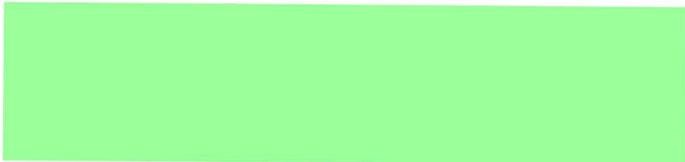
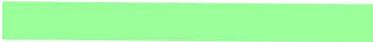


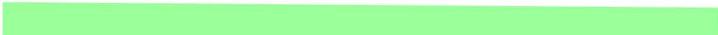


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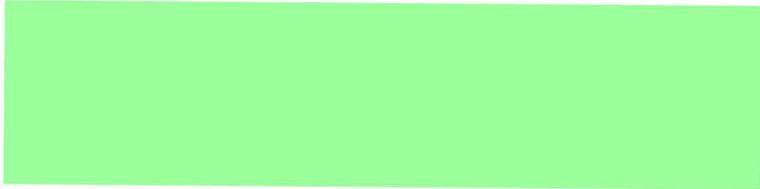


DATE: **MAR 28 2014** OFFICE: VERMONT SERVICE CENTER 

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)

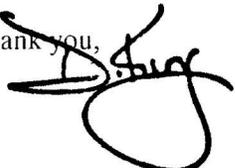
ON BEHALF OF PETITIONER:



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 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, states that it operates a retail business. The petitioner claims to be a subsidiary of [REDACTED] located in Pakistan. The petitioner seeks to employ the beneficiary as its president/CEO for a period of two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a 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 for review. On appeal, counsel for the petitioner asserts that the beneficiary "will supervise other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company." Counsel submits a brief in support of the appeal.

I. THE LAW

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

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

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

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

II. THE ISSUE ON APPEAL

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 12, 2012. The petitioner stated on the Form I-129 that the beneficiary will be employed as its president/CEO and indicated that the

company has six current employees and a gross annual income of \$501,564.00. In a letter dated June 4, 2012, the petitioner described the beneficiary's position as follows:

As the President and CEO of [the petitioner], [the beneficiary] will be the key U.S. contact for the directors of the foreign company. [The beneficiary] will be employed at the highest position within the U.S. Company, and will oversee managers who supervise day-to-day operations. In sum, [the beneficiary] will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company. Some of the specific job duties include: (i) Negotiating and supervising the drafting of purchase agreements; (ii) Developing trade and consumer market strategies; (iii) Hiring appropriate personnel and leasing equipment and retail distribution facilities; (iv) Overseeing the legal and financial due diligence process and resolving any related issues; and (v) Developing and implementing plans to ensure [the petitioner's] profitable operation.

<u>Description of Duties</u>	<u>Time Spent %</u>
Financial Decisions and Conducting Due Diligence for Expansion of outlets.	40%
Contract Negotiations and Developing Trade and Marketing Strategies	30%
Financial Decisions: Decision on Expansion, Incurring Expenses, resolving financial related issues	20%
Organizational Development of Company: Putting Management Team into place	10%

Additionally, [the beneficiary] is responsible for all our planning, expansion, investment, budgeting, and marketing. In addition, he hires and assigns other managers and employees and is in charge of increasing the sales of the company. He is employed at the highest executive level will [sic] has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation. Under [the beneficiary's] supervision, [the petitioner] expects to experience increase in the number of employees, significant growth in cash flow, and presence of significant customers creating a demand to employee [sic] a fulltime permanent executive.

[The beneficiary] supervises managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Executive or Managerial" in nature and are consistent with [the Act]. [The beneficiary] plans and directs the management for the Petitioner through its own employees, as well as contract employees who perform the legal and accounting duties. [The

beneficiary] will be the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decision-making.

The record shows that the petitioner was incorporated on June 10, 2009 for the purpose of "operating a convenience store retail business and any other lawful business for which corporations may be incorporated under the Texas Business Act."

In support of the Form I-129, the petitioner submitted its IRS Form 1120, Corporation Income Tax Return, complete with supplements for years 2010 and 2011.

On August 27, 2012, the director issued a request for additional evidence (RFE) in which he instructed the petitioner to submit, *inter alia*, the following: (1) a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; (2) a list of U.S. employees identifying each by name and position title, including a complete position description of all of the employees with a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; and (3) the petitioner's Form 941, Employer's Quarterly Return, for the third and fourth quarters of 2011 and for the first and second quarters of 2012.

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

Beneficiary will supervise other professional and managerial employees, establish goals and policies for the U.S. investment, and exercise wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Executive or Managerial" in nature and are consistent with [the Act]. Beneficiary will plan and direct the management for the Petitioner through its own employees, as well as contract employees who perform the legal and accounting duties. Beneficiary will be the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decision-making.

Our Current executive and managerial Staff is as follows:

<u>Number</u>	<u>Name</u>	<u>Position</u>
1		President/CEO
2		Vice President and General Manager
3.		Retail Manager
4.		Assistant Manager

* * *

[The beneficiary] functioned in a Managerial position as Senior Manager – Operations for [the foreign entity], and will function in a Managerial position as President and CEO of [the petitioner]. The USCIS has defined distinctive characteristic for classification of an employment position as Managerial. Both the Senior Manager – Operations position for [the foreign entity] and the President and CEO position for [the petitioner] meet these requirements and qualify as Managerial positions.

* * *

[The beneficiary] is responsible for the success or failure of the company. Operations, marketing, strategy, financing, creation of company culture, human resources, hiring, firing, compliance with safety regulations [sic]. [The beneficiary] knows the greatest power he possesses is that of delegation, sharing the work and allowing other employees to have opportunities to make executive decisions, and grow with the company. Creating culture, building the senior management team can be done only by the CEO.

The senior management team can help develop strategy. Investors can approve a business plan. But the CEO ultimately sets the direction. . . . [The beneficiary] decides, sets budgets, forms partnerships, and hires a team to steer the company accordingly.

[The beneficiary] hires, fires, and leads the senior management team. They, in turn, hire, fire, and lead the rest of the organization. He must resolve differences between senior team members, and keep them working together in a common direction. He sets direction by communicating the strategy and vision of where the company is going. . . .

[The beneficiary] serves as the President and CEO of [the petitioner] and continues to establish our U.S. operations. He is responsible for all our planning, expansion, banking, budgeting, and marketing. He addition, he hires and trains other managers and employees and is incharge [sic] of increasing the sales of the company. He is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

* * *

Under this retail enterprise, [the petitioner] has 6 employees and is looking to hire additional 4 employees by the end of current fiscal year. [The petitioner's] gross sales for the year 2011 fiscal year [sic] were \$501,564. The projected revenues for the 2012 are \$1.1 Million. . . . [The petitioner] also projects further acquisitions and investment development in the U.S. market through the leadership of its President/CEO, [the beneficiary], thereby increasing its job force and tax dollars.

* * *

In conclusion, [the beneficiary] is an executive employee overseeing the management of U.S. Operations. [The beneficiary] is not a first line manager and will not perform day-to-day work activities; instead he will oversee and direct the management and performance of key company goals and functions. [The beneficiary] will supervise the work of other supervisory, professional or managerial employees who are degreed individuals. [The beneficiary] is the executive at the very highest levels of decision-making within a company.

Counsel went on to provide a brief breakdown of the general manager and retail/operation manager's duties including the percentage of time they spend on their respective activities. Although the petitioner provided an organizational chart, the only employee specifically named in the chart was the beneficiary. The petitioner did not name the employees who would assume the positions of vice president/general manager, retail supervisor, assistant manager, three cashier/clerk positions, and a bookkeeper.

Additionally, the petitioner submitted a letter describing the beneficiary's proposed duties in the United States as follows:

As President and CEO of [the foreign entity's] United States affiliates, [the petitioner], [the beneficiary] has been and will continue to be responsible for:

- Serving as the key U.S. contact for the shareholders and directors of the parent company;
- Planning and developing the U.S. investment;
- Developing, organizing and establishing operations pertaining to the purchase, sale and marketing of merchandise for sale in the U.S. market;
- Identifying, recruiting and building a management team and staff with background and experience in the U.S. retail market;
- Overseeing managers who in turn supervise subordinate employees in running day-to-day operations;
- Executing or recommending personnel actions and establishing a management team to run daily operations;
- Negotiating and supervising the drafting of purchase agreements;
- Ensuring the marketing of products to consumers according to the parent company's guidelines;
- Overseeing legal and financial due diligence processes and resolving and related issues;
- Supervising all financial aspects of the company;
- Developing organizational policies and objectives;
- Developing trade and consumer market strategies based on guidelines formulated by the parent company;
- Negotiating prices and sales terms and formulating pricing policies and advertising techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

The AAO notes that while the petitioner also provided the requested quarterly tax return for the second quarter of 2012 during which the Form I-129 was filed, the document indicated that the petitioner had only three employees during that quarter as well as the prior quarter.

The director denied the petition on January 17, 2013, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director found that the petitioner failed to establish that the employees working for its convenience store occupy professional positions or that degreed professionals are needed for positions within the petitioner's operation. The director further determined that the petitioner failed to establish that it was adequately staffed with employees, who would provide the petitioner's goods and services. The director found that the petitioner does not require a bona fide manager who would perform the job duties listed under the

beneficiary's position and thus concluded that the beneficiary would not allocate his time primarily to tasks within a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner reiterates the same description of the beneficiary's position, as discussed above, and asserts that the evidence of record establishes that the beneficiary will be employed in an executive capacity. Counsel asserts that the beneficiary "will oversee supervisors and managers who supervise employees running day-to-day operations."

Upon review, and for the reasons stated herein, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* 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). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, counsel for the petitioner and the petitioner make different claims at different times, sometimes claiming that the beneficiary is clearly an executive, pursuant to section 101(a)(44)(B) of the Act, and sometimes claiming that the beneficiary is clearly a manager, pursuant to section 101(a)(44)(A). The petitioner cannot claim that the beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must establish that the beneficiary meets all four criteria set forth in the statute for either managerial or executive capacity.

While the petitioner has submitted several lengthy descriptions of the beneficiary's duties, it has described those duties in very broad terms, noting that he will "negotiate[e] and supervis[e] the drafting of purchase agreements"; "develop trade and consumer market strategies"; "ensur[e] the marketing of products to consumers"; "oversee the legal and financial due diligence process and resolving any related issues"; and

"develop and implement plans to ensure the [petitioner's] profitable operation." The petitioner previously provided a brief breakdown of how the beneficiary allocates his time, indicating that he makes financial decisions and conducts due diligence for expansion of outlets for 40% of the time; negotiates contracts and develops trade and marketing strategies for 30% of the time; makes financial decisions regarding expansion, incurring expenses, and resolving financial related issues for 20% of the time; and engages in organizational development of the company by putting a management team into place for 10% of the time. However, as properly determined by the director, the job description provided was insufficient in its lack of sufficient detail pertaining to the beneficiary's specific job duties. Although instructed to supplement the record with further information, the petitioner's RFE response, which included a list of fourteen additional responsibilities for the beneficiary, lacked any further detail or a breakdown of the amount of time the beneficiary will devote to each task. This failure of documentation is particularly problematic in the present matter given that the beneficiary's assigned tasks do not fall directly under traditional managerial or executive duties as defined in the statute. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are qualifying managerial or executive in nature, and what proportion are actually non-qualifying operational tasks. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

While the AAO does not doubt that a president and CEO exercises discretionary authority over the entity of which he/she is president, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner provided inconsistent evidence regarding the support staff the petitioner employed at the time of filing. Specifically, while the petitioner claimed to have employed a total of six employees, the petitioner's quarterly tax returns for the 2012 first and second quarters indicate that the petitioner had only three employees during each of those quarters. 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). Although the petitioner provided payroll documents listing three employees – [REDACTED] – employed by the petitioner in 2011, the petitioner did not provide similar documents with regard to the relevant time period surrounding the filing of the petition. In fact, even if the petitioner provided documentation identifying the names of the employees the petitioner had on payroll at the time of filing, such documentation would not resolve the profound inconsistency between the petitioner's quarterly tax returns for the first two quarters of 2012, which indicated that the petitioner had three employees, and the petitioner's original claim indicating that the petitioner had six employees at the time the petition was filed. Information pertaining to the petitioner's staffing is highly relevant, as it allows the AAO to gauge an understanding of who within the petitioner's organization would perform the non-qualifying operational tasks. Furthermore, 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 Systronics*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Given the deficient job descriptions offered by counsel and by the petitioner with regard to the beneficiary's proposed employment, and in light of the inconsistency regarding the petitioner's staffing at the time of filing, the AAO is unable to gauge what actual duties the beneficiary and his subordinates would perform in order to determine whether the petitioner has the ability to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying duties.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

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

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

Here, the petitioner claimed in its RFE response that the beneficiary would oversee the work of supervisory and professional employees and that he would gather "a team of subordinate managers to run the company's daily operations." While counsel's RFE response statement indicated that the petitioner employed a vice president/general manager, a retail manager, and an assistant manager, given the evidence showing that the petitioner had a total of three employees at the time the petition was filed, it is unclear how it could have maintained daily function when its entire staff was purportedly comprised of managerial employees. It is unclear how the petitioner's convenience store operation could have functioned without sales clerks or stock people. More simply put, the petitioner has failed to provide evidenced to establish a need for a team of managers to operate a convenience store. If USCIS fails to believe that an assertion of fact stated in the petition is true, USCIS may reject that assertion. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, the petitioner did not submit any evidence to demonstrate that the individuals whom the petitioner employed at the time of filing had received baccalaureate degrees, nor is there any evidence that

baccalaureate degrees were required for such employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The position descriptions for the beneficiary's direct subordinates are overly vague and inconsistent with the type of business the petitioner operations. Thus, the petitioner has not established that the beneficiary's direct subordinates require a baccalaureate degree, such that they could be classified as professional. Nor has the petitioner shown that these employees supervise subordinate staff members, other than in the organizational chart, or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although the petitioner indicates that the vice president/general manager has one direct subordinate, the supervisor of retail, the vice president/general manager's position description does not list any duties related, directly or indirectly, to the supervision of subordinate employees. Thus, the petitioner has not shown that the beneficiary's direct subordinate employee is a supervisor, manager or professional, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; 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 managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as president and CEO supervising a vice president/general manager, a retail manager, and an assistant manager, the AAO finds that this structure is not credible given the nature of the petitioner's business. The petitioner claimed to have six employees at the time of filing. However, no one but the beneficiary himself, whom the petitioner did not employ at the time of filing, was identified by name on the petitioner's organizational chart. Moreover, the petitioner's quarterly tax return clearly indicates that the petitioner had no more than three employees at the time of filing. The petitioner simply has not provided evidence to support the claims made in the petition or in the petitioner's organizational chart. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* 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 subordinates perform the actual day-to-day tasks of operating the retail store. The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary's position above that of a first-line supervisor of non-professional employees. Therefore, the beneficiary cannot qualify for the benefit sought as a personnel manager.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary will perform as a function manager. The petitioner did not articulate the beneficiary's duties as those of a function manager and

did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he will manage an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the beneficiary has not been shown to be employed in a primarily executive capacity. Despite the petitioner's claims, the petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although the petitioner claims that the beneficiary is an executive at the U.S. company, the only executive duties listed for the beneficiary merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As discussed above, the petitioner has failed to establish that it was adequately staffed at the time of filing to relieve the beneficiary from having allocate his time primarily to the performance of non-qualifying operational tasks. It is reasonable to conclude, and has not been shown otherwise, that most or all of the

employees given managerial job titles are actually operating cash registers, ordering inventory, stocking shelves, and performing other required daily tasks, and the actual structure of the company cannot be determined. Due to the extremely vague position descriptions provided for the beneficiary and the lack of credible descriptions for the beneficiary's subordinates, it remains unclear how the subordinates will relieve the beneficiary from performing non-qualifying administrative and operational duties. The petitioner has not established that a single convenience store has a reasonable need for a president and chief executive officer.

The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or an executive capacity in the United States. Accordingly, the appeal will be dismissed.

IV. CONCLUSION

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.