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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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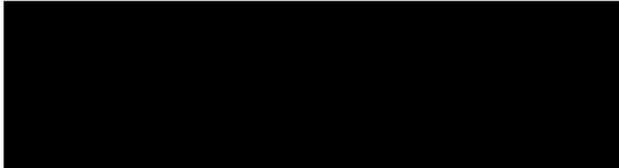
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it operates a gasoline station with convenience store and complete auto service. It claims to be an affiliate of M/s Wellserve Service Center, located in India. The petitioner seeks to employ the beneficiary as the general manager of its business in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been primarily performing the duties of a manager or executive with the foreign company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that "the denial is a product of legal error and abuse of agency discretion . . ." Counsel submits a brief and additional evidence in support of the appeal.

#### **I. The Law**

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

## **II. The Issue on Appeal**

The sole issue addressed by the director is whether the petitioner established that the beneficiary has been primarily performing the duties of a manager or executive with the foreign company.

### *Facts and Procedural History*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 29, 2008. The petitioner indicated on the Form I-129 that it is operating a gasoline station with convenience store and complete auto service with seven employees and a gross annual income of \$4,000,000.

Counsel for the petitioner submitted a letter detailing the beneficiary's duties at the foreign company as follows:

[The beneficiary] has been employed as [REDACTED] of the petitioner's Indian affiliate, [REDACTED], since 1990. In this position he has directed all the operations of this automobile service station. He has formulated sales policies, reviewed market analyses to determine potential demand for the company's services and products, and price schedules; developed sales campaigns to accommodate the goals of the company; and analyzed and controlled the expenditures of the company and prepared its budget and tax reports. He has negotiated contracts and supervised the day to day operations of the business, including hiring and supervising the persons performing its services.

\* \* \*

As for the Indian business, [the beneficiary] is its sole proprietor and is unquestionably managing the organization; totally controls its day-to-day operations; and directs and controls all of its personnel actions. Again, all the elements of the statutory definitions are present.

The petitioner submitted a salary register for the foreign company indicating that it employs six mechanics, one painter, one supervisor, one manager, three servicemen, and 5 "healper[s]" [*sic*] (there is one additional person listed but the position title was cut off of the document).

The petitioner failed to submit any additional information for the foreign company on the beneficiary's duties, the duties of any of his subordinates, and an organizational chart.

The director issued a request for additional evidence ("RFE") on February 4, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties abroad, including information on the beneficiary's subordinates, their job titles and position descriptions, and the percentage of time the beneficiary spends on each of the listed duties; (2) a list of all employees at the foreign location where the beneficiary is employed; and (3) an organizational chart for the foreign company depicting the beneficiary's position and all employees under his supervision by name and job title and including a brief description of their job duties, educational levels, and annual salaries.

In response to the RFE, counsel for the petitioner submitted a letter addressing the question of the beneficiary's managerial duties as follows:

The evidence [previously] introduced also shows that [the beneficiary] is the only person functioning as an "executive" with this 18 person auto repair and service business. I refer you to its "Salary Register" a copy of which was submitted with the petition. The documents from India also clearly indicate him to be the sole owner/manager/operator of this business and that it is his only source of income. He therefore, unquestionably:

- Directs the management of the business;
- Establishes the goals and policies of the business;
- Exercises **total** latitude in discretionary decision making for the business;

- Receives **no** supervision or direction from higher level executives, the board of directors, or stockholders because the business has no executives higher than him and no board of directors or stockholders (it is not a corporation).

Thus, the four listed criteria for an executive capacity position contained in 8 CFR 214.2(l)(1)(ii)(C) are satisfied by the facts of the case.

\* \* \*

This brings us to the RFE section dealing with "managerial" and "executive" capacity. A number of items are mentioned, including the number of employees of the foreign company, a block and line organizational chart, etc. The aforementioned Salary Register submitted with the petition indicates there are 18 employees of the foreign company, in addition to its owner, [the beneficiary]. It lists one "manager," one "supervisor," and 16 auto mechanics and helpers. None of them are "professional" workers and all of them are directly under the supervision of [the beneficiary] as CEO of the business. He is the only "executive" of the business.

Counsel also submitted a brief description of the job duties for the manager and supervisor positions that are subordinates to the beneficiary. The petitioner failed to submit the requested organizational chart and a more detailed description of the beneficiary's duties with the foreign company.

The director denied the petition on November 25, 2009, concluding that the petitioner failed to establish that the beneficiary has been primarily performing the duties of a manager or executive with the foreign company. In denying the petition, the director observed that "a preponderance of the beneficiary's duties have been and will be directly providing the services of the organization and supervising non-professional employees." The director further found that the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from the performance of non-qualifying duties. The director stated that it appears that the petitioner has not reached or will reach a level or organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis.

In support of the appeal, counsel for the petitioner submits a brief in which he asserts that the beneficiary "[is] a small business owner/operator/manager who does not directly/personally provide the services which are its basic business." Counsel makes several arguments against the director's position that the beneficiary cannot primarily spend a majority of his day on day-to-day functions; counsel emphasizes several aspects of the statutory and regulatory language to dispute the director's decision. In sum, counsel states:

Neither Section 101(a)(15)(L) nor Section 101(a)(44) of the Immigration and Nationality Act states that a person who primarily performs tasks necessary to produce a product or perform a service cannot be considered to be a person employed in a managerial or executive capacity.

Neither Section 214.2(l)(1)(ii)(C) nor Section 204.5(j)(2) of Title 8 of the Code of Federal Regulations states that a person who primarily performs tasks necessary to produce a product

or perform a service cannot be considered to be a person employed in a managerial or executive capacity.

\* \* \*

However, what I think is more important for the [petitioner's] petition for [the beneficiary] is the fact that neither statutes, regulations, nor any judicial ruling has ever stated that, "the petitioner must prove that the beneficiary does not spend a majority of his or her time on the day-to-day functions" of the business in order to establish that the job performed by the beneficiary overseas is in a "managerial" or "executive" capacity. In other words, there is no legal basis for the quoted holding – and there never has been.

\* \* \*

The USCIS states that from the evidence submitted "... it appears the beneficiary has been performing many aspects of the day-to-day operations of the business." He does perform some of the secondary aspects of the business, such as formulating sales policies and setting prices, and preparing budgets and tax reports, all of which are inherent to his managerial position. However, nothing submitted indicates that [the beneficiary's] "primary" function for [the foreign company] is anything other than managerial. He unquestionably does not repair or service customers automobiles. The denial notice itself clearly indicates that the evidence shows that [the beneficiary] "manages a small business." That is certainly true.

What the evidence also shows, even though no organizational chart was submitted and the USCIS did not get an hour-by-hour description of what [the beneficiary] does during a typical business day (neither of which would have added anything of significance to the fact that the evidence introduced already showed him to "manage a small business" and to perform some of the secondary aspects of the day-to-day operation of that business), is that the Indian affiliate of the petitioner, through the copy of its "Salary Register" submitted with the petition has 18 employees, not including its owner, [the beneficiary].

In the denial notice the USCIS objects, at some length, to the fact that the petitioner did not provide all of the evidence demanded in its Request for Evidence, specifically mentioning not providing an "organizational chart" and a job description detailing every likely activity that [the beneficiary] would be engaged in while directing the activities of [the foreign company].

However, the evidence introduced shows that [the beneficiary] owns and manages the daily operations of this small to medium-sized business, something which I do not believe the USCIS is questioning. The USCIS position is that without a more "specific" statement of his "duties" it cannot determine whether he spends a majority of his time managing only the day-to-day functions of the business. Furthermore, it is contending that unless it can determine that he spends the majority of his time managing something other than the day-to-day functions of the business he is not occupying a managerial or executive capacity position.

As is demonstrated in this presentation, that contention is lacking both legal and factual foundations. A person who spends the majority of his time managing the day-to-day

functions of a small business is not legally excluded from being considered to be in a managerial or executive capacity position in that business per Section 101(a)(44) of the Immigration and Nationality Act on those grounds alone. Nor is one who performs some of the tasks "necessary" to the "operation" of the business, such as formulating sales policies and setting prices. He would also have to be primarily engaged in directly providing the services of the business to be so excluded.

In fact, [the beneficiary] does spend the majority of his time in his position with [the foreign company] managing its day-to-day functions. Giving a more detailed description of his duties in the position isn't going to change that fact. Thus, what the USCIS has requested is superfluous to the stated purpose for the request. Its expressed reason for wanting this additional information is also legally erroneous, illogical, and lacking any reasonable factual basis.

An "organizational chart" would have given the USCIS exactly the same information on the staffing of the company that it already possessed. It would show that [the beneficiary] owns and directs the operation of the business, the manager reports directly to him, the supervisor reports directly to the manager and indirectly to [the beneficiary], the mechanics and helpers report directly to the supervisor, then to the manager, then to [the beneficiary]. That is exactly the information given to the USCIS in the response to the RFE. How would it being in the form of a chart make it different?

As for the specific duties of [the beneficiary], the evidence given to the USCIS, beyond any doubt whatsoever, proves that he is the sole owner and proprietor of [the foreign company], and that he directs, supervises, manages, etc. all of its day-to-day operations. That is, in fact, what he does and what the petitioner is saying that he does. Also, I don't believe anyone at the USCIS is contending that he does anything else, in particular there is no statement that the evidence shows [the beneficiary] to be actually working as a[n] auto mechanic, rather than "managing" the business. As stated, giving the USCIS more "specifics" on his duties isn't going to change these facts.

What has been stated re the duties of [the beneficiary] in India in the various documents submitted in the course of this case indicates that he:

- Directs all operations of the business
- Formulates sales policies
- Reviews market analyses to determine potential demand for the company's services and set price schedules
- Develops sales campaigns to accommodate the goals of the company
- Analyzes and control [*sic*] the expenditures of the business and prepares its budget and tax reports
- Negotiates contracts
- Supervises the day-to-day operations of the business, including hiring and supervising the persons performing its services
- Manages the business
- Directs the management of the business

- Establishes the goals and policies of the business

All of these duties [sic] are, as stated in the denial, quite generalized. That does not mean they are not accurate. They show that his primary function, that which in fact occupies far more than 50% of his time, is directly managing/supervising/directing the day-to-day operation of the business. He confers with his manager and chief mechanic (the "supervisor") re what work is in the shop, what needs to be done on the various jobs, who will be assigned to them, what parts or materials need to be obtained to complete them, whether they need to replenish the inventory, what customer complaints there may be, what personnel actions might be needed in the immediate future, if there are repairs or upgrades of the facility needed, etc. [The beneficiary] then decides what needs to be done and directs his subordinates on actions to be taken. Thus, he does exactly what one would expect the "manager" of this type of business to do. Everything else he does, such as budgeting, negotiating, sales and advertising campaigns, public relations, preparing government documentation, never occupies more than 50% of his time on any given day, nor does he perform all, or any, of these activities during any particular day, they are things he does when the need arises. Therefore, estimating what percent of his total time is spent on any one of them is both extremely difficult and basically meaningless to this inquiry, since they do not constitute his "primary" activity. They are simply secondary activities inherent to the management of a small business. Managing the operation of the business is, as repeatedly stated, what he does. However, he does not repair or service the cars, nor is he the "front-line supervisor" of those who are repairing and servicing the cars.

The issue in the case therefore isn't whether [the beneficiary] is the "manager" of the business in India, it is whether his activities show his position to be in a "primarily" "managerial" or "executive" capacity for the purpose of L-1A classification under the law. The petitioner says they do and the USCIS disagrees. The petitioner is herewith countering that USCIS position by showing that it has not proper legal or factual justification and is thus incorrect.

\* \* \*

In addition, the stated basis for the denial does not include a question as to whether the duties to be performed by the beneficiary in the United States are in a managerial or executive capacity nor was that issue raised in the RFE. I am assuming, therefore, that USCIS has no question on that topic and have not addressed it in this presentation.

The additional evidence submitted by counsel consists of the following: (1) copies of two letters previously submitted by counsel with the initial petition and response to the RFE; (2) a copy of the salary register for the foreign company previously submitted; (3) copies of documents and photographs of the foreign company previously submitted; and (4) copies of judicial decisions referenced by counsel in his brief.

#### *Discussion*

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has been primarily performing the duties of a manager or executive with the foreign company.

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

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

Counsel for the petitioner provided several vague statements about the beneficiary's job duties. Counsel describes the beneficiary's duties in very broad terms, noting he has "directed all the operations of [the automobile business for the foreign company];" "direct[ed] the management of the business;" "establish[ed] the goals and policies of the business;" "exercise[ed] total latitude in discretionary decision making for the business;" "negotiate[ed] contracts; and "supervis[ed] the day-to-day operations of the business." Such a vague representation of how the beneficiary divides his day among all of his duties is not sufficient to demonstrate that his day-to-day duties are primarily managerial or executive in nature. These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 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.).

Additionally, the job descriptions include several non-qualifying duties, such as "'formulated sales policies;" "reviewed market analyses;" "developed sales [and advertising] campaigns;" "public relations;" and "prepared [the foreign company's] budget and tax returns." It appears that the beneficiary has been primarily engaged in providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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). Counsel for the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. Counsel simply states that the job duties listed "show that his primary function, that which in fact occupies far more than 50% of his time, is directly managing/supervising/directing the day-to-day operation of the business. Everything else he does . . .

never occupies more than 50% of his time on any given day . . . ." This failure of documentation is important because several of the beneficiary's identified tasks do not fall directly under traditional managerial duties as defined in the statute. Counsel contends that the law does not explicitly prohibit the beneficiary from *primarily* performing the tasks necessary to produce a product or perform a service. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The law requires that the beneficiary be *primarily* performing the duties of a manager or executive, as defined in sections 101(a)(44)(A) and (B) of the Act. Thus, if the beneficiary is *primarily* performing tasks necessary to produce a product or provide a service, he or she cannot also be *primarily* performing the duties of a manager or executive as required by the statute.

Counsel for the petitioner asserts that additional detailed information about the beneficiary's duties would not add anything of significance to the descriptions already provided. Counsel states that USCIS' request for such detailed information is "superfluous, legally erroneous, illogical, and lacking any reasonable factual basis." The AAO disagrees with counsel's assertions. Counsel refused to provide a detailed description of the beneficiary's duties and a breakdown of the amount of time the beneficiary spends on each job duty and holds that the fact that the beneficiary owns and manages the foreign company is sufficient to establish that he is performing in an executive capacity. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary has been employed as a personnel manager, the petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Although the petitioner refused to submit an organizational chart for the foreign company, the petitioner's salary register depicts two tiers of managerial employees where the beneficiary supervises a single manager supervising a staff of one supervisor, six mechanics, one painter, three servicemen, and five helpers. Although counsel did provide brief job descriptions for the single manager and single supervisor of the foreign company, the job duties described do not relate to relieving the beneficiary from performing non-qualifying duties but rather to providing a specific service of the foreign company. Therefore, the petitioner has not provided credible evidence of an organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

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

*Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Here, the evidence indicates that the beneficiary supervises one manager, who supervises one supervisor that supervises all other personnel. The petitioner failed to submit any position requirements or educational requirements for the subordinate employees that would evidence the need for professional staff.

The petitioner has neither claimed nor established, in the alternative, that the beneficiary has been employed primarily as a "function manager" with the foreign company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties being performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. The petitioner has not provided evidence that the beneficiary manages an essential function with the foreign company. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738.5739 (Feb. 27, 1987). The record must establish that the majority of the beneficiary's actual duties are managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. v. Sava*, 724 F. Supp. at 1108.

The petitioner claims that the beneficiary is an executive of the foreign company. 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 employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will focus on the broad goals and policies of the organization rather than day-to-day operations. The petitioner has not established that the beneficiary has sufficient subordinate employees to relieve him from performing non-qualifying duties; the vague job descriptions for the manager and supervisor submitted by counsel failed to establish that they would relieve the beneficiary from primarily performing non-qualifying duties. Counsel for the petitioner states that the beneficiary performs as an executive by virtue of his ownership of the foreign company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not

constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

While performing non-qualifying tasks necessary to produce a product or provide a service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary has been "primarily" performing managerial or executive duties with the foreign company. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager depends in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive in nature.

In the instant matter, the petitioner did not submit a detailed job description of the duties performed by the beneficiary at the foreign company and thus the AAO cannot determine if the beneficiary has been employed by the foreign company in a managerial or 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. at 165.

The AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary has been primarily performing the duties of a manager or executive with the foreign company. Accordingly, the appeal will be dismissed.

### **III. Managerial or Executive Capacity at U.S. Company**

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary will be employed in a managerial or executive capacity with the U.S. company as defined at section 101(a)(44) of the Act.

Counsel for the petitioner submitted a letter detailing the beneficiary's duties at the U.S. company as follows:

[The beneficiary] would be employed as the [REDACTED]. The principal business of this corporation is the operation of an automobile gasoline station, combined with a convenience store and complete automobile service and maintenance facility. [The beneficiary], who has owned and operated an automobile gasoline and service station for over 18 years, would be supervising and directing all the daily activities of this business and would be assisting in planning, developing, and establishing its policies and objectives in accordance with board directives. He would be directing its pricing and sales policies, identifying, developing and evaluating marketing strategies, and working on defining a business model. He would review activity reports and financial statements to determine progress and status in attaining those objectives and make revisions in accordance with conditions; direct and coordinate formulation of financial programs to provide funding; plan and develop marketing and public relations policies designed to improve the company's market share; and, as stated, have the ultimate responsibility for all the day to day operations of the service station.

[The beneficiary] [REDACTED] of [the petitioner], would direct the management of the organizations business, would be establishing its goals and policies, would exercise wide latitude in discretionary decision making, would function at a senior

level within the organization, would receive **no** supervision from the board of directors or the stockholders (the corporation has no board of directors and he owns over 50% of the stock), and would exercise discretion over the day-to-day operations of the company. In other words, all of the elements of the statutory definitions would be present.

The petitioner submitted an employee list for the U.S. company indicating that it currently employs one auto technician, one cashier/mechanic, and six cashiers. The petitioner failed to submit any additional information for the U.S. company on the beneficiary's duties, the duties and educational requirements of any of his subordinates, or an organizational chart.

The petitioner failed to provide a detailed job description listing the beneficiary's duties with the U.S. company. In fact, the majority of the duties listed merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 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.).

Additionally, the job description includes both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them or indicate any subordinate employees that will relieve him from performing non-qualifying duties. Again, the AAO notes that the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Due to the deficiencies detailed above, the petitioner has not met its burden to establish that the beneficiary will be employed in a managerial or executive capacity with the U.S. company. For this additional reason, the petition cannot be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9<sup>th</sup> Cir. 2003).

#### **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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.