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U.S. Citizenship  
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Services

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FILE: WAC 03 110 53679 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:  
[Redacted]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Nevada corporation engaged in the business of wholesale fashion accessories. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the beneficiary would not be employed in a managerial or executive capacity and denied the petition.

On appeal, counsel disputes the director's findings and submits a brief in support of his arguments.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary would be performing in a capacity that is managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

In support of the petition, the petitioner submitted the following description of the duties to be performed by the beneficiary under an approved petition:

The [b]eneficiary's employment as the [p]resident of the United States facility will be in an executive capacity. He will continue to be actively involved in the day-to-day operations of the business. He will personally supervise all employees and will have the authority to hire and fire and promote these employees. The [b]eneficiary will also be responsible for developing and implementing company policy. As the [p]resident, the [b]eneficiary will be given discretion over the day-to-day operations of the company and will continue to report directly to the Board of Directors of the company. As such, the [b]eneficiary will continue to be employed in an executive capacity in the United States.

On October 30, 2003, the director issued a notice requesting that the petitioner submit additional information. In regard to the beneficiary's position in the United States, the director instructed the petitioner to submit a more detailed description of the beneficiary's duties illustrating more clearly a typical day on the job. The director also requested a line and block organizational chart illustrating the beneficiary's position within the managerial hierarchy, listing the beneficiary's position and the positions of his subordinates, as well as brief job descriptions and educational levels of the beneficiary's subordinates. Additional documentation was also requested in the form of the petitioner's wage reports for the first quarter of 2003.

In response, the petitioner repeated the job description offered earlier in support of the petition adding that the beneficiary would have a high degree of discretionary authority in regard to the goals and management of the company. The petitioner also added the following to the beneficiary's job description:

[The beneficiary's] duties involve directing and coordinating national and international sales and marketing and client service activities for our company's products both in Asia and in the United States. He will continue to develop and establish a network of working relationships with suppliers and distributors in the United States to enhance the company's presence in the domestic and international markets. He will regularly meet with clients and manufacturers to discuss needs and market demands and to review results of past products. He will work with the other executives in our company to develop and implement marketing strategies based on current market developments within the area. He will engage in corporate marketing and will establish and implement new strategies for development and penetration of new markets such as alternative products, marketing and distribution plans, and resolutions of regulatory and operational issues.

The petitioner stated that it could not sum up the beneficiary's "typical" workday, claiming that the beneficiary's tasks vary from one day to the next. The petitioner further stated that negotiating with financial institutions, addressing client concerns regarding sales and returns, and hiring and firing employees are all typical duties of the beneficiary. The beneficiary also submitted its quarterly wage statement for the first quarter of 2003 naming nine employees one of whom is not listed on the petitioner's organizational chart, which was also among the petitioner's submissions in response to the director's request. The organizational chart was broken down into four levels of employees with the beneficiary and an executive named as the first level employees. It is noted that the person named as the executive secretary does not appear on the petitioner's first quarterly wage report for 2003. Thus, there is no documentary evidence that an executive secretary was employed by the petitioner during the time period in question. The chart shows that the beneficiary's immediate subordinate is a purchasing manager who also has a secretary. Level two of the organizational chart lists an administrative manager, a management supervisor and one individual in IT support. It is noted that the management supervisor is not named in the petitioner's first quarterly wage report for 2003. Level three of the organizational chart lists a total of five employees—a clerk supervisor, two customer service employees, a clerk, and a shipping clerk. Of those five employees, only the clerk supervisor, one customer service employee, and the clerk appear on the relevant quarterly wage report. There is no evidence that the other customer service employee or the shipping clerk were employed by the petitioner at the time the petition was filed. Finally, level four of the organizational chart lists two sales representatives, one warehouse supervisor, and one cleaning lady. However, none of these employees was listed in the petitioner's first quarterly wage report; nor was any other evidence provided documenting their employment. While the petitioner provided a number of W-2 wage statements, all of the statements were for the year 2002 and are, therefore, irrelevant in the instant proceeding, as the petition was filed in 2003.

On February 23, 2004, the director denied the petition. Based on 2003's third quarterly wage report the director noted that a number of the employees listed in the organizational chart are not documented in the petitioner's wage report.

On appeal, counsel fails to address the obvious discrepancies between the petitioner's organizational chart and its quarterly wage reports from 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner's failure to address the inconsistencies between its own claims and the documents it submitted gives rise to questions regarding the petitioner's true staffing structure during the relevant time period.

Counsel also asserts that every company needs to have multiple executive and managerial employees and states that a company cannot be comprised of only lower level employees. While counsel is correct in pointing out that organizations need managerial and executive employees to oversee work being done by lower-level employees, the number of managerial employees should be justified by the needs of the organization and should be proportional to the size of the overall work force. In the instant case, the petitioner's organizational chart suggests that over 30% of the petitioner's work force is comprised of either managerial or executive employees. Moreover, the chart illustrates a managerial hierarchy where the purchasing manager supervises the administrative manager and the management supervisor. The petitioner has not demonstrated that it has progressed to a complexity level that would warrant a management structure where one managerial employee supervises other managerial or supervisory employees. Further, the petitioner has submitted no documentary evidence to establish the employment of a management supervisor, as the person named in this position does not appear on the petitioner's wage report for the first quarter of 2003.

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. § 204.5(j)(5). In the instant case, the description of the beneficiary's job duties is too broad to convey a realistic understanding of what the beneficiary actually does on a daily basis. 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). The petitioner's description of the beneficiary's duties lacks the necessary specifics. For instance, the petitioner provides no indication of the actual tasks the beneficiary would perform in his effort to "devise strategies and formulate policies;" nor is there any indication of the types of policies the beneficiary would formulate. While these vague job responsibilities imply a definite degree of discretionary authority, they are not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? Moreover, the petitioner's vague description of duties suggests that the beneficiary will continue to carry out certain marketing and customer service related duties, none of which can be deemed managerial or executive. It is noted that 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). In the matter at hand, the petitioner's failure to provide a detailed list of the beneficiary's duties prevents the AAO from being able to determine how much of the beneficiary's time is spent performing non-qualifying duties. As such, the AAO cannot

affirmatively determine that the beneficiary primarily performs managerial or executive duties. For this reason the petition cannot be approved.

Notwithstanding the director's decision, the director concluded that the employees under the beneficiary's supervision cannot be deemed managers "because *they* are not managing professional employees." (Emphasis added in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional, managerial, or supervisory employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. The director's comment, however, reflects an inaccurate interpretation of the law and, therefore, will be withdrawn.

Nevertheless, 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.