



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF KGS- LLC

DATE: MAY 9, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an operator of a gas station, convenience store, and laundromat, seeks to temporarily employ the Beneficiary as its president and director of operations under the L-1A nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in a managerial or executive capacity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish that it will employ the Beneficiary in managerial or executive capacity.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the Petitioner made a material change by claiming that the Beneficiary will be employed in a managerial capacity.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

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, 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.

II. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity.

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":

Matter of KGS- LLC

- (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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Evidence of Record

The Petitioner filed the Form I-129 on February 23, 2015. On the Form I-129, the Petitioner indicated that it has five current employees in the United States and an estimated gross annual income of approximately \$1.2 million.

In support of the petition, the Petitioner provided a supporting statement, stating that it purchased an existing business, which consisted of a gas station, convenience store, and laundromat, in August 2014. The Petitioner stated that it plans to expand the business to include beer sales and a liquor store and to increase store hours. The Petitioner provided the following percentage breakdown describing the Beneficiary's proposed position:

- Develop the business, setting the potential expansion proposals including timeframes, funding limitations, and the procedures to accomplish the successful implementation of market growth as discussed in the business plan. 30%
- Set goals, policies, and standards for the work performed. (It is expected that with time this duty will decrease as the written policies are established in the first 4 months. The remaining [*sic*] of the year, the policies and goals will be updated to ensure that they are understood and consistently used). 10%
- Assure high ethical purchasing standards are maintained and that all applicable laws and corporate directives are adhered to. 10%
- Review and ensure that subordinate positions are meeting the targets, goals and policies of organization. 5%
- Ensure the proper training of employees in their respective departments. Review the training and product knowledge of the new hires. 5%
- Direct the manager as to the store's daily retail activities. 20%

Matter of KGS- LLC

- Marketing and advertising. 5%
- Forecast expansion planning. 15%

The Petitioner added that the Beneficiary would have final say in hiring and firing decisions.

The Petitioner also provided job descriptions for its manager, assistant manager, and three store clerks/cashiers as well as a corresponding organizational chart. The chart depicts the Beneficiary at the top of the organizational hierarchy, followed by a store manager, who is depicted as manager of the gas station/convenience store and the laundromat, the latter of which depicts no other employees. The remainder of the gas station/convenience store hierarchy includes an assistant manager, who is subordinate to the store manager and is depicted as overseeing three store clerks.

In addition, the Petitioner provided IRS Forms W-2, Wage and Tax Statements, from 2014 for its store manager and one clerk/cashier and employee paystubs leading up to the date of filing. The paystubs were provided for one full-time store manager, one part-time assistant manager, and two part-time store clerk/cashiers.

The Director issued a request for evidence (RFE) on March 4, 2015, instructing the Petitioner to submit evidence that the Beneficiary will be employed in a managerial or executive capacity in the United States.

In response to the RFE, the Petitioner submitted a statement asserting that the Beneficiary will assume the most senior position within a “multi-level organizational hierarchy.” The Petitioner further stated that the Beneficiary manages the operations function and the sales and marketing function, which the Petitioner asserts are two essential functions of the organization.

The Petitioner stated that operations management will involve “business development, production, and service initiatives” as well as “management of products, process [*sic*], services and supply chains.” The Petitioner provided the following percentage breakdown for managing the operations function:

Setting goals, policies, and standards for the work performed. 20%

- Developing customer loyalty by implementing policies such as rewards programs . . . and promotional contests to ensure return customers[.]
- Planning, organizing and pursuing new initiatives to increase business through various distribution channels. . . .
- All policies and standards revolve around the objective of [the Petitioner,] which is to provide the customers with superior products at affordable prices[.]

Performing overall necessary financial operations duties such as: 15%

- Reviewing financial statements, sales and activity reports, and other performance data to measure productivity and progress on individual goal achievement;

(b)(6)

Matter of KGS- LLC

- Determining the areas needing cost reduction and program improvement; managing grantor contracts and reimbursement requests;
- Developing and monitoring all accounting systems and procedures capturing all billings and receipts and for the recording of all revenue transactions;
- Establishing policies for invoicing to suppliers, including the calculation of completed units of service.
- Developing policies that include that cash register reports are run at the end of each shift, the money in the drawer (including all change) is counted, and the totals on the report match the cash receipts and drawer.

Meet with all organizational personnel to review existing organizational policies in order to create new streamlined policies and to coordinate functions and operations throughout the organizational hierarchy[.] 10%

Improve operational systems, processes and policies in support of [the Petitioner]'s mission[.] 10%

- [The Petitioner]'s mission is to provide the customers in the [redacted] neighborhood with great food and superior products as well as [l]aundromat services at competitive prices[.]
- Specifically, processes and policies that support better management reporting, information flow and management, business process and organizational planning.
- Implementing state of the art Point of Sale systems that gives customers a more enjoyable experience and creates an easier way to cater to the loyalty and rewards craving customer base[.]

Coordinates and directs managerial employees to perform quality control inspections of the operations and provided general oversight of equipment, facilities, and materials. 10%

- Implements a streamlined process that collects real world data on the products (such as cigarettes, food sales, gasoline sales), identifies any substandard products and taking the corrective action necessary (such as removing the product, improving the delivery/infrastructure, or providing refunds as necessary).

Review subordinates' reports on their work progress necessary to make discretionary decisions and adjust the goals and policies accordingly. Meet with subordinate managers to ascertain cause and correction for deviations in the sales and procurement goals. Advise all personnel of any possible issues or delays. 10%

- [The Beneficiary] is currently considering the benefits of introducing a competitive sales quota for all employees to enhance profits. During the first few months he will weigh the aggravating and mitigating factors of this system and determine the most efficient compensation scheme that provides maximum profits.

Ensure the proper training of employees in his department. Discuss the employee requirements and performance with senior management. Review the training and product/services knowledge of the new hires. Responsible for establishing a management structure which clearly outlines the establishment of managerial personnel who will implement the policies as established. The subordinate managerial positions will be accountable to [the Beneficiary] and will be under his ultimate control. 10%

Ensuring that the proper safety precautions are taken and promoting the safety of the employees[.] 5%

- Requiring cash register employees to keep only small amounts of cash in their registers[.]
- Installing a drop-safe under the cash register to provide an easy and safe location for employees to drop excessive cash[.]
- Clearing the drop-safes at the end of each shift and include the excess cash in the daily bank deposit[.]
- Installing shatter-proof glass, security systems and security cameras to protect the safety of the employee's [sic] and customers[.]

Meet with Store Managers working in the development of new campaigns and services which may relate to the company. Implementing programs to maximize competitive positioning and sales, meeting financial goals. 5%

Control that Store Managers maintain a balanced inventory to insure material available to meet [the Petitioner]'s plans and goals; [sic] 5%

- Specifically, [the Beneficiary] will implement a policy that ensures that inventory of the location's gasoline tank amounts is taken regularly, as well as the inventory of all counter-vendor sales, such as cigarettes, lottery and money orders at the end of each shift.

Next, the Petitioner focused on the sales and marketing function, asserting that the Beneficiary will direct distribution of the Petitioner's products to its customers. The Petitioner provided the following percentage breakdown of the Beneficiary's job duties with respect to sales and marketing:

Accomplishes sales and marketing objectives by overseeing the recruiting, selecting, orienting, training, assigning, scheduling, coaching, counseling, and disciplining employees; communicating job expectations; planning, monitoring, appraising, and reviewing job contributions; planning and reviewing compensation actions; enforcing policies and procedures. 20%

- One of the most important [m]arketing technique[s] [the Beneficiary] will utilize is known as "Value Additions". [sic] This is the use of coupons and free appraisals, aimed at increasing customer satisfaction and separating [the Petitioner] from any competition in the area[.]

Matter of KGS- LLC

- Referral networks are important to create as they build a grass roots campaign and maximizes efficiency in creating a positive brand[.]

Oversees the achievement of marketing and sales objectives by assessing marketing and sales information and recommendations to strategic plans and reviews; preparing and completing action plans; implementing production, productivity, quality, and customer-service standards; resolving problems; establishes a procedure for completing audits, identifying trends, determining systems improvements, and implementing necessary changes. 15%

Creates and ensures that marketing and sales financial objectives are met by forecasting requirements; delegating the preparation of an annual budget and scheduling expenditures; analyzing variances; and initiating corrective actions. 10%

Determines annual and gross-profit plans by forecasting and developing annual sales quotas for regions; projecting expected sales volume and profit for existing and new products; analyzing trends and results; establishing pricing strategies; recommending selling prices; monitoring costs, competition, supply, and demand. 10%

Accomplishes marketing and sales objectives by planning, developing, implementing, and evaluating advertising, merchandising, and trade promotion programs; developing field sales action plans. 10%

- Advertising campaigns include billboards, newspaper ads, flyers, positive customer reviews, and possibility [sic] television ads[.]

Ensures new market opportunities are identified; oversees defining the market, competitor's share, and competitor's strengths and weaknesses; forecasting projected business; establishing targeted market share. 10%

Improves product marketability and profitability by researching, identifying, and capitalizing on market opportunities; improving product packaging; coordinating new product development. 10%

Updates job knowledge by participating in educational opportunities; reading professional publications; maintaining personal networks; participating in professional organizations. 5%

Manages the development, nurturing and growing of grass roots campaigns with community partners[.] 5%

- Located close to a busy tourist destination, [the Beneficiary] will work with local businesses to create a mutually beneficial relationship[.]

Ensure that brand messages are consistent by overseeing the creation and delivery of press releases, advertisements, and other marketing materials, ensures that customers are engaged on social media[.] 5%

The Petitioner concluded that based on his management of the operations and sales and marketing functions, the Beneficiary was eligible for L-1A classification as a function manager.

The Director denied the petition on June 4, 2015, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States. In denying the petition, the Director objected to the Petitioner seeking treatment as a new office, finding that the Petitioner does not fit the criteria of a new office. The Director also found that the Petitioner made a material change by claiming that the Beneficiary would assume the role of a function manager, despite its original claim indicating that the Beneficiary would be employed in an executive capacity. The Director further pointed to the Petitioner's quarterly wage report for the fourth quarter of 2014, which shows that the Petitioner had only two full-time employees at the time the Petition was filing. The Director questioned the Petitioner's ability to support the Beneficiary's management of two essential functions, finding that the record did not contain sufficient evidence to establish who will perform the underlying tasks of the essential functions the Beneficiary would manage.

On appeal, the Petitioner submits additional supporting documentation and an appellate brief disputing the Director's assertion that the Petitioner materially altered its original claim and asserting that it has consistently maintained that the Beneficiary would be employed in a managerial capacity. The Petitioner pointed to several of the Beneficiary's responsibilities, including acquisition of proper licensing and insurance policies, in support of its claim that the Beneficiary will "oversee the overall function of Sales and Operations," which the Petitioner asserts are critical to the organization.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

When examining the managerial or executive 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 in a managerial or executive capacity. *Id.*

The definitions of managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to

ordinary operational activities alongside the Petitioner's other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World, Inc. v. INS*, 940 F.2d 1533.

As a threshold matter, we note that the Director was correct in pointing out the discrepancy between the Petitioner's original claim, indicating that the Beneficiary would be employed in an executive capacity, and the subsequent claims made on appeal and in the RFE response, where the Petitioner claimed that the Beneficiary would assume the role of a function manager. A review of the Petitioner's original supporting statement shows that the Petitioner expressly stated that the Beneficiary's "primary responsibility will continue in an executive capacity to develop the business, establishing the goals and policies of the U.S. organization." That said, we do not find that the Petitioner's subsequent claim – that the Beneficiary would assume the role of a function manager – necessarily constitutes a material change, given that the job descriptions the Petitioner provided similarly focus on the Beneficiary's role as head of the organization in which he would set policies and spearhead the expansion of the organization.

Nevertheless, we find that the job description offered in the Petitioner's RFE response statement is not sufficient to establish that the Beneficiary would be employed in a managerial or executive capacity. Namely, we find that the Petitioner did not provide an adequate description of the Beneficiary's proposed job duties within the specific context of the Petitioner's gas station/convenience store/laundromat business, which consists of one retail location and its employees. First, we note that while the RFE instructed the Petitioner to provide a job description delineating the Beneficiary's daily tasks and the percentage of time the Beneficiary would allocate to each duty, the Petitioner did not comply with this request. Rather, the Petitioner provided a job description, which indicates that the Beneficiary's position would be comprised of duties that fit within one of two categories – operational duties and duties related to sales and marketing. While the Petitioner provided a breakdown of the percentage of time the Beneficiary would devote to each of the tasks in each stated category, the Petitioner did not specify how much time the Beneficiary would allocate to each category as a whole, thus providing no context within which to determine how much of the Beneficiary's overall time would be allocated to individual job duties within each of the two categories. In other words, there is no way to determine what total portion of the Beneficiary's time would be allocated to the operational tasks category and what total portion would be devoted to the category involving sales and marketing duties. Given that each category contains non-managerial tasks, such as meeting with and training non-supervisory and non-professional employees, creating marketing campaigns, and marketing the Petitioner and its products, it is critical for the Petitioner to not only list the Beneficiary's prospective job duties, but also to specify what portion of time the Beneficiary would allocate to each individual daily task. In the present matter, the Petitioner did not provide a comprehensive percentage breakdown establishing what portion of the Beneficiary's time would be allocated to managerial versus the operational non-qualifying tasks.

Further, we find that the content of the job description provided in the RFE response lacks sufficient information about the Beneficiary's actual daily tasks within the context of the Petitioner's gas station/convenience store/laundromat operation. Namely, in reviewing the job duties listed to describe the Beneficiary's role with respect to the Petitioner's operations, the Petitioner claimed that

the Beneficiary would set the organization's goals, policies, and work standards. However, the Petitioner did not clarify how implementing customer loyalty and rewards programs exemplifies the Beneficiary's policy- and goal-setting role. Rather, a rewards program is more akin to a marketing tool used to bring in customers and generate more revenue. The Petitioner did not state actual policies or goals that the Beneficiary plans to set that would lead to a greater understanding of what the Beneficiary would do on a daily basis to ensure that the Petitioner is able to meet organizational goals and policies within the context of its retail operation. The Petitioner also stated that the Beneficiary's role as head of the Petitioner's finances would include reviewing sales and activity reports, developing an accounting system, and establishing policies for invoicing suppliers. However, the Petitioner did not explain how often sales and activity reports are generated or who generates such reports; nor did the Petitioner explain how the proposed accounting system and invoicing policies differ from those currently in use. It is also unclear how these broadly stated business objectives translate into routine tasks for the Beneficiary in his role as president of the organization. Further, the Petitioner did not specify what actual tasks are performed in the course of coordinating and directing managerial employees with regard to quality control. In fact, it is unclear who, other than a single store manager, is included in the Petitioner's reference to "managerial employees."

Finally, in reviewing the Beneficiary's role in sales and marketing, we note that the record contains additional ambiguities. For instance, the Petitioner refers to "[r]eferral networks" and "grassroots campaigns" in attempting to describe how the Beneficiary would meet the sales and marketing objectives. However, the record does not indicate that the Petitioner employs any marketing employees. It is therefore unclear who, if not the Beneficiary himself, would carry out the underlying tasks required to create marketing campaigns and start up "grassroots" efforts to increase the Petitioner's customer base.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of a beneficiary's subordinate employees, the presence of other employees to relieve a beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. As indicated above, the record does not contain sufficient evidence to establish that the Petitioner's organizational complexity and its staffing composition at the time of filing were sufficient to support the Beneficiary in a primarily managerial capacity.

In addition, the statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. 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)(4). If a petitioner claims that a beneficiary directly supervises other employees, those subordinate employees must be supervisory, professional, or managerial, and the beneficiary

must have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Sections 101(a)(44)(A)(ii)-(iii) of the Act; 8 C.F.R. §§ 214.2(l)(1)(ii)(B)(2)-(3).

To determine 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. *Cf.* 8 C.F.R. § 204.5(k)(2) (defining “profession” to mean “any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation”). 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.”

In the present matter, the Petitioner neither claims nor does the record contain sufficient evidence to establish that the Beneficiary would allocate his time primarily to overseeing a staff of supervisory, professional, or managerial personnel. While the Petitioner claimed five employees on the petition and provided an organizational chart reflecting a five-person hierarchy, the record does not contain supporting evidence to corroborate this claim. Rather, the record contains pay stubs for four employees for pay periods going back to September 2014 with the most recent pay stubs from the pay period beginning January 5, 2015. The record contains no pay stubs or other wage documents to establish whom the Petitioner employed at the time of filing, and there is insufficient evidence to establish that the Petitioner employed more than four people during any pay period leading up to and including the time of filing of the petition. In fact, the pay stubs show that of the Petitioner’s four employees, three employees – two store clerks and the assistant manager – were employed on a part-time basis. Thus, there is no evidence to establish that the Petitioner had any full-time employees, aside from a store manager, at the time of filing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (quoting *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

In fact, even if the Petitioner were to provide evidence showing a five-person staff at the time of filing, as claimed in the petition, it is unclear that such a staff would be sufficient to establish either the need or ability of the Petitioner to employ the Beneficiary in a capacity where the primary portion of his time would be allocated to tasks within a qualifying managerial capacity. Despite the Petitioner’s expectation that it would expand its current business by selling additional varieties of merchandise, extending its hours of operation, and hiring more people in addition to acquiring additional businesses, these anticipated developments cannot be factored into our decision in the instant matter, where we focus on the facts and circumstances that existed at the time the Petitioner filed the Form I-129. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). Here, given that the gas station/convenience store/laundromat was the Petitioner’s only acquisition at the time of filing, our decision must take into account only that business and its capacity to realistically accommodate someone who would primarily perform tasks within a qualifying managerial capacity. Based on the facts and circumstances that existed at the time of filing, we find that the Petitioner would not have the ability to support the Beneficiary as a personnel manager.

The Petitioner has not established, in the alternative, that the Beneficiary will be employed primarily as a “function manager,” as claimed. 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. The term “essential function” is not defined by statute or regulation. If a petitioner claims that a beneficiary will manage an essential function, a 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 a beneficiary’s daily duties dedicated to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, a petitioner’s description of a beneficiary’s daily duties must demonstrate that the Beneficiary will manage the function rather than perform the duties related to the function.

As discussed above, the Petitioner in the present matter provided a deficient job description that did not provide an accurate account of the actual job duties the Beneficiary would carry out in his proposed employment. This considerable deficiency as well as the Petitioner’s limited staffing composition leads us to question the Petitioner’s ability to support the Beneficiary in a position where his time would be allocated to primarily managerial-level tasks. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the Petitioner nevertheless has the burden of establishing that the non-qualifying tasks that the Beneficiary would perform are only incidental to the proposed position. As previously indicated, 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. at 604. In the matter at hand, the Petitioner has not provided sufficient evidence to meet that burden.

On appeal, the Petitioner submits a brief pointing to the Beneficiary’s critical role in maintaining proper licenses and insurance policies and ensuring that fees and premiums are paid on time. However, these operational tasks do not establish that the Beneficiary would be primarily employed in a managerial capacity. The Petitioner also claims that the Beneficiary would be relieved from the daily operational tasks because he would function at a senior level within the organization. However, we find that the Beneficiary’s placement within the Petitioner’s hierarchy may be wholly unrelated to the nature of the job duties he would carry out. As discussed previously, neither the Beneficiary’s job description, nor the evidence of the Petitioner’s staffing, is sufficient to establish that the Beneficiary would be relieved from having to allocate his time primarily to performing non-qualifying operational tasks, despite the Beneficiary’s placement at the top of the Petitioner’s organizational hierarchy. In fact, while the Petitioner claims on appeal that the Beneficiary would engage in negotiations with various merchandisers who supply the inventory, it is unclear that this would be deemed a qualifying managerial-level task. Further, it is unclear why the Petitioner did not include this job duty in the job description that was provided in response to the RFE. Based on these deficiencies, we find that the Beneficiary will not be employed as a function manager.

We also find that the record lacks sufficient evidence to establish that the Beneficiary will be employed in the United States in an executive capacity. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for a beneficiary to direct and a 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. A 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.*

In the matter at hand, the Petitioner asserted in its letter of support that the Beneficiary would oversee the overall operations of the Petitioner, and that his primary responsibilities in an executive capacity would include developing the business and establishing the goals and policies of the U.S. organization. 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. The Petitioner has not demonstrated 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 despite the Petitioner’s initial 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. *See 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

We note 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 petition for classification as a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as 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; *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

As previously noted, it is unclear who will be performing the actual day-to-day operations of the company. For example, while the Petitioner vaguely stated that the Beneficiary would oversee “the achievement of marketing and sales objectives,” we must once again question who would actually perform the marketing tasks that the Beneficiary is charged with overseeing. Given that the Petitioner has a limited organizational structure, which is currently comprised of a gas station/convenience store/laundromat operation and does not include any marketing personnel, it is not reasonable to assert that the Beneficiary’s role with regard to marketing would be limited to mere oversight. Rather, it appears unlikely that the Petitioner would meet the marketing objects that the Beneficiary would set out without the Beneficiary’s direct involvement in carrying out some of the underlying marketing duties. If USCIS finds reason to believe that an assertion stated in the petition is not true, USCIS may reject that assertion. *See, e.g.*, section 204(b) of the Act, 8 U.S.C. § 1154(b); *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 at 15.

The record is also unclear as to who would oversee the operations of the Petitioner’s laundromat, which is another part of the Petitioner’s business operation. While the Petitioner’s organizational chart indicates that the same individual who manages the gas station/convenience store would also oversee operations of the laundromat, we note that the job description provided for the store manager does not reflect this additional responsibility. The Petitioner has not resolved the inconsistency between the store manager’s job duties and the assertions provided in the Petitioner’s organizational chart by submitting independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, this unresolved issue leaves open the possibility that the Beneficiary would be directly involved in overseeing and running the operations of the laundromat, thus potentially adding to the list of uncertainties pertaining to the time the Beneficiary would allocate to operational tasks that are outside the realm of a managerial capacity. Again, we note that 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. at 604.

In sum, based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

III. BENEFICIARY’S SERVICES FOR TEMPORARY PERIOD

In addition, while not addressed in the Director’s decision, the record shows that the Beneficiary owns 50% of both the foreign entity and the U.S. Petitioner. If this fact is established, it remains to be determined that the Beneficiary’s services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if a beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary’s services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the

completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the Beneficiary's services in this matter are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

IV. CONCLUSION

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

ORDER: The appeal is dismissed.

Cite as *Matter of KGS- LLC*, ID# 16549 (AAO May 9, 2016)