



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

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

MATTER OF G-S-E-, INC.

DATE: SEPT. 13, 2016

CERTIFICATION OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a gas station and convenience store, seeks to temporarily employ the Beneficiary as its president/CEO 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 an executive or managerial capacity.

The Director, Vermont Service Center, originally denied the petition on four alternate grounds. The Petitioner subsequently filed an appeal with this office. Upon *de novo* review, we withdrew the Director's decision and remanded the matter to the Director with instructions to request additional evidence and enter a new decision that was to be certified to us if adverse to the Petitioner.

The Director complied with those instructions and issued a new decision on April 20, 2016, denying the petition on the grounds raised in our remand decision. Specifically, the Director found that the evidence of record did not establish that: (1) the Petitioner has a qualifying relationship with the foreign entity; (2) the Beneficiary will be employed in a managerial or executive capacity in the United States; (3) the Beneficiary had one year of continuous full-time employment abroad in the three years preceding the filing of the petition; and (4) the Beneficiary was employed abroad in a managerial or executive capacity. The record shows that the Petitioner has not provided any further evidence or information addressing the April 20, 2016, decision that has been certified to this office for review.

Upon review, we will affirm the Director's decision and deny the petition.

#### I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the proposed 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. QUALIFYING RELATIONSHIP

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that it has a qualifying relationship with the Beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

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(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

....

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

#### A. Evidence of Record

The Petitioner filed the Form I-129 on March 22, 2013. On the L Classification Supplement to Form I-129, the Petitioner identified the Beneficiary's last foreign employer as [REDACTED]. The Petitioner indicated that the foreign and U.S. companies have a parent-subsidiary relationship and simply stated [REDACTED] India," where asked to describe the stock ownership and control of each company on the Form I-129.

In support of the petition, the Petitioner submitted its Articles of Incorporation, dated March 5, 2013, indicating that it is authorized to issue 1000 shares of stock.

The Director issued a request for evidence (RFE) advising the Petitioner that the evidence submitted was insufficient to establish the ownership and control of the U.S. company. The Director instructed the Petitioner to submit evidence of its qualifying relationship with the foreign entity.

In response to the RFE, the Petitioner submitted a letter from the foreign entity, dated August 6, 2013, indicating that it was written by [REDACTED] however, the letter is not signed. The letter states that the foreign entity "is 100% stockholder of [the Petitioner]." In support of this claim, the Petitioner submitted a stock certificate and stock ledger. The stock certificate, numbered "COM101," indicates that the Petitioner issued 1000 shares of its stock, without par value, to [REDACTED] on April 28, 2013. The stock ledger indicates that the Petitioner issued the foreign entity 1000 shares of stock on April 28, 2013 and on stock certificate "COM1001."

The Director originally denied the petition on January 17, 2014, concluding that the Petitioner did not establish that the Beneficiary's foreign employer and the U.S. company are qualifying organizations. The Director's conclusion was based on a finding that the terms of the Petitioner's lease agreement impacted its ability to control the operation of the company. We withdrew the Director's finding, but instructed the Director, on remand, to request additional evidence to establish that the foreign entity

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had actually purchased the 1000 shares of the Petitioner's stock, as stated on the share certificate provided.

On remand, the Director issued a second RFE advising the Petitioner that the evidence submitted was insufficient to establish the ownership and control of the U.S. company due to the discrepancy in the certificate numbers and the lack of supporting evidence to show that the foreign entity paid for its claimed shares. The Director instructed the Petitioner to submit evidence to overcome these deficiencies.

In response to the second RFE, the Petitioner stated that the inconsistent certificate numbers appearing on the stock certificate and stock ledger were a typographical error and the correct certificate number is reflected on the actual certificate. The Petitioner contended that "this typographical error is not fatal to the approvability of the Petitioner nor does it negate the ownership of the stock since the copy of the actual certificate is in the record and clearly shows the number." The Petitioner asserted that evidence of the transfer of funds was previously submitted for the record.

The Petitioner submitted copies of what appear to be two wire transfer receipts from [REDACTED] of [REDACTED] Texas. Both receipts have the same numbers and are dated December 23, 2009. Both receipts show that [REDACTED] in [REDACTED] Texas received the transferred funds (\$4995.00), and both receipts have a handwritten note stating "Remittance towards personal gifts and donations." The two receipts are almost identical, except one bears a typewritten "IN-WIRE FM" name of [REDACTED] and on the other, the "IN-WIRE FM" name has been obscured, and the name [REDACTED] has been handwritten in its place.

The Director denied the petition and certified it to us for review on April 20, 2016, concluding, in part, that the Petitioner did not establish that it has a qualifying relationship with the foreign entity. In denying the petition, the Director found that the certificate and the ledger are not sufficient evidence to show ownership and control as the Petitioner did not provide sufficient corroborating evidence of the stock purchase.

#### B. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that it has a qualifying affiliate relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology Int'l*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Sys., Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the

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direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology Int'l*, 19 I&N Dec. at 595.

Here, the Petitioner claimed that it is 100% owned and controlled by the foreign entity. The only evidence the Petitioner provided of said ownership was a stock certificate and a stock ledger, both stating that the petitioning U.S. company issued 1000 shares of stock to the foreign entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 1632. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the Director reasonably inquired beyond the issuance of paper stock certificates into the means by which stock ownership was acquired.

The Petitioner attempted to provide evidence of the foreign entity's stock purchase by way of a wire transfer from December 2009. However, there are several concerns raised by these wire transfer receipts. First, the receipts show that the funds were transferred to [REDACTED] not to the petitioning U.S. company. Second, the receipts are dated December 23, 2009, while the petitioning U.S. company was established in March 2013. Third, the receipts clearly state "remittance towards personal gifts and donations," rather than referencing the purchase of any stock. And fourth, the Petitioner submitted two different versions of the same receipt, one of which had been altered and neither of which identified the foreign entity as the originator of the transferred funds. These inconsistencies raise doubts as to the validity of the documentation provided to demonstrate the petitioning U.S. company's ownership and control. Doubt cast on any aspect of the Petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The Petitioner did not provide probative evidence of the foreign entity's purchase of the Petitioner's stock.

Further, in its response to the second RFE, the Petitioner referred to the Beneficiary as the "prime owner" of the petitioning company. This statement raises additional concerns in regards to the U.S. company's actual ownership and control and undermines its claim that the Petitioner is wholly owned by the foreign entity.

For these reasons, the evidence of record does not establish that the Petitioner has a qualifying relationship with the Beneficiary's foreign employer.

### III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

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.

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

A. Evidence of Record

The Petitioner filed the Form I-129 on March 22, 2013 and stated that it would operate as a “retailer and wholesaler of miscellaneous consumer goods.” On the L Classification Supplement to Form I-129, where asked to describe the Beneficiary’s proposed duties in the United States, the Petitioner stated that the Beneficiary “will continue to work as President/Director. Will be responsible for overall operation of the company and continue to function in the same capacity as of last three years.”

The Petitioner submitted a letter from the foreign entity dated March 18, 2013, stating that the Beneficiary “will have full authority and responsibility to establish, build and manage the business in a manner, which is in line with the company’s interest and complies with the local rules and regulations.”

The Petitioner submitted a job description for the Beneficiary’s position and listed the names of both the foreign entity and the petitioning U.S. company,<sup>1</sup> stating that he would devote 40% of his time to financial responsibilities, such as maintaining the enterprise on sound financial footing, making deposits and timely payments to international suppliers, arranging working capital necessary to purchase inventory, arranging payment of employee salaries, and arranging payment of running expenses of the operation; 40% of his time to operational responsibilities, such as inventory management, personnel management, and premises management; and 20% of his time to regulatory responsibilities, such as ensuring that all relevant licenses have been obtained and remain current, ensuring proper procedures for maintenance of books of accounts, and ensuring proper calculation of taxes and timely payments to the local, provincial, and federal government of India.

The Petitioner submitted evidence of business activities for a company called [REDACTED] which is located in [REDACTED] Florida and does business as [REDACTED] but it did not explain the significance of this evidence. On the Form I-129, the Petitioner stated that the Beneficiary would be working at [REDACTED] in [REDACTED] Florida and listed this same address as his current residential address.

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<sup>1</sup> The Petitioner did not indicate whether this list of job duties specifically pertains to the Beneficiary’s position abroad or proposed position in the United States. However, the Petitioner consistently refers to this list of job duties when discussing the Beneficiary’s proposed employment in the United States throughout its letters in the record. Therefore, we will consider this a description of his proposed U.S. position.

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In response to the Director's RFE, the Petitioner submitted additional letters, including a new letter from the foreign entity, describing the Beneficiary's proposed duties in similar terms. The Petitioner stated that in the initial phase of the U.S. business, the Beneficiary will hire three subordinate supervisors for operations, marketing and procurement, as well as store clerks, cashiers and inventory handlers. The Petitioner submitted job descriptions for the proposed positions of marketing manager, operations manager, and procurement manager and stated that these employees, once hired, would report to the Beneficiary.

The Director originally denied the petition concluding, in part, that the Petitioner did not meet the regulatory requirements for a new office petition. On remand, we found that the Petitioner did not establish that it qualifies as a new office and instead must show that it was able to support the Beneficiary in a qualifying managerial or executive capacity as of the date of filing.

In the second RFE, the Director instructed the Petitioner to submit evidence to overcome the deficiencies in the record. In response, the Petitioner stated that the Beneficiary "is the driving force behind the proposed operation." The Petitioner stated that the Beneficiary "will have to wear many hats" as the CEO of the U.S. company and provided examples from other sources as evidence that an executive position must be flexible and may involve operational tasks depending on the size of the organization. The Petitioner also submitted a "non-exhaustive and partial list" of examples of the Beneficiary's proposed activities for the U.S. company in its initial phase, such as monitoring business performance and expanding into other markets/areas; making decisions to diversify offered products and services in the retail locations; making personnel decisions, including hiring, training, retention, performance review, and promotions; conceptualizing, designing, and executing the look and feel of the retail outlets; creating, negotiating, and maintaining vendor relations; making product selections; setting pricing, credit terms, product display policies, and all related issues to maximize product offerings; and determining and executing marketing strategies to increase community involvement, product offerings, customer traffic, and customer retention.

The Petitioner submitted a copy of a bachelor of arts degree from the [REDACTED] for [REDACTED] and an evaluation of her credentials from a Canadian university stating that her degrees are equivalent to a four-year bachelor's degree at a reputable Canadian university. The Petitioner provided evidence that it employed [REDACTED] in 2013 and 2014, but did not provide her job title or job duties in support of the petition.

The Petitioner submitted its 2014 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, indicating that it earned \$870,334 in gross receipts or sales and paid \$20,000 in salaries and wages during 2014. The Petitioner also submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2013, indicating that it had one employee and paid \$7500 in wages, tips, and other compensation during that period.

The Petitioner submitted an IRS Form W-2, Wage and Tax Statement, for 2013 indicating that [REDACTED] earned \$7500 in wages, tips, and other compensation from the U.S. company during 2013.

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The Petitioner also submitted a Form W-2 for 2014 indicating that [REDACTED] earned \$20,000 in wages, tips, and other compensation from the U.S. company during 2014.

The Director denied the petition and certified it to us for review concluding, in part, that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. The Director noted that the Petitioner demonstrated that the Beneficiary will function at a senior level within the company, but did not demonstrate that he will primarily perform managerial duties consistent with the statutory definition. The Director further found that since the Petitioner has only one employee, the Beneficiary would be handling the day-to-day tasks of operating the business rather than performing managerial or executive duties.

B. Analysis

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

As a preliminary matter, we note that, in response to the second RFE, the Petitioner refers to itself as a new office. However, on remand, we found that the Petitioner, which claimed to have at least one affiliate that had been operating in the United States for more than one year at the time of filing, does not qualify as a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), and instead must show that it was able to support the Beneficiary in a managerial or executive capacity when it filed this petition.

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 in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the Petitioner must show that the beneficiary performs certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Second, the Petitioner must prove that the Beneficiary 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*, 940 F.2d 1533.

Here, the Petitioner characterized the Beneficiary's role as president/CEO and briefly described his duties in very broad terms, noting that he will be responsible for the overall operation of the company and will have full authority and responsibility to establish, build, and manage the business. The Petitioner also provided a brief job description indicating that the Beneficiary will devote 40% of his time to financial responsibilities, another 40% of his time to operational responsibilities, and the remaining 20% of his time to regulatory responsibilities. The Petitioner provided several tasks the Beneficiary will perform within each area of responsibility. However, some of those tasks, such as

maintaining an optimal level of inventory or making security arrangements, do not provide a clear picture of what he will actually be doing. In addition, other tasks demonstrate that the Beneficiary would be performing non-qualifying operational and administrative duties on a daily basis, such as making timely payments to suppliers, inventory management, vendor relations, ordering inventory, preparing work schedules, completing personnel files, lease negotiations, and ensuring that licenses are obtained. The Petitioner did not indicate how these duties qualify as managerial or executive. While these broadly described responsibilities may indicate the Beneficiary's senior level of authority within the company, the listed duties within each area of responsibility indicate that he will be involved in running the day-to-day operations of the business.

In response to the second RFE, the Petitioner stated that executives, like the Beneficiary, must be flexible and perform additional operational duties depending on the size of the business. The Petitioner provided a new list of job duties for the Beneficiary's proposed position in the United States incorporating marketing-related duties that had not been previously described. However, the Petitioner did not clarify how these new marketing duties would fit into the previously provided job description that, again, had allocated percentages of the Beneficiary's time. Further, these newly listed marketing duties, coupled with the job description previously provided, indicate that the Beneficiary would be directly involved in the day-to-day routine sales and customer service tasks of the business. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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 petitioner'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.

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, 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 Petitioner stated that it would hire three subordinate supervisors and three to four lower-level employees in the upcoming year, the record reflects that it had no employees at the time of filing and therefore it cannot support a claim that the Beneficiary would be employed as a personnel manager. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

The record does show that the Petitioner had one employee beginning in the fourth quarter of 2013 and throughout 2014, and it includes evidence that this individual possesses the equivalent of a bachelor's degree. However, the Petitioner did not provide her job title or job duties in support of its claim that she was hired as a professional. Regardless of whether or not the proposed subordinate positions require a professional degree or have supervisory or managerial responsibilities, as required by section 101(a)(44)(A)(ii) of the Act, the Petitioner has not demonstrated that the Beneficiary's duties, as of the date of filing, would primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees.

The Petitioner has not established, in the alternative, that the Beneficiary would be 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 clearly describe 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, a 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.

In the instant matter, the Petitioner has not articulated a specific function that the Beneficiary would manage or provided evidence to demonstrate that the Beneficiary will primarily perform managerial duties related to a specific function. As noted, the Beneficiary's job duties include operational and administrative tasks required to run the day-to-day sales, customer service, and marketing operations of the business. The Beneficiary is not required to directly supervise subordinate staff if he manages an essential function of the U.S. company, but the Petitioner must nevertheless establish that someone other than the Beneficiary will be performing the day-to-day operational tasks inherent to the Petitioner's business. Here, the Petitioner did not provide any evidence of other employees to perform these duties for its retail store. Therefore, the Petitioner has not established that it will employ the Beneficiary in a managerial capacity, specifically as a function manager.

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, a given 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 a petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, we note again that 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.

The Petitioner referred to the Beneficiary's proposed position as executive and stated that he will be performing executive tasks. However, the Petitioner has not provided evidence to demonstrate that the Beneficiary's proposed duties in the United States will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. Other than a vague reference to "setting the long-term strategic direction of the business," which was not included in the list of duties that were allocated percentages of the Beneficiary's time, the job duties provided for the Beneficiary's proposed position in the United States do not demonstrate that the Beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

Additionally, the Petitioner did not demonstrate that there will be other employees at the U.S. company to relieve the Beneficiary from performing the day-to-day routine operational and administrative tasks of the business, so that he can focus on directing the management of the organization and establishing the goals and policies of the organization. The Petitioner correctly observes 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 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

The Petitioner is doing business as a gas station and convenience store but the record does not support a finding that the Beneficiary would be relieved from performing day-to-day routine tasks associated with operating the business. While the Petitioner indicated a plan to hire up to seven employees within one year of filing, it had no employees at the time the petition was filed and in fact hired only one

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employee in the 21 months that followed. The Petitioner has not shown how a staff of one employee would relieve the Beneficiary from significant involvement in the day-to-day operation of a gas station and convenience store which is likely open for business seven days per week.

The Petitioner further refers to several unpublished decisions in which we 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. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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.

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.

#### IV. ONE YEAR OF EMPLOYMENT ABROAD

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary had one year of continuous full-time employment abroad with a qualifying entity in the three-year period preceding the filing of the petition, pursuant to 8 C.F.R. § 214.2(l)(3)(iii).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) states:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

##### A. Evidence of Record

On the Form I-129, the Petitioner stated that the Beneficiary's "date of last arrival" to the United States was July 27, 2008 and his current nonimmigrant status was that of a "visitor," valid until March 22, 2013. On the L Classification Supplement to Form I-129, the Petitioner stated that the Beneficiary was employed by the foreign entity, [REDACTED] from January 1, 2004 to May 27, 2011. Where asked to explain any interruptions in the Beneficiary's employment, the Petitioner stated "currently on assignment in the USA." Finally, the Petitioner did not respond where asked to list the Beneficiary's

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previous stays in the United States in an H or L status. In its initial letter of support, the Petitioner again stated that the Beneficiary has worked as the general manager and CEO of the foreign entity since its inception in 2004.

The Petitioner submitted a Deed of Partnership indicating that the foreign entity was established in Pakistan on January 5, 2005. The Petitioner also submitted a letter from [REDACTED] Chartered Accountant, dated January 9, 2009, who stated the following regarding the Beneficiary's employment with the foreign entity:

This is to certify that [the Beneficiary] is running [REDACTED] Item shops on the Firm Name [REDACTED] since last 10 years. He is running the shop in an excellent manner and this shop is one of most famous and reputed shop [sic] for electrical and electronic items.

In the first RFE, the Director advised the Petitioner that the evidence submitted was insufficient to demonstrate that the Beneficiary has been employed by the foreign entity since 2004. The Director instructed the Petitioner to submit evidence that the Beneficiary was employed full time by a qualifying foreign entity for one continuous year within the three-year period preceding the filing of the petition.

In response, the Petitioner submitted the exact same letter detailed above from [REDACTED] with a new date of January 9, 2013. The Petitioner also submitted a new letter from [REDACTED] dated July 7, 2013, certifying that the Beneficiary "has worked with [REDACTED] as the manager for the period from January 1, 2002 to June 30, 2008."

The Petitioner submitted copies of hand written "salary receipts" issued to the Beneficiary for the months of January through December of 2012, all issued in January 2012, and for the months of January to June of 2013, all issued in January 2013.

The Director originally denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization. In remanding the petition, we found that, if the Petitioner could establish that it has a qualifying relationship with the Beneficiary's prior L-1 employers, it may be able to establish that the Beneficiary's period of stay in L-1A status for those employers would not be deemed interruptive for purposes of determining whether he met the one year foreign employment requirement.<sup>2</sup> We also

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<sup>2</sup> Although the petitioner did not indicate any prior periods of stay in the United States in L status on the Form I-129, USCIS records reflect that the beneficiary has been granted L-1A status on two previous occasions since his initial admission as a B-2 nonimmigrant in July 2008. The Beneficiary was granted L-1A status from February 11, 2009 to January 24, 2010, based on a petition filed by [REDACTED] The

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found that the Petitioner submitted contradictory statements regarding the Beneficiary's dates of employment at the foreign entity. Specifically, we noted several discrepancies in the dates listed on the Form I-129 and between the various letters of support, such that we were not able to determine the Beneficiary's actual dates of employment at the foreign entity.

On appeal, the Petitioner submitted evidence of ownership for [REDACTED] one of the Beneficiary's prior L-1 employers, by way of a stock certificate and stock ledger. The stock certificate, numbered "COM101," indicates that [REDACTED] issued 1000 shares of stock, without par value, to [REDACTED] on April 28, 2010. The stock ledger indicates that [REDACTED] issued the foreign entity 1000 shares of stock on April 28, 2010, and on stock certificate "COM1001."

In the second RFE, the Director instructed the Petitioner to submit evidence to overcome and clarify the deficiencies and discrepancies in the record. In response, the Petitioner stated that the foreign entity operated as a sole proprietorship concern prior to being converted into a partnership on January 5, 2005. The Petitioner also stated that its "qualifying relationship with [REDACTED] and [REDACTED] is established by virtue of the common ownership due to the involvement of [the Beneficiary] as the prime owner of the same." The Petitioner further stated that all of the documentation provided to establish that the Beneficiary was employed by the foreign entity for one continuous year clearly covers the three-year period immediately preceding February 11, 2009.

The Petitioner submitted another letter from [REDACTED] dated September 29, 2015, stating that the Beneficiary served as the general manager/CEO at the foreign entity from January 9, 1999 to June 30, 2008. The letter explained that the two previously submitted letters mentioned the same date range but made some errors regarding the length of employment (10 years) which led to the confusion mentioned on remand.

The Petitioner submitted the foreign entity's "salary sheet" for the period January 13, 2007 to December 13, 2007. The document shows that the Beneficiary was paid an amount of 22500 per month in the position of "manager-CEO."

The Director denied the petition and certified it to us for review concluding, in part, that the Petitioner did not establish that the Beneficiary was employed full time by a qualifying foreign entity for one continuous year within the three-year period preceding the filing of the petition. In denying the petition, the Director found that the Petitioner did not demonstrate that it has a qualifying relationship with the Beneficiary's prior L-1 employers. The Director found that the Beneficiary was last

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Beneficiary was also granted L-1A status from April 27, 2011 to April 26, 2012 based on a petition filed by [REDACTED]

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employed by the foreign entity in June 2008, which was five years prior to the filing of the instant petition.

#### B. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that the Beneficiary was employed by a qualifying foreign entity for one continuous year within the relevant three-year time period.

The Petitioner filed the Form I-129 on March 22, 2013, and the Beneficiary has been in the United States since July 27, 2008. However, the beneficiary was previously granted L-1A status from February 11, 2009 to January 24, 2010 based on a petition filed by [REDACTED] and again from April 27, 2011 to April 26, 2012 based on a petition filed by [REDACTED]. On remand, the Director advised the Petitioner that if it could establish that it has a qualifying relationship with the Beneficiary's prior L-1 employers, it may be able to establish that the Beneficiary's period of stay in L-1A status for those employers would not be deemed interruptive of his period of employment abroad.

The Petitioner submitted a stock certificate and stock ledger indicating that the foreign entity has an ownership stake in [REDACTED] which could support its claim that this entity is its affiliate. However, the record contains no evidence of the ownership of [REDACTED] the Beneficiary's initial L-1A employer. Further, as discussed above the petitioning U.S. company's qualifying relationship to the foreign entity has not been established through sufficient evidence. Nevertheless, even if we concluded that the Beneficiary's period of employment with [REDACTED] was employment for a qualifying entity, the period between the Beneficiary's admission to the United States and his commencement of employment for [REDACTED] was nearly three years and would be deemed interruptive of any qualifying employment with the foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A).

In the instant matter, the Petitioner has shown that the Beneficiary was employed by the foreign entity prior to his date of last arrival to the United States on July 27, 2008, and that he has not maintained his continuous lawful status for a qualifying organization in the intervening five years preceding the filing of the instant petition. As such, the Petitioner has not established that the Beneficiary was employed full-time by a qualifying foreign entity for one continuous year within the three-year period preceding the filing of the petition.

#### V. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition, in part, based on a finding that the Petitioner did not establish that the Beneficiary was employed by the foreign entity in a managerial or executive capacity.

A. Evidence of Record

On the L Classification Supplement to Form I-129, where asked to describe the Beneficiary's duties abroad for the three years preceding the filing of the petition, the Petitioner stated that the Beneficiary "acted as President/Director. Responsible for operation of a[n] electronics and other appliances distribution establishment."

The Petitioner submitted a letter from the foreign entity, dated March 18, 2013, stating that the Beneficiary has been employed since the company's inception as its general manager and CEO. The letter states that the Beneficiary is authorized to make day-to-day and long-term strategic decisions and has been responsible for directing the management of the organization and establishing the goals and policies of the company.

The Petitioner submitted the foreign entity's organizational chart, depicting the Beneficiary as general manager, reporting directly to the president. The chart shows that the Beneficiary supervised a finance manager, a procurement manager, a marketing and sales manager, and a customer service manager, along with "temporary staff and labors as per ongoing needs (5-7 persons)." The chart also shows that each manager had one subordinate office assistant and one subordinate "outdoor assistant." The organizational chart further stated that the management positions required a bachelor's degree.

In the RFE, the Director instructed the Petitioner to submit evidence that the Beneficiary's position abroad was in a managerial or executive capacity. In response, the Petitioner submitted a letter from the foreign entity, dated August 6, 2013, stating that the Beneficiary was the managing partner at the foreign entity, entrusted with senior level functions in the organization and charged with the responsibility and authority to make day-to-day and long-term strategic decisions on the foreign entity's behalf. The Petitioner stated that the Beneficiary was responsible for directing the management of the organization and for establishing its goals and policies.

The Director originally denied the petition concluding, in part, that the Petitioner did not establish that the Beneficiary was employed by the foreign entity in a managerial or executive capacity. In remanding the petition, we found that the Petitioner's descriptions of the Beneficiary's position abroad were too broad to demonstrate his actual daily duties and mostly paraphrased the statutory definition of executive capacity. We further found that although the foreign entity's organizational chart specifically stated that the subordinate management positions require a bachelor's degree and the subordinate clerical positions require an associate's degree, the Petitioner did not provide any position descriptions for the subordinate positions to show that the positions are professional, supervisory, or managerial in nature. Finally, we found that the Petitioner did not demonstrate that the foreign entity actually employed any of the listed subordinates or that they actually have the professional degrees listed as requirements in the organizational chart.

In the second RFE, the Director instructed the Petitioner to submit evidence to overcome the deficiencies in the record. In response, the Petitioner stated that since the Beneficiary was one of two partners with a 50% stake in the foreign entity, he was one of the two executives in the business.

The Petitioner submitted a different organizational chart for the foreign entity, depicting the Beneficiary at the top tier of the hierarchy as the CEO/manager, supervising two senior managers, who supervise a junior manager and an electrician. The organizational chart states that the Beneficiary has a master's degree in commerce and the rest of his subordinate staff were "high school graduates." The organizational chart also includes a brief list of job duties for each of the positions as follows:

CEO/Manager – Manages the company and keeps the company running. Signs contracts with product vendors. He also monitors the company budget and makes executive decisions like changing suppliers and business expansions.

Senior Managers – Manage all lower level employees and keep the business running. They also perform duties on the daily schedule and makes sure to look at the customers' complaints and requests.

Junior managers/electricians – These employees tend to the shop and work under the orders of the Senior managers and the CEO. They perform repairs on the customers' items if needed and show them how the electronic item works.

The Petitioner submitted a salary chart for the foreign entity's employees from January to December 2014, showing that it employed two senior managers, two junior managers, and two electricians during that period.

The Director denied the petition and certified it to us for review concluding, in part, that the Petitioner did not establish that the Beneficiary was employed by the foreign entity in a managerial or executive capacity. In denying the petition, the Director found that the Beneficiary's listed duties abroad are broad and do not demonstrate executive or managerial duties. The Director found that the fact that the Beneficiary is at the top of the hierarchy on the foreign entity's organizational chart is not sufficient to demonstrate that the Beneficiary was employed as an executive or manager.

## B. Analysis

Upon review of the petition and the evidence of record, we conclude that the Petitioner has not established that the Beneficiary was employed by the foreign entity in a managerial or executive capacity. The Petitioner refers to the Beneficiary's position abroad as executive. As a result, we will evaluate the Beneficiary's position exclusively under the criteria for executive capacity.

The Petitioner characterized the Beneficiary's role at the foreign entity as general manager/CEO and briefly stated that he was authorized to make day-to-day and long-term strategic decisions and

established the goals and policies of the company. The Petitioner initially did not provide any additional information pertaining to the Beneficiary's foreign employment. The brief description provided simply paraphrases the statute for executive capacity and does not establish that the Beneficiary was employed by the foreign entity in an executive or managerial capacity. In response to the RFE, the Petitioner again paraphrased the statute for executive capacity and stated that the Beneficiary was in charge of the strategic operation, in addition to his involvement in day-to-day operations, was responsible for directing the management of the organization, and for establishing its goals and policies. Again, these statements do not provide any insight as to what he actually did at the foreign entity on a routine basis. The Petitioner did not provide a clear picture of how the Beneficiary spent his day at the foreign entity and what tasks he actually performed that would establish he was employed in an executive capacity. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In response to the first RFE, the Petitioner stated that the Beneficiary supervised all projects undertaken by the company from start to finish and had the authority to make all decisions. In response to the second RFE, the organizational chart submitted stated that, as CEO/manager, the Beneficiary signed contracts with product vendors, monitored the company budget, and made decisions such as changing suppliers and business expansions. Here, it appears that the Beneficiary performed some of the non-qualifying routine operational and administrative tasks required to continue operations. The Petitioner, again, did not indicate how these duties are executive in nature and did not provide sufficient information about the actual tasks he performed to demonstrate that he was employed in an executive capacity. 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the Petitioner made a vague reference to the Beneficiary's involvement and guidance in day-to-day operations, but did not provide any additional information clarifying what that means or what it includes in terms of the Beneficiary's position and duties. The Petitioner's blanket statement raises questions about his involvement in non-qualifying operational tasks and how much time he devoted to non-qualifying duties and executive duties. Based on the current record, we are unable to determine whether the claimed executive duties constituted the majority of the Beneficiary's duties, or whether the Beneficiary primarily performed non-executive administrative or operational duties. The Petitioner's description of the Beneficiary's job duties does not establish what proportion of the Beneficiary's duties was executive in nature, and what proportion was actually non-executive. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Again, 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

Petitioner's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the Petitioner's business, and any other factors that will contribute to understanding a Beneficiary's actual duties and role in a business.

The Petitioner provided two different organizational charts for the foreign entity. The first organizational chart indicated that the Beneficiary supervised a finance manager, a procurement manager, a marketing and sales manager, and a customer service manager, who in turn each supervised subordinate personnel. It also indicated that these management positions require a bachelor's degree. The second organizational chart indicated that the Beneficiary supervised two senior managers, who supervise a junior manager and an electrician. The Petitioner did not provide an explanation for the changes in the foreign entity's structure, or provide sufficient evidence of who actually worked for the company during the Beneficiary's employment abroad or what duties they performed during the relevant time period preceding the Beneficiary's last entry to the United States in 2008. As such, the Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, we conclude that the Petitioner has not demonstrated that the Beneficiary's duties primarily focused on the broad goals and policies of the organization rather than on its day-to-day operations. As noted above, the Petitioner did not submit a detailed description of the Beneficiary's foreign position sufficient to establish that the Beneficiary's daily routine consisted of primarily executive duties, nor did it provide evidence that the foreign entity had sufficient staff to relieve the Beneficiary from performing non-qualifying operational and administrative duties at the foreign entity. Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary was employed by the foreign entity in a managerial or executive capacity.

## VI. CONCLUSION

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The initial decision of the Director, Vermont Service Center, dated April 20, 2016, is affirmed, and the petition is denied.

Cite as *Matter of G-S-E, Inc.*, ID# 8027 (AAO Sept. 13, 2016)