute to the operation of the U.S. store or otherwise relieve the beneficiary from performing non-managerial duties associated with its 24/7 operation.

Similarly, the petitioner failed to present sufficient evidence to establish that within one year it would employ sufficient personnel to relieve the beneficiary from primarily performing non-qualifying duties. As required by section 101(a)(44)(C) of the Act, 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. 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 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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 sections

101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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, but those needs will not excuse a beneficiary who will spend the majority of his or her time on non-qualifying duties by the end of the first year of operation.

A review of the totality of the evidence submitted shows that the petitioner has reached the staffing levels proposed in its business plan. However, it has not established that it has sufficient staffing to maintain 24 hour operation of the convenience store without the assistance of the employees depicted as supervisors on its organizational chart. At the time the petitioner filed this petition, it claimed to operate a new gas station and convenience store with six subordinate employees. The petitioner provided evidence to show that its cashiers worked an average of 145 hours out of 168 hours per week. The petitioner has not established that it sufficient staff to keep a single cashier on duty during all of its operating hours. Further, it is reasonable to believe that the petitioner may need to have more than one employee in its store during certain hours. The petitioner did not explain who would perform cashier services when a cashier was not available, or how the six employees are sufficient to account for three eight hours shifts on a daily basis. According to the business plan, "the General Manager will perform the bulk of duties required to operate the business activities." Therefore, the beneficiary may reasonably be expected to perform any and all duties required to keep the store open, including duties that would normally be assigned to a non-managerial employee. The petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties, nor has it indicated any intent to increase its staffing levels during the first year of operations.

While counsel correctly observes that the petitioner does not need to establish that the beneficiary's duties are wholly managerial or executive in nature, the petitioner did in fact specifically state that the beneficiary will allocate 100% of her time to qualifying duties. Therefore, it is reasonable for the director to question whether the provided duty description accurately reflects the beneficiary's actual duties in light of the totality of the evidence submitted. Further, as noted above, the beneficiary's business associate, Mr. [REDACTED] states that the beneficiary performs a number of administrative and operational tasks associated with managing a retail store, non-qualifying duties which were not included in the petitioner's description of the beneficiary's position. Finally, the evidence submitted on appeal indicates that the beneficiary has commitments to another store operated by [REDACTED] LLC" which may further limit the amount of time she can reasonably devote to managerial duties on behalf of the petitioner.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) in support of his assertion that the small size of a petitioner should not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, we note 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). In *National Hand Tool Corp.*, the court 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. We interpret the regulations and statute as prohibiting discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the petitioner must still 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 petitioner did not establish that the beneficiary would be primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Counsel further 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 even though he was the sole employee. 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.

We do not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its general manager. The definitions of executive and managerial capacity, however, each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). For the reasons discussed above, the petitioner has not established that the beneficiary's actual duties will be primarily managerial or executive in nature. Accordingly, the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons. 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.